STATE OF MICHIGAN

COURT OF APPEALS

REBECCA ANN ROSE, Plaintiff-Appellant,	UNPUBLISHED September 27, 2012
v	No. 303238 Ottawa Circuit Court
WESLEY ALLEN ROSE, SR., Defendant-Appellee.	LC No. 06-055337-DO

Before: WILDER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

This divorce action for enforcement of a consent judgment returns to the Court following a 2010 remand. *Rose v Rose*, 289 Mich App 45; 795 NW2d 611 (2010) (*Rose I*). Plaintiff appeals by leave granted from the trial court's order on remand in which the court declined to enter the specific enforcement remedies sought by plaintiff. We conclude that the trial court, in refusing to entertain any enforcement of spousal support greater than $900, abused its discretion. We therefore reverse and remand for further proceedings in front of a different judge.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. PROCEEDINGS PRIOR TO REMAND

The parties were married for 22 years, and their primary asset was a die making business – Die Tron, Inc. When the parties divorced, defendant husband "wished to avoid liquidating or selling Die Tron . . . , in part because he hoped that David Rose, his son from a prior marriage, would eventually buy the business." *Rose I*, 289 Mich App at 47. "Instead of converting defendant's Die Tron holdings into cash, the parties agreed that defendant would pay plaintiff spousal support in the amount of $230,000 a year and that plaintiff would forgo any interest in Die Tron." *Id*.

The consent divorce judgment required defendant to pay approximately $19,000 in non-modifiable monthly spousal support:

> It is the intention and understanding of the parties that the spousal support obligations of the defendant be non-modifiable regarding duration and amount, except [for circumstances involving the death of one of the parties]. . . .

> This is the agreement of the parties, and it is the intention of the parties that regardless of any change in circumstances or in the lifestyles of plaintiff or defendant, this spousal support provision is to be non-modifiable.

Within a year and a half after the consent judgment, the parties learned that defendant's son had mismanaged Die Tron and had rendered Die Tron's financial status precarious. The parties signed an agreement to modify the timing—but not the total amount—of the spousal support payments for one year. The agreement stated, in part:

> Both [plaintiff and defendant] acknowledge that due to cash flow problems at Die Tron, Inc., [defendant] will be unable to make the required payments for a period of time. Both parties have therefore agreed to a modified payment schedule for the next twelve (12) months as follows:
>
> [payment schedule described]
>
> Beginning with the payment due January 15, 2009, the parties agree to revert to the payment schedule in the Judgment of Divorce.
>
> The parties agree that in all other respects, the Judgment of Divorce as entered on August 11, 2006 shall remain in full force and effect.

Defendant paid only a marginal amount of the support due under this agreement. As of the spring of 2008, defendant owed approximately $79,900 in accrued spousal support. The bank ultimately seized Die Tron's assets.

At approximately the same time, plaintiff moved to enforce the original spousal support provision and sought a security interest in defendant's property. Defendant responded with a motion to modify his support obligations. After a hearing, the trial court found that defendant's annual income was $52,000 and that his total assets had a value of approximately $500,000 (not including a $300,000 401K plan). The court then found that it was "impossible" for defendant to comply with the spousal support provisions and granted defendant's motion and reduced his future spousal support obligation to $900 monthly. The court reasoned that Die Tron's demise was an extraordinary circumstance that warranted modification of the consent judgment and that equity required modification of the spousal support provisions.

This Court reversed, holding that the trial court erred by modifying spousal support under the catchall provision of the relief from judgment rule, MCR 2.612(C)(1)(f). *Rose I*, 289 Mich App at 60. We stated, "plaintiff and defendant included the clear and unambiguous language in their divorce judgment making spousal support nonmodifiable . . . . Given the judgment's clearly expressed, enforceable, and nonmodifiable spousal-support wording, we conclude that the trial court erred by failing to afford proper deference to the parties' binding agreement." *Id*. at 59. The case was remanded to the trial court for further proceedings. *Id*. at 62.

B. AFTER REMAND

Upon remand, plaintiff moved for reinstatement of the consent judgment and also sought a judgment of $553,900 in spousal support arrearage. Plaintiff also requested liens, security

interests, and a receiver for defendant's real and personal property, including defendant's home in Florida. In addition, plaintiff sought a show cause hearing to address whether defendant should be held in contempt of court for failing to comply with court orders.

Defendant appeared at the hearing without an attorney. He sought a continuance to obtain funds to pay his attorney. The trial court denied the continuance, reinstated the consent judgment, and entered a judgment against defendant for the $553,900 arrearage. The court denied plaintiff's request for a receivership but enjoined defendant from divesting assets:

> The request to authorize a receiver is denied from this Court. However, if there is a remedy pursued in the state of Florida, this Court will authorize the Florida court to appoint a receiver if the court in Florida or any of the legal entities in Florida deem it appropriate.
>
> The Court will authorize an injunction, to the extent that it is enforceable in Florida, precluding Mr. Rose from divesting assets aside from living expenses, reasonable living expenses, that is, precluded from encumbering or divesting himself of his assets.

The trial court further authorized plaintiff to opt into the Friend of the Court (FOC) system for assistance in enforcing the judgment. However, the trial court refused to enter an additional order to require defendant to pay more than $900 each month, noting, "the Court of Appeals did not set aside this Court's finding that at the time we had the hearing [defendant] was only capable of paying $900 per month." The court's order stated:

> The Friend of the Court may assist with wage executions and other enforcement of Defendant's Spousal Support Obligation, however this court will not entertain Contempt charges brought against Defendant by the Friend of the Court for any amount over $900.00 per month, the amount previously determined by this Court to represent the amount for which Defendant has the ability to pay.

The following February 2011, plaintiff again moved to enforce the spousal support judgment, to compel discovery responses, and to appoint a receiver over defendant's Florida property. Plaintiff's motion again requested that defendant show cause why he should not be held in contempt for disregarding the trial court's orders. Defendant did not appear at the motion hearing. Plaintiff's counsel informed the court that defendant had been in a motorcycle accident in Florida in November 2010. Plaintiff's counsel also provided the court with a website printout that, according to plaintiff's counsel, listed defendant's Florida home for sale for $640,000. Plaintiff contended that the listing violated the court's restraining order concerning property.

The trial court granted plaintiff's motion to compel discovery and confirmed that the restraining order was still in effect. The trial court denied plaintiff's request for a receiver, stating:

> This Court and the Court of Appeals have given orders of specific judgment, and those orders need to be registered in Florida, and then there needs to be execution in the state of Florida. If a Florida court wishes to appoint a receiver, that's fine .

> . . . But your remedy is to have this Judgment registered in the state of Florida, through full faith and credit, and then collect under Florida law.

Plaintiff's counsel responded that the judgment had been registered in Florida, but that defendant's failure to comply with discovery had precluded execution on the judgment. The trial court advised plaintiff that the discovery order would require defendant to participate truthfully in a debtor's exam.

The trial court denied plaintiff's show cause request, stating, "that's not going to be a good remedy, I mean, in reality. Both sides are suffering, and I cannot make what's not there [sic]. There's not enough funds to satisfy either party." In its order, the trial court explained "the Court will not entertain enforcement against Defendant for any amount over $900.00 per month, the amount previously determined by this Court to represent the amount for which the Defendant has the ability to pay."

Thus, the trial court's most recent order compelled defendant to comply with plaintiff's discovery requests and to participate in a debtor's examination; restrained defendant from selling, transferring, or encumbering any assets; and confirmed that plaintiff could execute the consent judgment in Florida. The order denied plaintiff's request for contempt proceedings against defendant, declined to order defendant to pay more than $900 monthly, and declined to appoint a receiver over the Florida property.

Plaintiff now appeals by leave granted.

II. ANALYSIS

On appeal, plaintiff argues that the trial court improperly refused to follow this Court's decision in *Rose I*, wherein this Court upheld the provision of the consent divorce judgment providing for nonmodifiable spousal support. The trial court refused to enforce the spousal support provision delineated in the consent judgment and instead reaffirmed its prior order reducing the monthly spousal support payments from $19,000 to $900.

Plaintiff further argues that the trial court erred by failing to implement the enforcement remedies available by statute. Specifically, the trial court mistakenly refused to enter a judgment awarding joint ownership of defendant's property or otherwise granting plaintiff the right to seize or execute a lien on the property. Moreover, defendant was in contempt of court when he allowed his Florida house to be listed for sale. The trial court should have held defendant in contempt, but refused to do so.

A. STANDARDS OF REVIEW

We review de novo the question of whether the law of the case governs a trial court's decision. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008). Similarly, we review de novo a challenge to whether a trial court followed an appellate court's ruling on remand. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

We review for abuse of discretion the trial court's choice of remedies in a divorce action. See *Butler v Butler*, 356 Mich 607, 618-19; 97 NW2d 67 (1959). We review for abuse of discretion a trial court's decision in a contempt proceeding. *In re Contempt of Henry*, 282 Mich App 656, 671; 765 NW2d 44 (2009).

B. LAW OF THE CASE

The law of the case doctrine provides that "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Kalamazoo v Dept of Corrections (After Remand)*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998) quoting *CAF Investment Co v Saginaw Township*, 410 Mich 428, 454; 302 NW2d 164 (1981). This Court has further explained the role of the lower court on remand:

> When this Court disposes of an appeal by opinion or order, the opinion or order is the judgment of the Court. MCR 7.215(E)(1). And a lower court "may not take action on remand that is inconsistent with the judgment of the appellate court." Rather, the trial court is bound to strictly comply with the law of the case, as established by the appellate court, "according to its true intent and meaning." [*Kasben*, 278 Mich App at 470 (internal citations omitted).]

In *Rose I*, we held that the trial court erred in vacating the spousal support award and reducing defendant's spousal support obligation to $900 per month. On remand, the trial court acknowledged that holding but opined that "the Court of Appeals did not set aside this Court's finding that at the time we had the hearing [defendant] was only capable of paying $900 per month." As such, the trial court did not believe that *Rose I* precluded it from refusing to entertain any FOC contempt filing requiring defendant to pay more than $900 per month.

While *Rose I* did not directly comment on the trial court's conclusion that defendant was only capable of paying $900 per month, we impliedly ruled that defendant's ability to pay was not a factor. In *Rose I*, we noted that when the parties agreed that "defendant would maintain[] full ownership of his business and the ability to transfer its ownership to his son," "both parties deliberately risked that future circumstances would render the contract inequitable." *Rose*, 289 Mich App at 59. This Court also rejected the circuit court's reliance on equitable considerations as a basis for reducing defendant's support obligation and noted that the parties had accepted that circumstances might change to the detriment of one party or the other:

> The circuit court's invocation of its equitable authority to modify spousal support pursuant to MCL 552.28 ignores and invalidates the parties' election to forgo flexibility and their explicit waiver of the right to seek support modifications based on equitable considerations. Rather, the parties' carefully crafted compromise reflects their willingness to accept that changed circumstances might render this election unfair to one or the other. [*Id*. at 60.]

Furthermore, this Court pointed out that "[a]s a seasoned business owner, defendant undoubtedly understood that an economic downturn or financial mismanagement could endanger the solvency

of his company," and that "[h]e nevertheless agreed that plaintiff could receive nonmodifiable spousal support." *Id*. at 62.

This Court was obviously quite aware of the trial court's finding that defendant could only afford $900 per month, noting, "[a]fter relieving defendant from his obligation to pay $230,000 in annual spousal support, the circuit court applied the factors analyzed in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992), and ruled that defendant must pay plaintiff spousal support of $900 a month." *Id*. at 58. One of the property division factors cited in *Sparks* is "earning abilities of the parties." We concluded that, considering the parties clear and express agreement, as well as their apparent acknowledgment that changed circumstances may result in a detriment to one party or the other, when determining whether to set aside the spousal support award and also whether to modify the support obligation, no weight should be given to the fact that the demise of Die Tron dramatically changed defendant's ability to pay the amount of the spousal support he agreed to pay in the consent divorce judgment.

After remand, although the trial court did not set aside or modify the support order, it refused to entertain contempt proceedings for any amount over $900 based that on findings regarding defendant's ability to pay that it made some two years before the ruling at issue in this case, ignoring the lien provisions of MCL 552.27, which provides:

> If alimony or an allowance for the support and education of the children is awarded to either party, the amount of the alimony or allowance constitutes a lien upon the real and personal estate of the adverse party as provided in section 25a of the support and parenting time enforcement act, 1982 PA 295, MCL 552.65a. The court may do 1 or more of the following if the party defaults on the payment of the amount awarded:
>
> (a) Order the sale of the property against which the lien is adjudged in the same manner and upon the same notice as in suits for the foreclosure of mortgage liens.
>
> (b) Award execution for the collection of the judgment.
>
> (c) Order the sequestration of the real and personal estate of either party and may appoint a receiver of the real estate or personal estate, or both, and cause the personal estate and the rents and profits of the real estate to be applied to the payment of the judgment.
>
> (d) Award a division between the husband and wife of the real and personal estate of either party or of the husband and wife by joint ownership or right as the court considers equitable and just.

After the divorce judgment, defendant had an interest in two businesses, Rose-Hitson LLC and W.R. Aircraft, LLC. He also had his 401(k) account and another mutual funds account, some life insurance policies and bank accounts, as well as the five vehicles. MCL 552.27 clearly places a lien on all of those assets. By saying it would not entertain any enforcement proceedings for an amount over $900, the court seemed to indicate that the lien provisions would not be invoked for any future payments. Nor did the court seek to apply subsection (d). The

court said it would enter a judgment for the amount of the arrearage, but it did not award execution of the judgment. A trial court abuses its discretion when it fails to exercise its discretion when properly asked to do so. *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998). The trial court has effectively precluded plaintiff from using any enforcement mechanism to obtain the full amount of spousal support and has, therefore, acted in a manner inconsistent with *Rose I*. While the trial court acknowledged that it could not set aside or modify the spousal support order, it has essentially refused to enforce the spousal support provision as written.

C. REMAND TO A DIFFERENT JUDGE

Plaintiff requests that we remand to a different judge. In general, the same trial judge will hear a remanded case unless the appearance of justice requires that a different judge hear the case on remand. *Bayati v Bayati*, 264 Mich App 595, 602-603, 691 NW2d 812 (2004). Remand to a different judge is appropriate "if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Id.*

We are concerned that the trial court judge seems reluctant to follow *Rose I* and require that defendant ever pay more than $900 per month in spousal support. We also note that the trial court has commented on plaintiff's profligacy and "unwise investments," stating that "[p]laintiff would require that this Court allow the complete destruction of Defendant's estate to pay Plaintiff's post marital debt." Such comments indicate that the trial court believes that how plaintiff is using her own assets is material to whether defendant should be required to pay what he agreed to pay in the consent judgment of divorce and further indicates the trial court's reluctance to apply the lien provisions of MCL 552.27. Under the circumstances, we believe that a different judge should hear the case to ensure that the law is followed and appropriate enforcement mechanisms are considered.

Reversed and remanded for further proceedings in front of a different judge. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly