

STATE OF MICHIGAN
COURT OF APPEALS

DESIREE RUTH HERR, a/k/a DESIREE RUTH
DEW,

UNPUBLISHED
May 16, 2000

Plaintiff-Appellee,

v

CHARLES FREDERICK HERR,

No. 210815
Wayne Circuit Court
LC No. 95-528311-DM

Defendant-Appellant.

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court order clarifying the parties' judgment of divorce. We reverse.

On April 23, 1996, the parties placed their settlement agreement on the record. Among other things, the parties agreed that plaintiff would receive \$1.5 million in alimony through an initial payment of \$200,000 and subsequent installments at a minimum rate of \$1,500 per week for ten years. After 1996, plaintiff would be entitled to half of any lump sum distributions defendant received from his employment and half of any salary increase over defendant's current salary of \$400,000 as payment on the balance of the alimony. Interest would not be charged on the outstanding balance of this alimony obligation. Defendant received all stock in American Driveline, Inc.

However, the judgment of divorce merely stated, "In addition to the Minimum Weekly Payment, and except for the year 1996, Defendant shall pay Plaintiff Fifty Percent (50%) of any *income* he receives above Four Hundred Thousand Dollars (\$400,000.00), and said additional payment shall be applied to the balance owed on the Base Alimony" (emphasis added). In January 1997, defendant, who was contemplating selling some or all of his American Driveline stock, brought a motion for clarification. Defendant asserted that the term "income" in the above provision should be interpreted to mean "income from employment."

The trial court ruled that any taxable income defendant realized from the sale of the American Driveline stock would constitute “income” for purposes of the alimony provisions of the judgment of divorce. Furthermore, defendant could defer payment of the income from the sale of the stock to avoid adverse tax consequences only if he obtained a surety bond and paid ten percent interest on the unpaid balance. Defendant moved for reconsideration, contending that the trial court had materially altered the terms of the parties’ agreement. The trial court denied the motion.

On appeal, defendant argues that the trial court erred as a matter of law by materially altering the terms of the judgment of divorce in response to his motion for clarification. This presents a question of law that we review de novo. See *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 574; 603 NW2d 816 (1999).

We agree that the trial court erred. A settlement agreement is binding when it is made in open court. MCR 2.507(H); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). Such an agreement constitutes a contract and is to be governed by the legal principles applicable to the construction of contracts. *Id.* The transcript of the April 23, 1996, hearing, during which the parties placed their settlement agreement on the record, clearly supports defendant’s assertions that plaintiff received no interest in the American Driveline stock and that defendant was responsible for accelerating the alimony payments only when the wages and bonuses he received from his employment exceeded \$400,000.

The primary goal in the construction or interpretation of any contract is to honor the intent of the parties, *id.* at 349-350, and a court does not have the right to make a different contract for the parties, see *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). While parties are generally free to take from, add to, or modify an existing contract, a meeting of the minds is necessary to modify a binding contract after it has been made, just as it is to create the contract. *Port Huron Education Ass’n v Port Huron Area School District*, 452 Mich 309, 326-327; 550 NW2d 228 (1996). In the instant case, the record is devoid of any evidence that the parties agreed to the new terms in the trial court order purporting to clarify the judgment of divorce, and the trial court had no authority to modify the terms of the parties’ original agreement or to alter their substantive rights.

In addition, the trial court erred because an alimony agreement providing for alimony in gross is nonmodifiable. See *Pinka v Pinka*, 206 Mich App 101, 103; 520 NW2d 371 (1994). Alimony in gross is a sum certain and is payable either in one lump sum or in installments of a definite amount over a specific period of time. *Bonfiglio v Pring*, 202 Mich App 61, 63; 507 NW2d 759 (1993). In determining whether an alimony agreement is one “in gross,” this Court construes the parties’ agreement in order to give effect to the parties’ expressed intent. *Pinka, supra.* Here, the parties agreed that plaintiff would receive \$1.5 million, with \$200,000 to be paid immediately and the rest in installments, and the judgment of divorce specified that the alimony was “alimony in gross.” Moreover, the parties agreed at the April 23, 1996, hearing that the alimony award would not be modifiable. Under these facts, it is clear that the parties intended to create alimony in gross, and the trial court therefore had no authority to modify the alimony award.

In light of the foregoing, we need not address defendant's claim that the ten-percent interest rate on any outstanding capital gain alimony imposed by the trial court was usurious and in violation of MCL 438.31; MSA 19.15(1).

Reversed.

/s/ Mark J. Cavanagh

/s/ David H. Sawyer

/s/ Brian K. Zahra