STATE OF MICHIGAN

COURT OF APPEALS

LESTER LEE LINDLEY,

Plaintiff/Counter-Defendant-Appellant,

v

PATRICIA ANN LINDLEY,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
September 29, 2000

No. 216210
Newaygo Circuit Court
LC No. 97-017422-DO

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. Following a settlement entered on the record, defendant moved for entry of judgment. The trial court entered the written judgment over plaintiff's objections. We affirm the trial court's denial of plaintiff's request for modification of the property settlement provisions of the divorce judgment, but remand for further proceedings to clarify the parties' agreement with regard to alimony and to correct a clerical error in the judgment.

On September 12, 1997, plaintiff filed for divorce. On May 13, 1998, the date scheduled for trial, the parties reached a settlement agreement that was entered on the record. Defendant moved for entry of judgment on July 6, 1998, asserting that the proposed judgment of divorce attached to her motion was consistent with the oral settlement agreement. Plaintiff responded by alleging errors in the written judgment and requesting modification. On September 29, 1998, the trial court entered an opinion and order concluding that the judgment was consistent with the parties' agreement. At a hearing on November 23, 1998, plaintiff objected again based on alleged inconsistencies between the transcript of the settlement agreement and the judgment. The court entered the judgment and also granted defendant's request for attorney fees.

We address first defendant's argument that this Court does not have jurisdiction over plaintiff's appeal. Defendant argues that plaintiff is not an aggrieved party and the judgment of divorce is not a final judgment that can be appealed as of right. This issue is not properly before this Court because plaintiff filed neither a cross-appeal nor a motion to dismiss the appeal. MCR 7.207; MCR 7.211(C)(2)(a); *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140; 602 NW2d 390 (1999). Even if defendant had properly raised this issue, it is without merit. Although it is true that a

party who enters a consent judgment is not an aggrieved party, *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990), the judgment at issue here was not entered by consent or stipulation. While plaintiff agreed to the settlement entered on the record on May 13, 1998, he vigorously and continually objected to the judgment of divorce entered on November 23, 1998, maintaining that the final judgment is inconsistent with the settlement placed on the record by the parties. Finally, contrary to defendant's contention, the oral settlement did not constitute the final judgment because it was not a written order. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

Plaintiff argues that the trial court erred when it determined that the judgment of divorce entered on November 23, 1998, was consistent with the settlement placed on the record by the parties. We review a trial court's findings of fact for clear error. MCR 2.613(C); *Traxler v Ford Motor Co*, 227 Mich App 276, 282; 576 NW2d 398 (1998). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

Plaintiff cites as inconsistencies several items that were included in the final judgment but not in the oral settlement agreement: (1) a provision reflecting dower rights, (2) a provision concerning plaintiff's health insurance benefits, (3) a provision regarding the parties' rights to proceeds of insurance policies, and (4) a provision regarding the parties' rights to annuity and profit sharing plans. Although these terms were not included in the settlement record, these provisions are required in a final judgment of divorce. MCR 3.211(B); MCL 552.101; MSA 25.131. Review of these terms reveals boilerplate language that, while not present in the settlement placed on the record, does not conflict directly with any of the stated terms of the settlement. Therefore, we do not believe the court clearly erred in finding the written judgment to be consistent with the settlement entered on the record in this regard. In any event, the inclusion of these provisions in the final judgment of divorce is not inconsistent with substantial justice and, therefore, does not require modification or reversal. MCR 2.613(A); *Hale v Comerica Bank Detroit*, 189 Mich App 382, 383; 473 NW2d 725 (1991).

Plaintiff also points out an apparent clerical error in the judgment. In the transcript of the settlement, the parties agreed that plaintiff would retain ten condominium time shares; however, the final judgment only lists nine time shares. This error was discussed during the November 23, 1998, hearing and both defendant and the trial court indicated their willingness to enter an amended order correcting this omission. Because neither defendant nor the trial court oppose correction of this error, we remand for correction of the judgment. Plaintiff should file a motion with the trial court pursuant to MCR 2.612(A) with a proposed amended order that correctly lists the missing condominium time share.

Plaintiff argues an additional inconsistency in the language of the provision regarding alimony. In the transcript of the settlement, the terms of the alimony are stated very simply as "five years alimony at $500 a month." However, the language of the judgment of divorce contains several additional conditions and restrictions:

> IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, PATRICIA ANN LINDLEY, shall pay alimony to the Plaintiff, LESTER LEE

> LINDLEY, *said alimony to be non-modifiable by either party* and shall be considered income to the Plaintiff and deductible to the Defendant for income tax purposes. *If either party shall die before five (5) years from the date of entry of this Judgment, the Defendant's obligation for alimony shall terminate as of the date of death.* Said alimony to be paid as follows: Defendant shall pay the sum of $500.00 per month commencing June 1998, through the office of the Newaygo County Friend of the Court for transmittal to the Plaintiff, LESTER LEE LINDLEY, for a total of five (5) years. *Upon full satisfaction of said above set forth amount, Defendant shall not have any further duty of alimony payments to the Plaintiff and no further alimony shall be preserved.* Plaintiff shall provide [the] Friend of the Court with his address and keep them advised of any change of address. The date of commencement shall be June 1998 or upon entry of this Judgment, whichever is later. [Emphasis added.]

Again, some of the added provisions of this section are required by court rule or statute. For example, the provision stating that defendant will pay the alimony to the Newaygo County Friend of the Court is in accordance with MCR 3.211(D)(4), which requires that a judgment awarding spousal support state that the payment is to be made through the friend of the court. Because such provisions are required by law and do not affect plaintiff's substantive rights, the inclusion of these provisions in the judgment or their omission from the settlement does not require reversal. MCR 2.613(A); *Hale, supra* at 383.

However, other provisions included in the alimony portion of the judgment, but not mentioned in the settlement entered on the record, are not necessarily consistent with the settlement entered on the record and may affect the parties' substantive rights. Specifically, the judgment entered by the trial court states the alimony is "nonmodifiable," although nothing was stated when the settlement was entered in the record with regard to whether the alimony provision was modifiable. This Court has recently held that

> to be enforceable, agreements to waive the statutory right to petition the court for modification of alimony must clearly and unambiguously set forth that the parties (1) forgo their statutory right to petition the court for modification and (2) agree that the alimony provision is final, binding and nonmodifiable. Furthermore, as we stated in *Pinka* [*v Pinka,* 206 Mich App 101; 520 NW2d 371 (1994)], this agreement should be reflected in the judgment of divorce entered pursuant to the parties' settlement. [*Staple v Staple,* ___ Mich App ___; ___ NW2d ___ (Docket No. 204026, issued 6/27/2000), slip op p 9. Footnote omitted.]

The *Staple* court further noted that

> when the parties agree to a property division by fixed, non-modifiable installment payments (that is, the misleadingly named "alimony in gross" arrangement), there is no statutory right to modification under MCL 552.28. . . . Our ruling today has no effect on

> these agreements, which, as stated above, involve divisions of property and are not truly alimony arrangements. [*Id.* Citations omitted.]

Here, while the settlement entered on the record provided that defendant would pay plaintiff $500 a month for five years, i.e., a sum certain, there was no mention of whether that amount was modifiable nor whether it was "alimony in gross." Furthermore, as plaintiff points out, although the judgment entered states that defendant's obligation for alimony terminates upon the death of either party, the settlement agreement entered on the record contained no such provision. Such a provision is generally inconsistent with an award of alimony in gross. *Staple, supra*, slip op at 2; *Hall v Hall*, 157 Mich App 239, 243; 403 NW2d 530 (1987). Cf. *Turner v Turner*, 180 Mich App 170, 173-174; 446 NW2d 608 (1989). Because a significant inconsistency with regard to the alimony provision exists between the settlement entered on the record and the judgment, we find that the court clearly erred in finding the two to be consistent in that regard and remand for a hearing to clarify the parties' agreement with regard to alimony.

Plaintiff also argues that the trial court should have modified the property division contained in the judgment of divorce because it is grossly inequitable and was obtained through duress. The trial court is bound by the negotiated property settlement of the parties and may not modify the judgment in the absence of fraud, duress, mutual mistake, severe stress, or gross inequity. *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990); *Villadsen v Villadsen*, 123 Mich App 472, 476; 333 NW2d 311 (1983). The finding of a trial court regarding a party's consent to a settlement will not be overturned absent an abuse of discretion. *Keyser, supra* at 270.

We first address plaintiff's argument that the settlement agreement was obtained through duress. Nothing in the transcript of the May 13, 1998, hearing supports plaintiff's proposition. In fact, the record tends to show that plaintiff knowingly and willingly consented to the settlement. When questioned by his attorney, plaintiff indicated that he agreed to the settlement and knew it was final:

> *Q.* You've heard the settlement as placed on the record, is that correct?
>
> *A.* Yes.
>
> *Q.* Do you agree to be bound by the terms of the agreement?
>
> *A.* I do.
>
> *Q.* And do you realize that once you agree to this, you cannot come back and ask the Court to change it, as it is final?
>
> *A.* That's fine.

It is not clear from the lower court record whether the issue of duress was ever raised or decided by the trial court. The court's opinion and order regarding the judgment of divorce simply states that "the proposed judgment is consistent with the parties' agreement." Giving plaintiff the benefit

of the doubt that the issue was properly before the trial court and, therefore, preserved for appellate review, the trial court's opinion can only be construed as finding that the parties voluntarily consented to the agreement. Because the trial court was best situated to determine consent and plaintiff's testimony acknowledging his agreement with the settlement was sufficient evidence of consent, the court did not abuse its discretion by finding that plaintiff consented to the settlement.

Plaintiff also requested that the trial court modify the agreement due to gross inequity, arguing that the significant retirement benefits and assets that defendant accumulated during the marriage should have been divided between the parties and that he should receive a larger alimony payment. Plaintiff further argues that, as a result of these inequities and his reduced income due to his illness, he has suffered a substantial decrease in his standard of living, while defendant's standard of living has increased.

Plaintiff is correct that defendant's retirement benefits earned during the marriage could have been considered part of the marital estate and subject to division between the parties. MCL 552.18(2); MSA 25.98(2); *Quade v Quade*, 238 Mich App 222, 225; 604 NW2d 778 (1999). However, because the parties reached an agreement in which they specifically stated that the parties would each keep their respective retirement benefits, the trial court cannot override that agreement, absent a showing of fraud, mutual mistake or duress. *Id*. at 226. The trial court apparently found none of these conditions. Plaintiff argues that he was under the mistaken impression, based on advice of counsel, that he was not entitled to defendant's benefits. However, the unilateral mistake of one party based on a misunderstanding of his rights or poor legal advice is insufficient to justify modification of a binding property settlement. See *Hilley v Hilley*, 140 Mich App 581, 585; 364 NW2d 750 (1985); *Villadsen*, *supra* at 477. Further, plaintiff is precluded from seeking a portion of defendant's current employment benefits because of the binding settlement agreement. *Keyser*, *supra* at 269-270. It also is apparent from a comparison of the property awarded to plaintiff and defendant that there is no gross inequity here. Although the arrangement agreed to by the parties may leave plaintiff with a reduced standard of living compared to defendant, the division of property as a whole appears equitable.

Because plaintiff has failed to demonstrate sufficient evidence of duress, mutual mistake or inequity, the trial court did not err when it refused to modify the property settlement provisions of the judgment of divorce. Whether plaintiff has the right to request modification of the alimony provision will depend upon the trial court's clarification of the parties' agreement with regard to whether the alimony is modifiable.

We affirm in part but remand for correction of the clerical error in the judgment and for a hearing to determine the parties' agreement with regard to alimony only. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins