STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA K. COOK,

Plaintiff/Counter-Defendant-Appellant,

v

DOUGLAS L. COOK,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
November 15, 2002

No. 232427
Clare Circuit Court
LC No. 96-900448-DM

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. Plaintiff challenges the court's granting defendant leave to amend to file a counterclaim for divorce, its decision to set aside the previous judgment of divorce, and the factual findings regarding the property award and alimony. We affirm.

Plaintiff first argues that the trial court erred in granting defendant leave to amend to file a counterclaim for divorce. The grant or denial of leave to amend is within the trial court's discretion and this Court will not reverse unless the decision constituted an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion exists when an unprejudiced person, considering all the facts, would say there was no justification for the ruling. *Detroit/Wayne Co Stadium Authority v Lewiston*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

Under MCR 2.203(E), a counterclaim must be filed with the answer or filed as an amendment under MCR 2.118. A motion to amend ordinarily should be granted, and should be denied only for particularized reasons: (1) undue delay, (2) bad faith, (3) repeated failure to cure deficiencies, (4) undue prejudice to the nonmoving party, and (5) futility. *Weymers*, *supra* at 658; *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Leave to amend a complaint should not be granted if it results in prejudice to the other party. *Weymers*, *supra* at 659. However, prejudice should only justify denial to amend the complaint if it would prevent the party from having a fair trial because the new allegations are offered too late in the proceedings. *Id*. An amendment proposed so late that it would cause adjournment of an impending trial may justify denial of leave to amend. *Cummings v Detroit*, 151 Mich App 347, 353; 390 NW2d 666 (1986).

Plaintiff filed her complaint for separate maintenance in September 1996. Defendant filed his counterclaim for divorce more than a year later. The court granted leave to amend on the grounds that plaintiff failed to allege a breakdown in the martial relationship in her complaint for separate maintenance as required under MCL 552.7 and, that if it did not grant leave to amend, it would be faced with two separate trials concerning the same issues.

Plaintiff was not prejudiced by the late filing of defendant's counterclaim for divorce. Moreover, plaintiff had ample time to answer defendant's counterclaim and prepare for trial. As a means of judicial economy, the court properly chose to allow the counterclaim for divorce.

Plaintiff next raises several issues regarding the trial court's findings of fact. A lower court's order modifying a divorce judgment is reviewed de novo; however, great consideration is given to the court's findings. *Villadsen v Villadsen*, 123 Mich App 472, 476; 333 NW2d 311 (1993). Findings of fact will not be reversed unless clearly erroneous. *Stoudemire v Stoudemire*, 248 Mich App 325, 336-337; 639 NW2d 274 (2001). A finding is clearly erroneous, if after review of the record, this Court is left with a definite and firm conviction that a mistake was made. *McNamara v Horner*, 249 Mich App 177, 182-183; ___ NW2d ___ (2002).

Property divisions consented to by the parties and finalized either in writing or on the record cannot be modified by the court. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). Absent evidence of fraud, duress, or mutual mistake, the court cannot set aside or alter provisions of a divorce judgment reached by negotiation and agreement of the parties. *Id*.; *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990). However, a court has the power to vacate a judgment when it determines that the parties shared a mistaken belief that led to their consent to the judgment. *Villadsen*, *supra* at 477. Mutual mistake exists when the parties have a common intention induced by a common error. *Id*.

The trial court correctly found that when the parties entered into the initial property settlement regarding plaintiff's shares of stock, they intended no tax consequences to defendant. Because the settlement, as written, results in tax consequences to defendant, the court found it did not manifest the intent of the parties and the court set aside the judgment on the ground of mutual mistake. In other words, the parties were mutually mistaken with regard to the means chosen. Because the judgment of divorce did not manifest the parties' intent, we find no clear error.

Plaintiff next argues the trial court erred when it valued the parties' two businesses. We disagree. When marital assets are valued between divergent estimates given by expert witnesses, the trial court has great latitude in arriving at a final figure. *Stoudemire*, *supra* at 338-339. This Court must give great deference to a trial court's findings when they are based on the credibility of witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). There is no one proper method to employ in valuing businesses and business assets. *Kowalesky v Kowalesky*, 148 Mich App 151, 155-156; 384 NW2d 112 (1986). When the trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

The court was in the best position to hear the testimony and decide what method of valuation was appropriate in this case. The court determined that the best method to use was that which was testified to by defendant's expert. There is no evidence that this method was not

appropriate in the instant case. Because the trial court's valuation of the businesses was within the range established by the proofs, we find no clear error.

Finally, plaintiff argues the trial court erred in changing its award of alimony from in gross to periodic. This Court reviews the trial court's factual findings relating to an award or modification of alimony for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). If the trial court's findings are not clearly erroneous, this Court must then decide whether the award, modification or denial of alimony was fair and equitable. *Id*. at 655.

Alimony in gross is a sum certain, payable in either one lump sum or by periodic payments of a definite amount over a specific period of time. *Turner v Turner*, 180 Mich App 170, 172; 446 NW2d 608 (1989). Alimony in gross is not considered true alimony, but is instead in the nature of a property division and is generally not modifiable. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). Generally, the party paying alimony in gross is not permitted to claim the payment as a tax deduction.

Alimony that is not in gross is considered periodic alimony that is modifiable under MCL 552.28. *Id*. at 566. Generally, the person paying periodic alimony may claim it as a tax deduction and the person receiving it must claim it as taxable income. To determine whether alimony is modifiable or nonmodifiable, this Court must focus on the trial court's intent in fashioning the award and give effect to that intent. *Bonifiglio v Pring*, 202 Mich App 61, 65; 507 NW2d 759 (1993).

From a reading of the hearing transcript, it is apparent that the trial court intended to change the language of the alimony provision to exclude the term "in gross"; however, the term nonetheless remained in the judgment. Although the trial court granted alimony to plaintiff in a specific amount payable in monthly installments, the trial court clearly intended for the alimony to be tax deductible to defendant. Recognizing that the alimony may not be tax deductible to defendant unless it was modifiable, the trial court added the death provision:

> Well, under the alimony section, I have already indicated that this is to be alimony in gross that is tax deductible, and there should be a provision that it will be terminated by death. I believe that will qualify for IRS consideration. I may be in error on that, but I do know if it's not there, that it's not going to qualify.

After review of the entire record we conclude the trial court clearly intended to award periodic alimony that would be modifiable by the death of either party and which would be tax deductible to defendant and taxable to plaintiff. Accordingly, we conclude the trial court did not err when it changed the alimony award from alimony in gross to periodic alimony.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens