STATE OF MICHIGAN

COURT OF APPEALS

WASIMA YUNUS,

Plaintiff/Counter-Defendant-Appellee,

v

ASIM YUNUS,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
October 23, 2007

No. 270417
Saginaw Circuit Court
LC No. 01-041222-DM

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right from a judgment of divorce. Defendant challenges the trial court's decision to award plaintiff spousal support of $25,000 a month, with the first five years nonmodifiable, and also the trial court's decision to require defendant to pay plaintiff's attorney and accounting fees. We affirm in part and reverse in part.

The parties were married for approximately 20 years and accumulated substantial income and assets during that period, principally from defendant's occupation as an electrophysiologist, a subspecialty of cardiology. While defendant was pursuing his professional career, plaintiff cared for the parties' two children and the home and also worked part time. Defendant was involved in extramarital affairs during the marriage and the trial court found that defendant was at fault for causing the divorce. The court divided much of the marital estate on a 60/40 basis in favor of plaintiff. The court also awarded plaintiff spousal support of $25,000 a month and ordered that the first five years were to be nonmodifiable, except in the event of plaintiff's death.

Defendant first argues that spousal support is always subject to modification for changed circumstances and, therefore, the trial court erred as a matter of law in ordering that the first five years of support were nonmodifiable. We review this question of law de novo. *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

Awards of spousal support are subject to modification based on changed circumstances. MCL 552.28; *Koy v Koy*, 274 Mich App 653, 661; ___ NW2d ___ (2007). "[A]n exception exists for alimony in gross, which is nonmodifiable absent a showing of fraud." *Bonfiglio v Pring*, 202 Mich App 61, 63; 507 NW2d 759 (1993). "Alimony in gross is a sum certain and is payable either in one lump sum or in periodic payments of a definite amount over a specific

period of time." *Id*. The term is misleading because the award is not intended as maintenance for a spouse, but rather is a division of the parties' property. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000).

In the past, a conflict existed with respect to whether an appellate court should rely on the intent of the trial court in determining if a support award was modifiable or nonmodifiable, or if a bright-line test should be used. In *Bonfiglio, supra*, this Court addressed the conflict whether a contingency provision for termination of spousal support upon death or remarriage rendered the support amount unascertainable and, as a result, modifiable as periodic support. In one line of cases, panels had followed a bright-line approach and held that if a provision awarded support with a contingency for termination on the recipient's death, it was deemed to be periodic and, therefore, subject to modification. *Id*. at 63-64.

In another line of cases, panels focused only on the intent behind the award, regardless of any survivorship or remarriage contingency. *Id*. at 64. In *Bonfiglio, supra* at 65, this Court adopted the latter test, explaining:

> We prefer the latter approach, and hold that the inclusion of a survival or a remarriage contingency in an alimony provision does not automatically or conclusively create modifiable periodic alimony rather than nonmodifiable alimony in gross. Instead, when called upon to distinguish between modifiable and nonmodifiable alimony, courts should focus on the intentions of the parties in negotiating a settlement agreement, or of the trial court in fashioning an alimony award, and give effect to that intent.

Therefore, whether the presence of the survival contingency clause renders the spousal support award modifiable during the first five years depends on the trial court's intent.[1]

Plaintiff requested that the first five years of spousal support be made nonmodifiable, in part, to compensate her for her years of sacrifices during the marriage when she cared for the home and the children, and worked only part time, while defendant pursued a professional career in medicine. Plaintiff testified that she did not pursue her own career so that defendant could continue to further advance his own career. The trial court found that defendant left plaintiff at about the same time that his earnings substantially increased and they were beginning to enjoy the financial benefits of the sacrifices plaintiff had made earlier in the marriage. It is apparent that the trial court intended to make the spousal support award nonmodifiable for the first five years in order to compensate plaintiff for assisting defendant in reaching his professional stature. Therefore, as a matter of law, the award of spousal support for the first five years properly could be made nonmodifiable, except in the event of plaintiff's death.

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[1] More recently, a special conflict panel of this Court held in *Staple, supra* at 578, 581, that parties may agree to forego their statutory right for modification of a support award, and thereby agree that an award of spousal support is nonmodifiable, when negotiating a divorce settlement. Because *Staple* applies only when parties negotiate a settlement, it does not apply in this case.

In addition to awarding nonmodifiable support for the first five years, however, the trial court also set limitations on when defendant could seek modification of spousal support after five years. We agree with defendant that these latter limitations are improper.

Periodic spousal support is subject to modification on a showing of changed circumstances. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Any decision to modify support should be based on circumstances as they exist at the time modification is sought. "The modification of an award of spousal support must be based on new facts or changed circumstances arising after the judgment of divorce." *Gates v Gates*, 256 Mich App 420, 434; 664 NW2d 231 (2003). By definition, changed circumstances cannot involve facts and circumstances that exist at the time the court originally enters the judgment. *Id*. at 435. When the trial court entered the divorce judgment, there was no actual issue, nor could there be, regarding modification, and it was improper for the court to attempt to define what might constitute changed circumstances warranting modification in the future. Moreover, the trial court's limitations imposed focused only on defendant's circumstances and would preclude defendant from seeking modification based on a change of circumstances affecting plaintiff's income.

We therefore vacate the portion of the judgment that sets forth threshold conditions for seeking modification of spousal support in the future. To the extent that the trial court was concerned that defendant might bring frivolous motions to modify support in the future, the court can address that situation if and when it occurs.

Next, defendant argues that the trial court's award of $25,000 a month in spousal support is excessive. As this Court has explained:

> We review the trial court's factual findings relating to the award or modification of alimony for clear error. A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. [*Moore, supra* at 654-655 (citation omitted).]

After reviewing the record, we conclude that the trial court's findings of fact were not clearly erroneous, and that the award of spousal support was neither unfair nor inequitable.

The main purpose of awarding spousal support is to balance the incomes and needs of the parties without impoverishing either party. *Moore, supra* at 654. Spousal support "is to be based on what is just and reasonable under the circumstances of the case." *Id*. See also MCL 552.23(1).

> Among the factors that should be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's

> fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

The court may take into account any other relevant circumstances, *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996), and should make specific findings of fact on those factors that are relevant to the particular case, *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993).

The trial court found that defendant was at fault in causing the divorce because of his infidelities. Defendant does not challenge this finding. As part of the property division, the court awarded plaintiff 60 percent of most of the marital assets, which amounted to approximately $180,480, but the parties agree that plaintiff later received proceeds from the sale of the marital home, bringing her property distribution share to approximately $325,000. Defendant, however, had annual earnings of over $800,000 since 2000. Plaintiff did not have any substantial assets of her own to use for her immediate support.

Defendant's ability to pay support is not contested, even though he was also supporting the parties' children and paying their college tuitions. Plaintiff, who was 50 years old at the time the judgment was entered, did not have an established career. Although she had obtained a degree in interior design and had worked part time in that field during the marriage, the most she earned in one year was $17,000. Plaintiff planned to move to Canton, Ohio, to be near her family, where she had no business contacts and would have to start an interior design business from the ground up. The trial court therefore found that it was unlikely that plaintiff would be able to support herself or earn any significant income in the near future. In light of these findings, which are not clearly erroneous, the trial court did not err by not imputing an income to plaintiff when calculating the amount of spousal support.

Defendant also argues that the trial court erred by failing to impute interest income that plaintiff would be able to earn from the cash she received in the property division. But defendant did not offer evidence on what income plaintiff might be expected to earn from her share of the property division. Further, the record does not support defendant's argument that plaintiff has been able to accumulate large amounts of cash over the years based on the temporary support payments she received while this matter was pending. Thus, it was not reasonable to assume that plaintiff's share of the property division would be available for investment. Therefore, the trial court did not err by failing to impute income to plaintiff from the property division.

Defendant's primary argument is that the trial court did not properly evaluate plaintiff's needs when awarding her support of $25,000 a month. Plaintiff presented evidence that her expenses would be $17,129 a month once she moved to Canton, Ohio, which included amounts for a mortgage on a new home and an amount toward her retirement. Plaintiff's expert witness testified that because plaintiff would be required to pay taxes on spousal support, $25,000 a month would be required to enable plaintiff to meet these expenses. Plaintiff's expert also testified that she took into account the amount plaintiff would be expected to receive from defendant's retirement savings when calculating the amount plaintiff would need to save for her own retirement.

Considering all relevant factors, the trial court did not err in awarding plaintiff $25,000 a month in spousal support. Defendant was likely to continue to earn at least $800,000 a year for the foreseeable future, leaving him with a disposable income of over $37,000 a month for his own support. The trial court's award allows both parties to continue to enjoy a comfortable lifestyle and is not clearly inequitable. Although defendant asserts that the physical and scheduling demands of his work may limit his ability to continue in his current career in the future, as previously noted, after five years defendant may petition for a modification of support if there are changed circumstances. We also reject defendant's reliance on computer software programs in evaluating the amount of spousal support because no such evidence was offered below.

In sum, the trial court's factual findings in support of its award of spousal support are not clearly erroneous. Furthermore, in light of the trial court's findings, the trial court's dispositional decision to award plaintiff $25,000 a month in spousal support is fair and equitable.

Defendant next argues that the trial court erred by awarding plaintiff attorney fees and costs in the final judgment. This Court reviews a trial court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). However, any factual findings on which the court bases its decision are reviewed for clear error and any questions of law are reviewed de novo. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

In a divorce action, attorney fees are not recoverable as of right, but may be awarded only where necessary to preserve a party's ability to carry on or defend the action. *Stoudemire, supra*. See MCL 552.13(1). MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Under either the statute or the court rule, attorney fees may only be awarded when a party requires financial assistance to pursue or defend the action. *Reed, supra*. "The reason for the rule is that no party should have to invade the assets the party relies on for support in order to obtain representation." *Olson, supra* at 635.

Although attorney fees may also be awarded because of misconduct of the opposing party, *Reed, supra* at 165, MCR 3.206(C)(2)(b), there is no argument on appeal that defendant was ordered to pay attorney fees and costs because of any misconduct in this litigation.

Early in this case, the trial court awarded plaintiff $14,000 for her attorney fees and costs so she could pursue this case. In addition, the temporary order entered in September 2002 required defendant to pay all household expenses, $1135 in child support, and $4000 a month in spousal support. The court explained that "this is because of the reasons for the divorce and the defendant's earning power. He has the ability to pay." Moreover, there was no dispute that defendant had control of most of the parties' assets throughout the litigation and that initially plaintiff had no means of paying her attorney fees herself while the case was pending. We agree that this order was proper.

But the trial court also awarded plaintiff an additional $37,000 for attorney fees and $6,231 for an accountant in the final judgment. The Court's final ruling on these fees clearly fails to conform with either *Stoudemire, supra* or MCR 3.206; consequently it was an abuse of discretion. Considering the temporary and now permanent spousal support plaintiff received and receives along with the fact that defendant paid virtually all household expenses, plaintiff did not and cannot demonstrate that the additional $37.000 award was necessary to preserve her ability to carry on or defend the action. See *Stoudemire, supra*. See also *Gates, supra* at 438-439. Neither did she make any showing that she "is unable to bear" the $37,000 expense as required by MCR 3.206(C) (2)(a).

The award of legal costs also included accounting fees, which were necessitated by defendant's complex financial holdings and earnings. See *Ianitelli, supra* at 645. But the record also does not support the trial court's determination of this additional $6,231 for accounting fees, as the same analysis applies to this amount. Moreover, the trial court apparently believed that the $6,231 expense for plaintiff's accounting expert was not part of the requested $37,000 in attorney fees. It was, in fact, part of that amount. Accordingly, we vacate the trial court's award of $37,000 in attorney fees and $6,231 in costs awarded to plaintiff.

We affirm in part and reverse in part. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey