

STATE OF MICHIGAN
COURT OF APPEALS

DAVID E. DAIEK,

Plaintiff-Appellant,

v

LISA J. DAIEK,

Defendant-Appellee.

UNPUBLISHED

April 8, 2008

No. 275569

Oakland Circuit Court

LC No. 2003-674751-DM

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order denying his motion to amend a consent judgment of divorce. We reverse and remand.

On May 20, 2003, the parties entered into a consent judgment of divorce. The judgment contained the following provision:

I.R.S. SECTION 71(b) PROPERTY

The Plaintiff shall further pay to the Defendant the sum of One Hundred Sixty Two Thousand Five Hundred (\$162,500) Dollars as additional property settlement, in pursuance of Section 71 of the Internal Revenue Code, as follows:

1. Commencing June 1, 2003, and every month thereafter, the sum of Eighteen Hundred Seventy Five (\$1,875.00) Dollars, until paid in full.
2. Plaintiff shall be entitled to pay such additional lump sums against the total outstanding obligation at his sole discretion. Payments in any 12 month period shall not be less than \$22,500.

The foregoing payments shall be deductible by Plaintiff and shall be taxable to Defendant for all permissible income tax purposes, and neither party shall file any income tax return inconsistent herewith.

The parties expressly recognize that the foregoing obligation has been negotiated and agreed to by the Plaintiff and the Defendant and is non-modifiable, as construed and interpreted in the Michigan Court of Appeals in *Macoit v*

Macoit, 165 Mich App 390 (1980); *Pierce v Pierce*, 166 Mich App 579 (1988); in *Turner v Turner*, 180 Mich App 170 (1989), and in *Bonfiglio v Pring*, 202 Mich App 61 (1993). It is the parties['] intention that this obligation shall be nonmodifiable by either party, in amount or in duration, and, no changes in circumstances of either party, even if material in nature, shall alter the parties' obligations or rights hereunder.

This obligation is for the support and maintenance of Defendant and shall not be dischargeable in any bankruptcy proceedings.

In the event of Plaintiff's death at any time prior to payment of any of the installments as above set forth, his obligations to make the remaining payments hereunder shall constitute a charge and obligation of his estate to the extent that they have not been satisfied by life insurance, annuity, or similar vehicle, and shall also be secured as provided elsewhere under the terms of this Judgment as executed by the parties.

Plaintiff made the required payments and claimed deductions for the payments on his tax returns. Defendant, however, on advice from her certified public account, did not report the payments as taxable income, apparently because there was no requirement in the consent judgment that payments cease on defendant's death. In May 2006, the Internal Revenue Service notified plaintiff that the payments did not qualify as deductible alimony for the above reason.

Plaintiff subsequently filed a motion requesting relief under MCR 2.612(A)(1). Plaintiff sought to amend the consent judgment to add language providing that the payments would terminate upon defendant's death, thereby qualifying as deductible alimony as intended by the parties. The trial court denied the motion and also denied plaintiff's alternative request for an evidentiary hearing to determine the parties' intent.

MCR 2.612(A)(1) provides:

Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.

A judgment may be corrected under this rule where it does not comport with what was intended. *McDonald's Corp v Canton Twp*, 177 Mich App 153, 159; 441 NW2d 37 (1989). A trial court's decision to grant or deny relief under MCR 2.612 is reviewed for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 642-643; 543 NW2d 75 (1995).

In this case, it is clear from the consent judgment that the payments in question were intended to qualify as property governed by § 71(b) of the Internal Revenue Code, 26 USC 71(b), which defines what constitutes "alimony or [a] separate maintenance payment" that is

required to be included as gross income.¹ This intent is clearly reflected in the judgment, which specifically lists the payments under the heading “I.R.S. SECTION 71(b) PROPERTY.” Further, consistent with § 71(b), the judgment expressly provides that “[t]he foregoing payments shall be deductible by Plaintiff and shall be taxable to Defendant for all permissible income tax purposes, and neither party shall file any income tax return inconsistent herewith.” According to documentation submitted by plaintiff, the only reason the IRS did not permit his deductions was that the consent judgment did not require that the payments cease upon defendant’s death, as required by § 71(b)(1)(d) in order for the payments to qualify as deductible alimony under § 71(b).

Because both parties clearly intended for the payments to qualify as § 71(b) property, and expressly agreed that the payments would be taxable to defendant and deductible to plaintiff, the trial court abused its discretion by denying plaintiff’s request for relief. “Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.” *Central Cartage Co v Fewless*, 232 Mich.App 517, 536; 591 NW2d 422 (1998). MCR 2.612(A)(1) is intended “to make the lower court record and judgment accurately reflect what was done and decided at the trial level.” *Id.* citing *McDonald’s Corp v Canton Tp*, 177 MichApp 153, 159; 441 NW2d 37 (1989). Here, the failure to include language necessary to effectuate the parties’ clear intent is the type of clerical mistake or error arising from an oversight or omission justifying relief under MCR 2.612(A)(1). Accordingly, we reverse the trial court’s decision and remand for correction of the consent judgment nunc pro tunc.

In light of our decision, it is unnecessary to address plaintiff’s alternative request for an evidentiary hearing.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering

¹ Among other requirements, in order for a cash payment to qualify as “alimony or separate maintenance” for purposes of the statute, there must be

no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse. [26 USC 71(b)(1)(d).]