STATE OF MICHIGAN

COURT OF APPEALS

GEORG RAITHEL,

Plaintiff-Appellee,

v

HANNA RAITHEL,

Defendant-Appellant.

UNPUBLISHED
October 26, 2023

No. 361761
Washtenaw Circuit Court
LC No. 18-000366-DO

Before: RICK, P.J., and SHAPIRO and YATES, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] an order denying her motion for modification of spousal support. We vacate and remand for an evidentiary hearing.

I. FACTUAL BACKGROUND

This action arises out of the parties' 2019 divorce. Defendant was married to plaintiff, her husband, for 32 years. The parties were married in Germany in 1987 and emigrated to the United States in 1995 after plaintiff received a job offer in Maryland. They share two adult children. Plaintiff is a university professor and businessman. Defendant is an ordained minister. After moving to the United States, defendant devoted her time to being a stay-at-home mom. She has not been employed outside the home since leaving Germany in 1995.

The judgment of divorce at issue here was entered on September 18, 2019. Relevant to this appeal, the judgment of divorce contained a spousal support provision, which states as follows:

> IT IS FURTHER ORDERED that commencing July 1, 2019, Plaintiff shall pay to Defendant, by means of a Uniform Spousal Support Order – No FOC Services, through an automatic bank transfer to a bank with an American branch,

[1] *Raithel v Raithel*, unpublished order of the Court of Appeals, entered November 17, 2022 (Docket No. 361761).

> MODIFIABLE spousal support in the amount of Three Thousand Four Hundred ($3,400) Dollars per month. The Uniform Spousal Support Order entered simultaneous with this Judgment of Divorce is incorporated by reference and merged into this Judgment of Divorce.
>
> IT IS FURTHER ORDERED that commencing July 1, 2019, Plaintiff shall pay to Defendant, by means of a Uniform Spousal Support Order – no FOC Services, through an automatic bank transfer, additional MODIFIABLE SPOUSAL SUPPORT, in an amount equal to one half of Defendant's German Government Health Insurance System, currently known as (GKV), health insurance cost not to exceed one-half of the monthly maximum amount as established by German law, if applicable. Defendant will provide Plaintiff with proof of her health insurance cost and documentation sufficient to allow Plaintiff to calculate his additional modifiable monthly spousal support obligation relating to Defendant's German Government Health Insurance.
>
> IT IS FURTHER ORDERED that Plaintiff is not awarded spousal support/alimony and spousal support/alimony to Plaintiff is forever barred. Plaintiff forgoes his statutory right to petition the Court for spousal support and agrees that this provision is final, binding, and non-modifiable in accordance with *Staple v Staple*, 241 Mich App 562 (2000).

The judgment of divorce contains another separate clause regarding health insurance, which states:

> IT IS FURTHER ORDERED that, except as otherwise stated above in section 2, upon entry of the Judgment of Divorce, each party shall be responsible for his/her respective health insurance expenses, including any and all uninsured medical, dental, and health care expenses. Each party shall hold the other harmless and indemnify the other with respect thereto.
>
> IT IS FURTHER ORDERED that pursuant to the Consolidated Omnibus Budget Reconciliation act ("COBRA") of 1984, Defendant may be entitled to health insurance through Plaintiff's employer for the maximum period of time provided by COBRA or until Defendant is covered by a group health plan pursuant to IRC Section 162(k) through employment, whichever occurs first. Plaintiff shall promptly provide Defendant with all necessary documentation and cooperate administratively such that Defendant can receive coverage under COBRA if she elects to do. . . .

On September 9, 2021, defendant filed a motion to modify spousal support. Defendant explained that when the judgment of divorce was entered, she planned to move back to Germany to live with her sister. There, she would have been able to purchase government health insurance, which would have cost her approximately $500 to $600 per month. The judgment of divorce contemplated defendant's move to Germany and mandated that plaintiff would have to pay half of defendant's monthly government-sponsored health care costs. Thus, plaintiff's total spousal support payments to defendant would have been approximately $3,650 to $3,700 per month. Defendant's move to Germany never happened because her sister was facing "significant health

challenges[.]" Thus, defendant did not obtain government-sponsored health care as was expected when the judgment of divorce was entered. As a result, plaintiff had only been paying $3,400 in spousal support since September 2019.

Defendant further explained that she brought the motion to modify spousal support because defendant's income had increased by 10% since the judgment of divorce was filed, and because her health insurance costs had increased significantly since she chose to remain in the United States. Specifically, plaintiff's yearly income had increased from $221,002 in 2019 to $242,233 in 2020. Defendant was forced to buy health insurance provided under the Consolidated Omnibus Budget Reconciliation Act, colloquially known as COBRA, which cost $765 per month. According to defendant, the incomes and needs of the parties were not balanced. In 2020, plaintiff had $10,831 per month in discretionary income after paying alimony, taxes, and health insurance, whereas defendant only had the $3,400 monthly spousal support payment. After paying her health insurance, defendant had $2,635 in income per month. Defendant argued that no income could reasonably be imputed to her, since she remained unemployed. For the foregoing reasons, defendant argued that a change in circumstances existed to support modifying the spousal support award, and asked that the trial court grant her motion.

In response to the motion, plaintiff explained that his increased income in 2020 was a result of his employment with a company called Rydberg Technologies, which received a contract in 2020 that earned him more money than he would ordinarily make. Plaintiff noted that his increase in income was temporary: the contract was only in place for one year, there were no plans for renewal, and plaintiff's primary employer had requested that he limit his time working with Rydberg Technologies to one day per week. Thus, plaintiff expected that in 2021, he would likely make approximately as much as he had in 2019 when the judgment of divorce was entered. Based on that assessment, plaintiff argued that defendant could not show that he had a greater ability to pay spousal support.

Plaintiff further argued that defendant's decision to continue living in Michigan and to obtain health insurance through COBRA were not "changed circumstances" warranting modification of spousal support. Plaintiff explained that it was foreseeable that defendant might have to obtain COBRA health insurance, pointing out that the judgment of divorce indicated she might be eligible for such insurance. Moreover, plaintiff contended that the judgment of divorce made the parties solely liable for their own health expenses outside of the spousal support provision regarding defendant's health care if she were to move back to Germany. Plaintiff thus asked the court to deny defendant's motion to modify spousal support.

The trial court heard argument on the motion. Defendant's counsel explained that defendant had attempted to obtain health insurance outside of COBRA, but that she did not qualify for Medicare or Medicaid and would have to pay significantly more money to obtain insurance through the Affordable Care Act. Defendant was currently unemployed and living "from place to place" with friends and with her children. She was eligible to work, but was currently unemployed. Regarding the increase in plaintiff's income, plaintiff's counsel explained that the increase in his Rydberg Technologies income was an anomaly that would not last. Plaintiff's counsel further explained that the federal government had given "a lot of money" to some companies and "some of it trickled down to [plaintiff,]" but that he would have less income in 2021.

At the close of argument, the following exchange took place between the trial court and counsel for the parties:

> *The Court*: Well, here's the deal. *Straud v. Straud* [*Stroud v Stroud*, 450 Mich 542; 542 NW2d 582 (1995)] says that in deciding—that changes that occur that were clearly within the future contingencies the parties had in mind when they reached the original agreement are not a change of circumstances, and I'm just—that's why I'm trying to get an overall, and I'm trying to get an overall picture here of whether there was something that was unanticipated.
>
> * * *
>
> And what I see in the judgment of divorce at this point is that each party under the—the settlement agreement is responsible for their health insurance.
>
> I also don't hear—so, there was—it was anticipated that if she didn't go to Germany that she would have to get health insurance here or pay COBRA.
>
> So, I don't find the—the fact that she is paying COBRA to be a change of circumstances that wasn't foreseeable.
>
> * * *
>
> [Defendant's counsel]: Your Honor, can I just say that [*Stroud*] is not—it's in opposite [sic]. In [*Stroud*] there was an escalator clause. The very contingency was that if he made more money, she would get more money.
>
> Here we don't have that. If we had that clause, we wouldn't be here today, so, [*Stroud*] is—
>
> *The Court*: Your—your proper—your proper cause of change in circumstances is that she's paying for health insurance. That was anticipated.
>
> You're not telling me she can't afford a place to live. You're not telling me you know, that she's had this large change of expenses. None of that is before me.
>
> [Defendant's counsel]: The primary change is his increase in income, and the case law is very clear on that. His income has increased and that is a change of circumstances in and of itself.
>
> * * *
>
> *The Court*: I—I don't see a change of circumstances that would warrant revisiting spousal supp—modif—modifying spousal support at this time.
>
> * * *

It is always anticipated that somebody's salary may go up a bit, but I do not see a change in circumstances at this point that warrants modifying spousal support.

Your motion is denied.

After the hearing, the trial court entered an order denying defendant's motion to modify spousal support. Plaintiff moved for reconsideration, but the motion was also denied. This appeal followed.

II. ANALYSIS

A. NONCONFORMITY OF DEFENDANT'S BRIEF

Plaintiff initially argues that this Court should not consider the merits of defendant's argument on appeal because 1) she failed to attach a copy of the motion hearing in her appellate appendices, in violation of MCR 7.212(J)(3)(*a*), and 2) she violated MCR 7.205(E)(4) by adding new issues to her brief on appeal that were not included in her application for leave to appeal to this Court. Both arguments lack merit.

As to MCR 7.212(J)(3)(*a*), plaintiff is correct that defendant did not attach a copy of the motion hearing transcript to her brief on appeal. However, a copy was provided in the lower court record. Thus, although defendant did not fully adhere to MCR 7.212(J)(3)(*a*), plaintiff has not shown cause to strike defendant's brief or otherwise decline to address her appeal on this basis. See MCR 7.216(C)(1)(*b*). As to MCR 7.205(E)(4), we note that the order granting defendant's delayed application for leave to appeal provided that "[t]his appeal is limited to the issues raised in the application and supporting brief." *Raithel v Raithel*, unpublished order of the Court of Appeals, entered November 17, 2022 (Docket No. 361761). While the issues are somewhat restated in her brief on appeal, they are fundamentally the same as those set forth in her application for leave to appeal. Accordingly, there is nothing preventing this Court from addressing the merits of defendant's argument in full.

B. SPOUSAL SUPPORT

Defendant argues that the trial court abused its discretion by declining to find a change in circumstances warranting modification of spousal support. We agree.

A trial court's factual findings relating to the modification of spousal support are reviewed for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Loutts v Loutts*, 298 Mich App 21, 25; 826 NW2d 152 (2012). "A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Beason*, 435 Mich at 805. If the trial court's findings are not clearly erroneous, this Court then reviews the trial court's ruling regarding spousal support for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). An abuse of discretion occurs when the trial court's ruling falls outside the range of reasonable and principled outcomes. *Id.* A trial court's spousal support ruling must be affirmed unless this Court determines that it was inequitable. *Loutts*, 298 Mich App at 26.

MCL 552.28 authorizes the modification of spousal support awards. It states, in relevant part:

> On petition of either party . . . the court may revise and alter the judgment, respecting the amount or payment of the alimony . . . and may make any judgment respecting any of the matters that the court might have made in the original action.

An award of spousal support is subject to modification on a showing of changed circumstances. *Lemmen v Lemmen*, 481 Mich 164, 166; 749 NW2d 255 (2008). A party can waive the right to modification, or otherwise indicate in the judgment of divorce that the spousal support award is intended to be final and unmodifiable. *Richards v Richards*, 310 Mich App 683, 692; 874 NW2d 704 (2015); *Smith v Smith*, 328 Mich App 279, 284; 936 NW2d 716 (2019). Here, the parties did not indicate in the judgment of divorce that the spousal support award was intended to be unmodifiable. Instead, the judgment of divorce specifically states that defendant was awarded "MODIFIABLE spousal support in the amount of Three Thousand Four Hundred ($3,400) Dollars per month[,]" as well as an additional amount of modifiable spousal support "equal to one half of Defendant's German Government Health Insurance System . . . health insurance cost not to exceed one-half of the monthly maximum amount as established by German law, if applicable." Thus, defendant was entitled to move to modify spousal support.

Modification of spousal support requires a two-step inquiry. *Luckow v Luckow*, 291 Mich App 417, 424; 805 NW2d 453 (2011). First, the moving party must show that a change of circumstances has arisen since the prior spousal support order was entered. *Id*. "By definition, changed circumstances cannot involve facts and circumstances that existed at the time the court originally entered a judgment." *Laffin v Laffin*, 280 Mich App 513, 519; 760 NW2d 738 (2008). Instead, "[a]ny modification of spousal support must be based on *new* facts or changed circumstances arising after the judgment of divorce, and requires an evaluation of the circumstances as they exist at the time modification is sought." *Id*. (emphasis added). "If the court finds that a party has established a change in circumstances, it must then make factual findings from which to conclude whether the alimony should be modified and, if so, by what amount." *Luckow*, 291 Mich App at 424 (quotation marks and citation omitted). Once a change in circumstances has been established, the court must evaluate whether spousal support should be modified using the following factors:

> (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. [*Berger v Berger*, 277 Mich App 700, 726-727; 747 NW2d 336 (2008) (quotation marks and citation omitted).]

The trial court must then "make specific factual findings regarding the factors that are relevant to the particular case." *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003) (citation omitted).

Defendant contended in her motion to modify spousal support and again on appeal that two changes in circumstances supported modification of the award: 1) plaintiff's income had increased since the judgment of divorce was entered, and 2) defendant did not move to Germany as contemplated in the judgment of divorce, meaning that plaintiff was not paying half of her health care costs as expected. Here, rather than move to Germany, defendant remained in the United States and sought health insurance through COBRA. The trial court found that defendant's COBRA health insurance costs were a "foreseeable consequence of her decision not to move to Germany." In making this determination, the trial court relied almost exclusively on *Stroud v Stroud*, 450 Mich 542; 542 NW2d 582 (1995). This was an error. In *Stroud*, the judgment of divorce provided a specific formula for calculating spousal support, which included calculated increases in support based on an increase in the cost of living or an increase in the plaintiff's income. *Id*. at 544-545, 550. The *Stroud* Court opined that a change in the parties' respective finances did not justify modifying spousal support, stating:

> [T]he alimony provision found in the original judgment of divorce was agreed upon by the parties. While the circuit court correctly observed that there have been changes in the circumstances of the parties, the original agreement clearly was written with future contingencies in mind. Even though the parties could not have foreseen the exact income levels that were reached during the 1980s, the changes were of a kind that fit neatly within the formulae upon which the parties agreed. Put another way, the changes were not *unanticipated* changes. [*Id*. at 550.]

Importantly, the *Stroud* Court found that the changes in income and other life circumstances experienced by the parties were not "unanticipated" because the spousal support formula laid out in the judgment of divorce was designed to account for the specific changes in circumstance experienced by the parties to the divorce. *Id*. *Stroud* involved a unique spousal support formula, and thus it is a fairly fact-specific case. As such, it is relatively unhelpful and should not have been applied to the instant matter, where the judgment of divorce did not contain a spousal support formula at all. The trial court thus erred in its reliance on *Stroud*, and eschewed its responsibility to "consider all the circumstances of the case" in determining whether to modify spousal support. *McCallister v McCallister*, 205 Mich App 84, 87-88; 517 NW2d 268 (1994).

Contrary to the trial court's conclusion, defendant's decision not to move to Germany was a change in circumstances warranting review of the spousal support award. Defendant anticipated that she would be able to move to Germany and stay with her sister, but because her sister was facing "significant health challenges," defendant could not move in with her. Thus, she could not obtain health insurance through the German government as expected. Nothing in the record suggests that defendant planned to remain in the United States or expected to have to pay out of pocket for COBRA health insurance. Plaintiff was required to pay spousal support in the amount of $3,400, as well as half of defendant's German health insurance costs. Even though defendant did not move back to Germany, she still has health care costs, which plaintiff is obligated to assist with paying via spousal support, according to the judgment of divorce. Her inability to move back to Germany is a change in circumstances that the trial court did not properly consider.

Defendant also argues that the trial court effectively rewrote the judgment of divorce by allowing plaintiff to avoid his obligation to help with her health insurance costs. To the contrary, plaintiff argues that the provision in the judgment of divorce regarding health insurance precludes him from assuming responsibility for paying half of defendant's COBRA health insurance costs. That provision states:

> except as otherwise stated above in section 2, upon entry of the Judgment of Divorce, each party shall be responsible for his/her respective health insurance expenses, including any and all uninsured medical, dental, and health care expenses. Each party shall hold the other harmless and indemnify the other with respect thereto.

"Consent judgments of divorce are contracts and treated as such." *Andrusz v Andrusz*, 320 Mich App 445, 452; 904 NW2d 636 (2017). "Unambiguous contracts must simply be enforced as they are written." *Id*. at 453. Plaintiff's interpretation of the judgment of divorce is incorrect. The subsection that he references relates to "uninsured" medical and dental costs, and does not itself negate the fact that a change in circumstances not contemplated in the judgment of divorce has clearly occurred as a result of defendant not moving to Germany as planned. Plaintiff's spousal support requirement obligates him to help pay for half of defendant's health insurance costs, even if it does not obligate him to help her with ancillary health care costs not covered by insurance. By failing to do so, plaintiff has avoided paying all of the spousal support that defendant is owed according to the spousal support agreement in the judgment of divorce. Thus the trial court abused its discretion by concluding that defendant's decision not to move to Germany was not a change in circumstances warranting review of the spousal support award. Defendant is entitled to an evidentiary hearing on the matter.

As to the matter of plaintiff's income, defendant admits that the increase was only approximately 10% between 2019 and 2021. Such a minimal increase would not qualify as a change in circumstances warranting review of the spousal support order on its own. In the context of child support, this Court has opined that "[s]ole reliance on an increase in one party's income without consideration of other relevant factors is inadequate to establish that a change in circumstances has occurred." *Pellar v Pellar*, 178 Mich App 29, 32; 443 NW2d 427 (1989). There is no reason why this principle would not apply similarly here. Thus, the trial court did not abuse its discretion by finding that the increase in plaintiff's income was not a change in circumstances. However, the increase in his income should be considered as a factor in determining how much spousal support plaintiff must pay to defendant on remand. *McCallister*, 205 Mich App at 87-88; *Berger*, 277 Mich App at 726-727. An evidentiary hearing must be held to determine the extent to which the spousal support order must be modified to account for plaintiff's responsibility to pay half of defendant's health insurance costs.

III. CONCLUSION

The trial court erred by concluding that defendant's decision not to move to Germany and obtain health insurance overseas, and her subsequent need to obtain health insurance through COBRA, were foreseeable events that did not constitute a change in circumstances warranting an evidentiary hearing. Additionally, although the trial court did not abuse its discretion by concluding that the increase in plaintiff's income was not a change in circumstances, the court

must still take it into consideration when reviewing whether to modify defendant's spousal support amount on remand.

We vacate the order denying defendant's motion to modify spousal support and remand for an evidentiary hearing. We do not retain jurisdiction.

/s/ Michelle M. Rick
/s/ Douglas B. Shapiro
/s/ Christopher P. Yates