

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM ARTHUR WENTZ,

Plaintiff-Appellant,

v

TOMIKO NAKAHARA WENTZ,

Defendant-Appellee.

UNPUBLISHED
February 26, 2002

No. 227172
Kent Circuit Court
LC No. 86-058579-DO

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

MEMORANDUM.

Plaintiff appeals by leave granted from the trial court's order denying his motion to terminate alimony. We vacate and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant were divorced in 1987. The judgment of divorce required plaintiff to pay alimony in the amount of \$600 per month until either party died or defendant remarried. The payment was to be reduced to \$490 per month upon plaintiff's retirement. The judgment provided that the trial court retained jurisdiction to enforce any provision therein.

In December 1999, plaintiff moved to terminate his alimony obligation. He asserted that defendant had returned to her homeland of Japan and had become employed, and that his personal circumstances, i.e., he was the sole support of his current wife and their two young children, necessitated the termination of his obligation to defendant. The trial court denied defendant's motion, concluding that it lacked jurisdiction to modify the alimony provision in the judgment.

An award of periodic alimony is modifiable upon a showing of changed circumstances justifying modification. MCL 552.28; *Bonfiglio v Pring*, 202 Mich App 61, 63; 507 NW2d 759 (1993).¹ A trial court's continuing jurisdiction to modify an award of periodic alimony is

¹ Parties may waive their right to petition the court for a modification of alimony. An agreement to waive the right must be stated clearly and unambiguously, and must be reflected in the judgment of divorce. *Staple v Staple*, 241 Mich App 562, 568-569; 616 NW2d 219 (2000). No such agreement exists in this case.

grounded in MCL 552.28, and is not dependent on any triggering language contained in a judgment. *Rickner v Frederick*, 459 Mich 371, 378-379; 590 NW2d 288 (1999).

We vacate the trial court's order denying plaintiff's motion to terminate alimony, and remand for further proceedings consistent with this opinion. The trial court erred by rejecting the general holding of *Rickner, supra*, that an award of periodic alimony is modifiable under MCL 552.28 upon a showing of a change of circumstances. In deciding whether the award of alimony was subject to modification, the trial court should have determined whether the alimony was periodic or gross. Alimony payments that are not for a total sum certain and that are subject to a contingency, such as death or remarriage, are generally regarded as periodic. Alimony payable as a lump sum or as a sum certain payable in installments is classified as alimony in gross. Alimony in gross is considered nonmodifiable. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000).

Upon remand, if the court determines that the alimony awarded to defendant is periodic, as seems to be the case, then the court must determine if plaintiff has shown a change in circumstances justifying modification. MCL 552.28; *Rickner, supra*; *Bonfiglio, supra*.

Vacated and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Martin M. Doctoroff

/s/ Donald S. Owens