STATE OF MICHIGAN

COURT OF APPEALS

PAUL J. KEISLING, JR., Plaintiff-Appellant,	UNPUBLISHED January 21, 2016
v	No. 324162 Livingston Circuit Court Family Division
BRIGID M. KEISLING, Defendant-Appellee.	LC No. 11-044622-DM

Before: RONAYNE KRAUSE, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order denying his motion to modify alimony based on a change of circumstances. We reverse and remand.

I. FACTS

The parties divorced in 2012. The consent judgment of divorce states the following with respect to spousal support/alimony:

> **IT IS HEREBY ORDERED AND ADJUDGED** that Defendant shall receive or be entitled to Spousal Support/Alimony in the amount of One Thousand ($1,000.00) Dollars per months effective April 1, 2012 and Spousal Support/Alimony shall cease on March 31, 2017, upon remarriage of the Defendant, or death of the Plaintiff, whichever happens first.

At the time of the divorce, plaintiff was working as a police officer and made $32.57 per hour. In 2013, plaintiff asserted, he was treated for anxiety reaction and the treating physician recommended that he stop working as a police officer. Plaintiff asserts that his financial situation worsened because of his inability to work. He claims he was forced to file bankruptcy on July 15, 2013. According to plaintiff, he subsequently found a job as a security guard that paid him $19.50 per hour. On January 10, 2014, defendant started receiving a monthly pension benefit of $1,809.30.

Plaintiff filed five motions with the trial court asking that his spousal support obligation be modified. In ruling on the fifth motion, the trial court made the following statement:

> This is the fifth time that I've had this motion in front of me . . . I understand his distress. But from my review of the pleadings in this case I've told him previously, and the rulings that I've made, are that this is non-modifiable. It cannot be modified in the opinion of the Court. That's a legal ruling . . . But my legal opinion is that it's non-modifiable. So please don't bring this back to me again.

Plaintiff argues that the court erred in ruling that the spousal support award was nonmodifiable.

II. ANALYSIS

A trial court's interpretation of a divorce judgment is reviewed de novo. *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012).

"The primary purpose of spousal support 'is to balance the incomes and needs of the parties in a way that will not impoverish either party.'" *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003) (internal quotation omitted). MCL 552.28 provides for the revision and alteration of a judgment for alimony as follows:

> On petition of either party, after a judgment for alimony or other allowance for either party or a child, or after a judgment for the appointment of trustees to receive and hold property for the use of either party or a child, and subject to section 17, the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, and also respecting the appropriation and payment of the principal and income of the property held in trust, and may make any judgment respecting any of the matters that the court might have made in the original action.

Read literally, MCL 522.28 does not dictate a change in circumstances requirement, but the Court of Appeals "has consistently applied the requirement to modification of alimony questions." *McCarthy v McCarthy*, 192 Mich App 279, 282; 480 NW2d 617 (1991). Michigan "courts and our Legislature have long recognized that the general rule of finality is not always suitable in the realm of matrimonial law" so "judgments of divorce must anticipate that circumstances will change for both the spouses who require support and the spouses who must provide that support" *Staple v Staple*, 241 Mich App 562, 565; 616 NW2d 219 (2000). "Consequently, our legislature long ago provided that courts may modify judgments for alimony upon petition of either party." *Id*.

In *Staple*, the Court was tasked with determining whether "parties who negotiate a divorce settlement may forgo this statutory right to petition the court to modify the alimony provisions and instead agree that the agreed-upon alimony provisions are final, binding, and nonmodifiable." *Id.* at 564. In answering yes to this question, the Court read Michigan caselaw as setting forth "[t]wo distinct approaches" used by courts in addressing whether a specific alimony provision is modifiable or nonmodifiable. *Id.* at 565-566. The Court classified the two as the "'bright-line' approach" and the "'intent' approach." *Id.* at 566-567.

The Court explained that courts following "the bright-line approach have held that the modifiability of alimony depends strictly on whether the alimony is classified as 'alimony in gross' or 'periodic alimony' . . . " *Id.* at 566. The Court explained that courts adhering to the bright-line approach instruct that alimony in gross occurs when "the alimony is either a lump sum or a definite sum to be paid in installments." *Id.* at 566. According to the Court, "alimony in gross . . . is in the nature of a division of property. Accordingly, alimony in gross is considered nonmodifiable and exempt from modification under MCL 552.28, though the recipient spouse dies or remarries before all the payments are made . . . " *Id.* However, when "the installment payments are subject to any contingency, such as death or remarriage of a spouse, courts adhering to the bright-line approach hold that the payments are more in the nature of maintenance payments, and therefore periodic alimony subject to modification." *Id*.

Conversely, the *Staple* Court explained, courts adhering to the "intent approach" have "opted . . . to resolve the 'finality' versus 'modifiability' dilemma in accordance with the parties' intent. Under this approach, the parties' intent takes precedence over the presence of contingencies." *Id.* at 567. These courts "allow the parties greater freedom in deciding if the alimony they agree to is periodic alimony or alimony in gross." *Id.*

Rather than endorsing either approach, the *Staple* Court adopted what is called "a modified approach," which allows the parties to forgo their right to modification in an agreed-upon alimony provision. *Id.* at 568. The Court stated:

> If the parties to a divorce agree to waive the right to petition for modification of alimony, and agree that the alimony provision is binding and nonmodifiable, and this agreement is contained in the judgment of divorce, their agreement will constitute a binding waiver of rights under MCL 552.28. In brief, we opt to honor the parties' clearly expressed intention to forgo the right to seek modification and to agree to finality and nonmodifiability . . .
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> . . . [W]e emphasize that our decision applies only to judgments entered pursuant to the parties' own negotiated settlement agreements, not to alimony provisions of a judgment entered after an adjudication on the merits . . . [*Id.* at 568-569.]

Thus, under *Staple*, although the distinction between alimony in gross and periodic alimony remains, parties may agree to waive the statutory right to modify an award of periodic alimony. To be enforceable, however, "agreements to waive the statutory right to petition the court for modification of alimony must clearly and unambiguously set forth that the parties (1) forgo their statutory right to petition the court for modification and (2) agree that the alimony provision is final, binding, and nonmodifiable." *Id.* at 581. The *specific* right to be waived must be *expressly* and unambiguously referred to in clear waiver language. *Id*. at 581 n 17.

Again, the alimony provision in the parties' divorce decree provides as follows:

> **IT IS HEREBY ORDERED AND ADJUDGED** that Defendant shall receive or be entitled to Spousal Support/Alimony in the amount of One Thousand ($1,000.00) Dollars per months effective April 1, 2012 and Spousal

> Support/Alimony shall cease on March 31, 2017, upon remarriage of the Defendant, or death of the Plaintiff, whichever happens first.

This provision establishes periodic alimony because it is subject to the contingency that "alimony shall cease . . . upon remarriage of the defendant, or death of the plaintiff." This makes the support ordered subject to modification under MCL 552.28 absent a clearly stated intent otherwise. See *id.* at 566. No such intent is evident in the language employed setting forth the award of periodic alimony.

The consent judgment does include a modification clause, which provides as follows:

> **IT IS FURTHER ORDERED** that no modification or waiver of any of the terms hereof shall be valid unless in writing and signed by both of the parties. No waiver of any breach hereof or default hereunder shall be deemed a waiver of any subsequent breach or default of the same or similar nature.

There is nothing in the modification clause that shows that the parties intended that the support award was nonmodifiable. Under *Staple*, in order to make an alimony provision nonmodifiable, the parties must explicitly forgo the statutory right to modification and state that the alimony provision itself is nonmodifiable. *Id.* at 581 n 17. The general language related to modification in this agreement, a separate section of the divorce judgment, a full 12 pages removed from the alimony provision, lacks the specificity *Staple* requires to make alimony nonmodifiable. *Id.*

Indeed, rather than precluding modification, the plain language of the agreement clearly contemplates the possibility of modification, pursuant to an agreement of the parties memorialized "in writing and signed by both parties." Specifically, pursuant to a "retention of jurisdiction" clause near the end of the agreement, spousal support is explicitly described as remaining under the court's jurisdiction. It states:

> **IT IS FURTHER ORDERED AND ADJUDGED** that except for issues which remain under the Court's Jurisdiction such as . . . (4) Spousal Support; this Judgment disposes of the last pending claim between the parties as of this date and closes this case.

Therefore, the trial court erred when it ruled the alimony award cannot be modified. The parties did not expressly waive their right to modification in the consent judgment.

"The modification of an alimony award must be based on new facts or changed circumstances arising since the judgment of divorce." *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). The party seeking to modify periodic alimony has the burden of showing changed circumstances meriting modification. *Gates v Gates*, 256 Mich App 420, 434; 664 NW2d 231 (2003). The trial court did not reach this issue. On remand, the trial court must determine whether there has been a change in circumstances to support modification of plaintiff's spousal support obligation.

Reversed and remanded. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien