

STATE OF MICHIGAN  
COURT OF APPEALS

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JAMES E. PEASE,

Plaintiff-Appellant,

v

MARY JANE PEASE,

Defendant-Appellee.

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UNPUBLISHED

January 27, 2011

No. 293305

Wayne Circuit Court

LC No. 97-731630-DO

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order denying his motion to modify or terminate his spousal support obligation to defendant in the amount of \$525 a week, which was established pursuant to a consent judgment of divorce. Because we conclude that the trial court failed to correctly construe the consent judgment, we vacate the trial court's order denying plaintiff's motion and remand for reconsideration of the motion consistent with this opinion.

A trial court may modify an award of spousal support based on new facts or different circumstances arising after the divorce judgment was entered. MCL 552.28; *Rapaport v Rapaport*, 158 Mich App 741, 746; 405 NW2d 165 (1987), mod 429 Mich 876 (1987). The burden is on the party moving for modification to show changed circumstances sufficient to warrant modification. *Graybiel v Graybiel*, 99 Mich App 30, 33-34; 297 NW2d 614 (1980). The existence of a change of circumstances is a question of fact. *Ackerman v Ackerman*, 197 Mich App 300, 301-302; 495 NW2d 173 (1992). We review the trial court's factual findings with respect to a motion to modify spousal support for clear error, and review any dispositional ruling to determine if it was fair and equitable under the circumstances. *Thornton v Thornton*, 277 Mich App 453, 458-459; 746 NW2d 627 (2007).

“A consent judgment is in the nature of a contract, and is to be construed and applied as such.” *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). We review de novo the proper interpretation of a contract, including whether it is ambiguous. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). A contract is ambiguous when two provisions irreconcilably conflict or a term is equally susceptible to more than one meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). “If no reasonable persons could dispute the meaning of ordinary and plain contract language, the Court must accept and

enforce contractual language as written, unless the contract is contrary to law or public policy.” *Laffin*, 280 Mich App at 517.

We initially note that plaintiff misconstrues the trial court’s decision as containing a finding of a sufficient change of circumstances, based on his retirement from Ford Motor Company, to entertain his motion to modify spousal support. Consistent with *McCallister v McCallister*, 205 Mich App 84, 86; 517 NW2d 268 (1994), the trial court recognized that a party’s retirement may constitute a change of circumstances. However, the material question in *McCallister* was whether “all the circumstances,” including not only the moving party’s retirement, but also his pension and Social Security income, added up to create a change in circumstances sufficient to justify a modification of spousal support. *Id.* at 86-88. Even though the party’s pension and Social Security benefits had been previously awarded to the party in the judgment of divorce, the trial court nonetheless considered them in denying the party’s request for a modification of spousal support. *Id.* This Court found no basis for disturbing the trial court’s decision that “the circumstances did not warrant modification of the original award.” *Id.* at 88.

In the present case, the trial court appropriately considered plaintiff’s ability to pay the agreed spousal support amount of \$525 a week, rather than simply considering the change in plaintiff’s employment status to retirement, when denying plaintiff’s motion. This approach was consistent with the consent judgment, which permits either party to petition for a modification of support based on “substantial changes in circumstances, including but not limited to the retirement of the Plaintiff husband.” In other words, while the parties viewed retirement as an example of a changed circumstance, their agreement clearly contemplates that the necessary change must still be “substantial.”

Although the trial court noted that it found the spousal support amount to be fair and equitable, it specifically denied plaintiff’s motion because plaintiff had “failed to meet his burden of showing a sufficient change in circumstances to warrant modification or termination of his spousal support obligation.” Because the trial court did not set a spousal support award, but rather denied plaintiff’s motion based on his failure to show the necessary change of circumstances, plaintiff’s arguments must be considered in that context.

With regard to plaintiff’s challenge to the trial court’s consideration of his pension and other post-retirement income sources, we agree in part with plaintiff’s claim that the trial court erred by failing to give effect to the terms of the consent judgment. Under the spousal support provision in the consent judgment, either party was permitted to move for a modification of spousal support after three years. In the event plaintiff retired after that three-year period, the judgment provided that “any other income received from employment or consulting, be taken into consideration relative to the spousal support award; however, the Plaintiff’s pension and stock savings investment plan not be taken into consideration, as the assets are to be divided in this divorce and should not be considered as income by either party.”

Plaintiff’s pension and “stock savings and investment plan” (SSIP) assets were divided between the parties pursuant to a separate “property settlement” section of the consent judgment. The judgment awarded defendant a 50-percent interest in the “marital portion” of plaintiff’s Ford pension through a Qualified Domestic Relations Order (QDRO), effective October 1, 2008.

Defendant was also awarded the first \$35,000 of plaintiff's interest in his SSIP with Ford, with the balance to be divided equally between the parties "effective at the close of business on September 14, 1998," through a QDRO.

The trial court properly construed the property settlement provisions as only awarding to defendant a portion of the pension that accrued during the parties' marriage. This same result is apparent with respect to the SSIP that was divided equally between the parties after an initial \$35,000 distribution to defendant. However, the trial court incorrectly relied on *Lang v Lang*, 169 Mich App 429; 425 NW2d 800 (1988), to support its decision to consider the pension for purposes of evaluating plaintiff's motion to modify or terminate spousal support.

In *Lang*, the parties entered into a property settlement, but expressly reserved the issue of spousal support for the trial court. The defendant, who already had been awarded his "retirement benefits" as part of the property settlement, argued that those benefits could not be considered in determining alimony. This Court stated that resolution of the claim depended largely on whether the retirement plan, itself, or the benefits derived therefrom, was treated as the marital asset. *Id.* at 433. This Court found that the rule against altering property settlements might bar consideration of the benefits in a future award or modification of alimony, but noted that if "the retirement plan itself is treated as a marital asset, there is no reason why the benefits thereafter derived therefrom should not be considered in determining the need for, or the ability to pay, alimony." *Id.* Ultimately, this Court determined that the "retirement benefits" language in the property settlement constituted a careless use of language. *Id.* Accordingly, it upheld the trial court's determination that the parties' express reservation of alimony for judicial determination contemplated that the retirement income would be considered. *Id.* at 433-434.

This case is distinguishable from *Lang* because the parties here reached an initial agreement concerning spousal support. When the parties' property settlement is read in conjunction with the spousal support provision in the consent judgment, it is clear that the parties agreed that neither the pension nor the SSIP that were distributed as part of the property settlement, nor any income earned from those assets, was to be considered in connection with spousal support determination. Therefore, the trial court erred when it relied on *Lang* to determine the parties' intent *solely* on the basis of the property settlement language. The parties' agreement, which consisted of the spousal support provision as well as the property settlement provision, unambiguously precluded consideration of income derived from plaintiff's pension and SSIP to the extent that those assets had already been divided in the property settlement.

Nonetheless, we disagree with plaintiff's argument that only employment or consulting income could be considered in deciding his motion to modify or terminate spousal support. We acknowledge that the consent judgment contemplated that plaintiff might continue working after his retirement, and that the judgment expressly provides for consideration of such income in determining spousal support. Specifically, it provides for consideration of "any other income received from employment or consulting."

But it does not necessarily follow that the judgment precludes consideration of other sources of income. "Persons are presumed to know the law[.]" *R L Polk Printing Co v Smedley*, 155 Mich 249, 252; 118 NW 984 (1908). Therefore, we may presume that the parties were aware when entering into the consent judgment that nonemployment financial sources could be

considered in evaluating spousal support. See, e.g., MCL 522.602(c), *McCallister*, 205 Mich App at 87-88. Although there are circumstances in which the maxim *expressio unius est exclusio alterius* may be applied to imply the exclusion of one thing from the express mention of another, *Grinnell Bros v Brown*, 205 Mich 134, 137; 171 NW 399 (1919), that maxim is only an aid in construction and cannot govern if it would defeat the parties' clear intent. See *AFSCME Michigan Council 25 v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005). Because we find nothing in the consent judgment to indicate that the parties intended to address potential non-employment sources of income, and the exclusion relating to the pension and SSIP in the spousal support provision applies only to benefits that were already distributed as part of the property settlement, the trial court reached the correct result by finding that there was no contractual prohibition from considering other non-employment sources of income.

In sum, while we conclude that the trial court misconstrued the consent judgment, this error only affected its consideration of the excluded portions of the pension and SSIP benefits in evaluating plaintiff's ability to pay spousal support. According to the trial court's findings, the excluded amount of the "pension benefits" would amount to approximately \$1,000 a month. We disagree with defendant's contention that this finding was a mere guess.

Nevertheless, we cannot simply conclude that the trial court's erroneous construction of the consent judgment was harmless or that the court would have reached the same result absent the error. Because the existence of a change of circumstances requires a factual determination, and because the trial court misapplied the consent judgment in evaluating plaintiff's motion, we must remand for reconsideration of whether plaintiff met his burden of showing a sufficient or "substantial" change of circumstances to warrant modification of his support obligation. The trial court may permit the parties to present additional evidence as necessary to properly evaluate the motion on remand. See *Thornton*, 277 Mich App at 459.

We briefly address plaintiff's remaining arguments because they are likely to arise again on remand. We agree with plaintiff's contention that the trial court was required to consider "all" factors relevant to an award of spousal support when deciding his motion. Indeed, as this Court has previously observed, the Legislature plainly intended "that our courts consider *all* the circumstances of the case when modifying an alimony award . . . ." *McCallister*, 205 Mich App at 87-88 (emphasis in original).

However, with respect to plaintiff's argument concerning the spousal support factors, we note that the trial court need only make findings with respect to those factors that are "relevant to the particular case." *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003). Because plaintiff's motion was based only on a change of his own financial circumstances, the trial court did not err by failing to consider defendant's circumstances when deciding whether sufficient circumstances existed to warrant a modification. Plaintiff has also failed to demonstrate any error in the trial court's consideration of his current wife's income as it relates to his own financial situation. It is well settled that "the effect of cohabitation on a party's financial status" is an appropriate factor to consider in evaluating spousal support. *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008) (citation omitted).

Further, while it is apparent from the record that the buyout payment that plaintiff received upon his retirement from Ford was not an available source for paying future spousal

support, plaintiff has not addressed, let alone established, any basis for concluding that the trial court used the buyout evidence for an impermissible purpose. Quite simply, plaintiff has misapprehended the context in which the court considered the buyout payment.

Finally, we reject plaintiff's claim that, at a minimum, spousal support should have been reduced proportionately to the changes in his income. The proportionality approach adopted by the trial court in *Kosch v Kosch*, 233 Mich App 346, 350-353; 592 NW2d 434 (1999), relates to the issue of child support—not spousal support.

For the foregoing reasons, we vacate the trial court's order denying plaintiff's motion to modify or terminate the spousal support obligation, and remand for reconsideration of plaintiff's motion consistent with this opinion.

Vacated and remanded. We do not retain jurisdiction. No costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kathleen Jansen  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell