STATE OF MICHIGAN

COURT OF APPEALS

EMILY ANNE ANGLIN,

Plaintiff-Appellant,

v

PHIL JAY ANGLIN,

Defendant-Appellee.

UNPUBLISHED
April 25, 2017

No. 331313
Kalamazoo Circuit Court
LC No. 2013-005282-DM

Before: BECKERING, P.J., and MARKEY and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, Emily Anne Anglin, appeals by leave granted the order denying her motion to modify child support and seek Friend of the Court (FOC) services.[1] We reverse and remand to the trial court for further proceedings consistent with this opinion.

The parties married in September 2005 and had two children together. Plaintiff filed for divorce in February 2013. The parties mediated their divorce over a period of months and submitted a comprehensive settlement agreement to the trial court. In May 2014, the trial court entered a consent judgment dissolving the marriage and granting the divorce. The judgment included a property settlement section. As part of the property settlement, defendant, Phil Anglin, was awarded all interests in Padea, Inc., a business owned by the parties before the divorce. Also as part of the property settlement, another business that the parties owned, PAKK Pubs, Inc. was to be sold and the proceeds split between the parties. The property settlement section also provided:

> Until such time as PAKK Pubs, Inc. has been sold, Plaintiff shall continue to be paid a salary of $38,000 per year total divided between PAKK Pubs, Inc. and Padea, Inc., d/b/a Rhinos, as is currently the case.

The judgment incorporated by reference a Uniform Child Support Order (UCSO) and a Uniform Spousal Support Order (USSO). The UCSO included a checked box that stated, "The

[1] *Anglin v Anglin*, unpublished order of the Court of Appeals, entered April 26, 2016 (Docket No. 331313).

support provisions do follow the child support formula." There was an attachment to the UCSO that contained a calculation for defendant's child support obligations under the Michigan Child Support Formula (MCSF). Those calculations showed that, under the MCSF, defendant's child support obligation would be $796.19 per month for both children. However, the UCSO included a checked box that stated, "Standard provisions have been modified." The UCSO included a provision that defendant's total child support obligation was $0. An attachment to the Uniform Child Support Order also contained the following provisions:

> 1. Until sale of PAKK Pubs, Inc. Plaintiff shall continue to draw her regular salary from PAKK Pubs, Inc. and Padea, Inc. in lieu of any direct support payments from Defendant.
>
> 2. Upon the sale of PAKK Pubs, Inc. Defendant shall pay to Plaintiff child support in an amount pursuant to the Michigan Child Support Formula. The parties shall attempt to agree on this amount and shall either enter a Stipulated Order establishing this amount or Plaintiff shall have the right to file a Motion to establish support, if the parties are unable to agree. This new support obligation shall be effective the date of the sale of PAKK Pubs, Inc.

Similarly, the USSO contained a checked box, that again stated, "Standard provisions have been modified (see item 8)." Item 8 contained language that is nearly identical to the attachment to the UCSO:

> Until the sale of PAKK Pubs, Inc. Plaintiff shall continue to draw her regular salary from PAKK Pubs, Inc. and Padea, Inc. in lieu of any direct support payments from Defendant. If the sale of PAKK Pubs, Inc. occurs on a day other than the first of the month, the amount of the first payment owed by Defendant to Plaintiff for actual spousal support shall be prorated accordingly.

In July 2015, plaintiff filed a motion to modify child support and receive FOC services. In that motion, plaintiff alleged that, while at the time of mediation, the parties had negotiated on the basis of 2012 tax information, defendant's tax information for 2013 showed a substantial increase in income. Plaintiff further alleged that defendant had remarried, acquired income-generating property, purchased two Porsche vehicles, and had significantly remodeled his home. Plaintiff proffered that this established a change in circumstances sufficient to modify defendant's child support obligations. "A trial court may modify a child support order if modification is justified by a change in circumstances." *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). If the modification deviates from the MCSF, due to a finding that application of the formula would be unjust or inappropriate, the court must set forth, either on the record or in writing, how the order deviates from the MCSF and the applicable reasons for deviation. *Id.*

Unlike the provisions of a divorce judgement that govern child and spousal support, the provisions governing property division may not be modified.[2] Here, defendant argued that given the atypical arrangements, the child support and spousal support were inextricably tied to the property settlement, and so no modification as to support could be considered.

The trial court agreed with defendant and denied plaintiff's motion on the grounds that modification was not permitted. Accordingly, it did not reach the question whether there had been a change in circumstances sufficient to merit such a modification.[3] Explaining its decision, the trial court noted that (1) the parties entered into a "global agreement," which included provisions addressing child support, (2) the parties entered an order for $0 child support, (3) the amount of child support that plaintiff was then receiving, in the form of her salary from PAKK Pubs and Padea Inc., was more than what she would have received under the MCSF, (4) there was no basis under MCL 2.612(C) for setting aside the judgment, and (5) setting the judgment aside was not in the best interests of the children nor was it in the best interests of justice.[4]

Plaintiff contends that the trial court erred in relying on the original divorce judgment because that judgment did not adhere to the requirements of the MCSF or MCL 552.605(2), and, therefore, the provisions in that judgment could not serve as a basis to deny her motion to modify child support. However, this argument constitutes an impermissible collateral attack on the divorce judgment. The failure of a party to appeal from an original judgment of divorce operates as a stipulation to the provisions in that judgment, and a party cannot later collaterally attack the validity of that judgment through a motion to modify child support. *Kosch*, 233 Mich App at 353. Because plaintiff never appealed the original judgment or order, she "effectively stipulated her consent to its provisions, including the original determination of child support." *Id*. Her argument that the judgment was void lacks merit.[5]

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[2] "Property-settlement agreements are, as a general rule, final and cannot be modified." *Smith v Smith*, 292 Mich App 699, 702; 823 NW2d 114 (2011).

[3] The trial court analyzed plaintiff's motion under the standard for seeking relief from a judgment or order, MCR 2.612(C), rather than as a motion for modification of child support. However, plaintiff did not file a motion for relief from the judgment or order; she filed a motion for modification of child support and to receive FOC services.

[4] The trial court's factual findings are reviewed for clear error. *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake was made. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). The trial court's ultimate disposition regarding a motion to modify child support is reviewed de novo. *Edwards v Edwards*, 192 Mich App 559, 562; 481 NW2d 769 (1992).

[5] Specifically, we decline to address plaintiff's challenge to the provision in the UCSO stating that the child support obligation was $0 and plaintiff's challenge to the method for payment of child support.

Although plaintiff may not collaterally attack the original divorce judgment, she may file a motion to change support based on a change of circumstances. In this respect, we conclude that the trial court erred by holding that the child support provisions and the property settlement are inextricably tied together and that the support provisions are non-modifiable. Although the clause detailing that plaintiff would continue to receive her salary of $38,000 from PAKK and Padea, Inc. is technically included in the section titled "Property Settlement," the real effect of plaintiff receiving the salary is that it stands in place of defendant's child support and spousal support obligations. That is, plaintiff's salary is not part of the property settlement, even if it is discussed in that portion of the judgment. See *Holmes v Holmes*, 281 Mich App 575, 598; 760 NW2d 300 (2008) (stating that a provision's location in a judgment "is a distinction lacking a meaningful difference"). The parties' testimonies combined with the plain language of the UCSO, USSO, and property settlement support that plaintiff's salary was child support and spousal support, which plaintiff received in lieu of direct support payments, not a property settlement. Child support and spousal support may be modified after the judgment of divorce has been entered provided there has been a change of circumstances. *Lemmen v Lemmen*, 481 Mich 164, 165; 749 NW2d 255 (2008). Accordingly, we conclude that the trial court erred by not considering the motion to modify support on its merits.

Defendant additionally argues that, regardless of any errors, plaintiff received more child support from her salary than she would through application of the MCSF. Although we have upheld child support orders that provide for payment over what the MCSF calculated, see *Holmes*, 281 Mich App at 590 (stating that while this Court "strongly disfavors deviations from child support formula . . . that *limit* a parent's obligation" that this Court "has enforced voluntary agreements to pay *additional* child support"), the child support order in this case is vague as to the amounts attributable to spousal support and child support. Defendant's testimony did not provide clarification. The parties' testimony demonstrate that, despite their best efforts to provide specifics, no one really knows how much of plaintiff's salary is specifically attributable to child support as opposed to spousal support, and so comparisons to the MCSF lack a clear basis.[6]

Accordingly, we reverse the denial of plaintiff's motion to modify child support and remand to the trial court with instructions to allow plaintiff an opportunity to submit evidence demonstrating a change in circumstances sufficient to justify modification of child support. If the trial court determines that there has been a change in circumstances sufficient to justify modification, the trial court may still use plaintiff's salary in lieu of direct payments; however, her salary would need to be increased by the same percentage as defendant's obligation under the MCSF. See *Kosch*, 233 Mich App at 349, 353 (finding that the trial court kept with the "spirit of

[6] Additionally, we are not persuaded by either party's proposed calculations about how the current agreement would compare to a situation where plaintiff simply received direct support payments. Each party attempts to approximate the applicable tax consequences under these scenarios using assumptions for which they do not provide evidentiary support. We need not delve into a full inquiry about what plaintiff's hypothetical tax liability would be without further evidence on the many factors that could affect such liability.

the judgment" when it deviated from the MCSF and increased the plaintiff's child support obligation by an amount proportionate to the increase in his income). If the court so chooses to keep the child support method the same, it should adhere to the requirements of MCL 552.605(2), as it would effectively act as a deviation from the MCSF.

MCL 552.603(2) provides that "[r]etroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support." Plaintiff provided notice to defendant of her motion to modify child support and use FOC services on August 5, 2015, the date of the signed notice of hearing.[7] Therefore, according to the statute, the earliest date that plaintiff might be entitled to retroactive modification would be August 5, 2015.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Douglas B. Shapiro

[7] Plaintiff originally filed a motion for relief from judgment on December 5, 2014. That motion was apparently disposed of by agreement of the parties. However, the parties' agreement was never memorialized or otherwise entered into the lower court record. Therefore, that petition is no longer pending, and thus, MCL 552.603(2) is not applicable to it. Moreover, MCL 552.603(2) states that the section applies to a "petition for modification." Plaintiff's December 5, 2014 petition was not a petition for modification, but rather, was a petition for relief from judgment.