

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN ELAINE SLOTA a/k/a SUSAN ELAINE
ROBISON,

UNPUBLISHED
February 9, 2010

Plaintiff-Appellant,

v

JOHN LEO SLOTA,

No. 285676
St. Clair Circuit Court
LC No. 02-002811-DO

Defendant-Appellee.

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

In this divorce case, plaintiff appeals by leave granted an order of the trial court granting and denying various motions concerning the parties' judgment of divorce. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

The parties agreed to a settlement that was incorporated into a consent judgment of divorce. Among other things, the settlement awarded plaintiff a \$310,000 lump sum payment in exchange for defendant receiving the marital business (a bar) and the property upon which it was located. Although the payment was due 60 days from March 26, 2004, the date the settlement was placed on the record, it was not made. Another provision of the divorce agreement provided that plaintiff was to have a priority lien on the business, the property it was located on, and another parcel of property that defendant was awarded, in order to secure the \$2,000 per month alimony payments awarded plaintiff. These liens were the subject of a prior appeal in this case where a panel of this Court held that the liens were not subordinate to any other liens on the properties, according to the enforceable and unambiguous language of the consent judgment, reversing the trial court. *Slota v Slota*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2007 (Docket No. 269640) (*Slota I*).

In the present appeal, plaintiff first asserts that the trial court erred in ordering that the lump sum payment could be paid in installments, contrary to the consent judgment. We agree. The interpretation of the parties' agreement presents a question of law subject to de novo consideration on appeal. *MacInnes v MacInnes*, 260 Mich App 280, 283; 677 NW2d 889 (2004).

Judgments entered pursuant to the agreement of parties are of the nature of a contract. *In re Lobaina Estate*, 267 Mich App 415, 418; 705 NW2d 34 (2005), quoting *Gramer v Gramer*,

207 Mich App 123, 125; 523 NW2d 861 (1994). A settlement agreement is a contract, and is to be construed and applied as such. *Id.* A contract must be interpreted according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). Unambiguous contract provisions must be construed as written. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005).

At the March 26, 2004 hearing, defendant testified that the lump sum payment was an accurate description of the settlement agreement, and both parties testified that they wished to enter into this agreement. The settlement agreement was incorporated into a consent judgment of divorce, and was signed by both parties. Defendant does not dispute that this was the intent or the agreement of the parties. The settlement agreement is not ambiguous on this issue. Nevertheless, the trial court modified the consent judgment so that defendant could make installment payments on the amount owed plaintiff.

Defendant argues that it was permissible for the trial judge to rely on his equitable and statutory powers to modify the settlement agreement. Defendant specifically contends that MCL 600.6107 and MCL 600.6201 vest the trial court with the authority to permit defendant to pay the judgment in installments. MCL 600.6107(1) provides as follows:

Whether or not the judgment creditor has resorted to any remedy available under the garnishment or execution statutes, the court may order the judgment debtor to pay to the judgment creditor or apply on the judgment, in installments, such portion of his income, however or whenever earned or acquired, as the court may deem proper, after due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the judgment debtor under any legal process.

According to defendant, MCL 600.6107(4), which provides as follows, specifically contemplates that this statute shall apply to matrimonial actions:

An order under this section, where the income sought to be reached consists in whole or in part of moneys awarded in a matrimonial action for the support of the judgment debtor by a court of this state, may be made only by such court. To enable the judgment creditor to apply for such an order, a proceeding under this chapter instituted in another court may be transferred to such court on order of such other court, without prejudice to the proceedings theretofore taken therein.

Defendant also states that MCL 600.6201 imparts the authority to permit installment payments by providing:

The judge of any court having civil jurisdiction at the time of the rendition of a judgment, upon proper showing made by the defendant with both parties or their attorneys present in court, may make a written order permitting the defendant to pay the judgment in installments, at such times and in such amounts as in the opinion of the judge, the defendant is able to pay.

We do not believe that any of these provisions authorized the court to convert the lump sum payment negotiated between the parties, and memorialized in this consent judgment of

divorce, to installment payments. MCL 600.6107 refers to judgment creditors and debtors. The marital relationship is not that of a debtor and creditor. *Lindner v Lindner*, 137 Mich App 569, 572; 358 NW2d 376 (1984). In *Linder*, this Court reasoned that “[t]he law governing the creation and dissolution of a marriage is unique unto itself and a rule that applies to commercial transactions need not apply to a marriage where the public policy considerations relating to the protection of divorcing spouses, *e.g.*, the desirability of adequate support and an equitable division of joint property, are entirely different.” *Id.* at 572-573. In fact, the trial court noted when considering an interest award that, “Michigan case law clearly establishes that the statute governing interest on money judgments does not apply to Judgments of Divorce.”

However, the trial court also stated that “this Court does have the authority through its equitable powers to issue appropriate Orders with regard to the enforcement of Judgments of Divorce”, then ordered defendant to pay \$5,000 per month to plaintiff toward the satisfaction of the unpaid balance of the cash award contained in the judgment of divorce. A trial court’s decision concerning equitable issues is reviewed *de novo*, although its findings of fact supporting the decision are reviewed for clear error. *Eller v Metro Indus Contracting, Inc.*, 261 Mich App 569, 571; 683 NW2d 242 (2004).

We first note that while the trial court referred to its powers to enforce an agreement, the agreement was for a lump sum payment, and the trial court did not enforce this provision. Instead, the trial court altered it. Modifications of property settlements in divorce judgments are strongly disfavored. *Baker v Baker*, 268 Mich App 578, 586; 710 NW2d 555 (2005). Consenting adults in a marriage have the right and the freedom to decide what is a fair and appropriate division of the marital assets in anticipation of a divorce, and our courts should not rewrite such agreements. *Lentz v Lentz*, 271 Mich App 465, 471-472; 721 NW2d 861 (2006). See also *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999) (observing that property divisions reached by the consent of the parties, and finalized in writing or on the record, cannot be modified by the court). Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiation and agreement of the parties. *Baker*, *supra*, at 586.

Here, the parties negotiated a lump sum payment within 60 days of the March 2004 hearing in order to buy out plaintiff’s interest in the marital business. The parties were specific in bargaining for defendant’s independent operation of the business in exchange for a lump sum that would quickly be provided, rather than much smaller periodic payments. A little over four years later, with the vast majority of the payment still outstanding, the trial court ordered that defendant pay the negotiated lump sum in installments. The court was apparently attempting to avoid ordering the sale of the business to pay plaintiff because defendant could not obtain the financing for the lump sum payment. In doing so, however, the trial court impermissibly altered the parties’ agreement, and changed the substantive rights of the parties. *Bers v Bers*, 161 Mich App 457, 464-465; 411 NW2d 732 (1987).

Defendant asserts, based on *Alexander v Alexander*, 103 Mich App 263, 266-267; 303 NW2d 202 (1981), that the trial court had the equitable power to modify the judgment of divorce to alleviate inequities when necessitated by fairness. However, in *Alexander*, fraud was the basis for the modification of the judgment, and this Court noted that divorce judgments may be altered only when the substantive rights of the parties are not changed. *Id.*

Defendant also relies upon *Molnar v Molnar*, 110 Mich App 622, 626; 313 NW2d 171 (1981) to support an equity argument. In that case, the divorce judgment allowed for the wife to remain in the marital home with the parties' minor child until either she remarried, or the child reached the age of 18 years, at which point the home would be sold. While the wife remained in the marital home, the parties were to each pay half of the mortgage, taxes, and insurance. Unfortunately, the parties' minor child died at the age of eleven. The husband then ceased paying his one-half of the mortgage, tax and insurance payments, and defendant moved to enforce the judgment of divorce. A panel of this Court determined that, "On the facts before us, we find that the property settlement was, in fact, for the benefit of the deceased minor child and that this benefit was known at the time that the judgment herein was entered. The purpose of the judgment was basically frustrated by the death of the child, an event unforeseeable at the time of judgment and not the fault of either party." This Court held that, "the death of the minor child triggers the sale provisions of the divorce judgment and that the house should be sold forthwith in accordance with the terms of the judgment."

Here, in contrast, the purpose of the parties' agreement was not frustrated. Defendant was to receive the parties' business, which he did, and continued to own and operate it. Plaintiff was to receive \$310,000 as a buyout of her share of the equity in the business. There was no change, unforeseeable to the parties after entry of the judgment, that frustrated the purpose of the lump sum provision or otherwise made the provision inequitable. Defendant immediately received and retained his benefit of the bargain, and plaintiff remained entitled to hers. Moreover, where, as here, defendant apparently made little to no effort in four years to pay down the debt, allowing him to now make installment payments that he could have been making (or saving toward a lump sum payment) all along is clearly inequitable to plaintiff. There being no allegation of fraud, duress, mutual mistake, or frustration of purpose, the trial court erred in altering the negotiated language contained in the parties' judgment of divorce, thereby altering the parties' substantive rights.

Plaintiff next contends that the trial court erred in denying her right to foreclose on her liens against defendant's properties and to obtain a judicial sale in order to enforce the lump sum payment. We disagree.

Divorce proceedings are conducted in the same manner as other suits in courts of equity; and these courts have the power to award issues, to decree costs, and to enforce its decrees. *Draggou v Draggoo*, 223 Mich App 415, 428; 566 NW2d 642 (1997). A court possesses inherent authority to enforce its own directives. *Wiand v Wiand*, 178 Mich App 137, 144; 443 NW2d 464 (1989).

In the "Continuing Jurisdiction" section of the divorce judgment the trial court's powers of enforcement were detailed:

IT IS FURTHER ORDERED AND ADJUDGED that this court shall retain jurisdiction of this cause for the purpose of enforcing the provisions of the aforesaid Judgment of Divorce, said enforcement to include the issuance of injunctions against the transfer of assets, ordering assets to be assigned, liened, and/or sold toward the satisfaction of this Judgment, or such other relief in aid or execution as is authorized by Statute or Court Rule, or such other relief as the Court may deem appropriate and equitable under the circumstances.

In this matter, when defendant had not satisfied his lump sum obligation to plaintiff, plaintiff moved for a judicial sale of the business and the real estate. However, plaintiff's liens were granted "for the purpose of guaranteeing, collateralizing, and securing alimony in favor of Plaintiff." The liens granted to plaintiff were *expressly* to secure payment of spousal support, which was not argued to be delinquent. The agreement was silent on the remedy for failure to pay the lump sum.

Nevertheless, the express language of the consent judgment of divorce provided the trial court with the authority to order assets to be assigned, liened, and/or sold, or such other legally authorized relief to assist in execution of the judgment that the court deemed appropriate under the circumstances. Accordingly, the court would not be altering the substantive right of defendant to own the land or operate the business, according to the judgment, had it ordered the judicial sale of defendant's property. This is not to say, though that the trial court was *obligated* to order the sale of the property. The trial court had the authority to grant a different remedy, if it could have fashioned one, to satisfy the lump sum owed, and it did not err in declining to order a judicial sale under the circumstances before it.

Plaintiff next argues that the trial court's limitation of the recovery of her attorney fees and costs to the period of time that the trial judge had been presiding over the case (after it had been reassigned to him) constituted clear legal error. The consent judgment of divorce contained a section titled "Enforcement" that provided:

IT IS FURTHER ORDERED AND ADJUDGED that the parties hereto shall perform their respective executory obligations as herein specified with the utmost good faith. In the event that a party hereto wrongfully fails to fulfill said obligation(s), thereby necessitating institution of enforcement proceedings, then the party in wrongful default of this Judgment shall pay the Court costs and reasonable actual attorney fees incurred by the non-defaulting party in addition to any damages created by such failure and/or refusal.

During the hearing on plaintiff's motion for post-judgment attorney fees and costs the trial court stated, "As it relates to your request for fees-costs and attorney fees, the cost I'm granting- I don't know what the costs, but not including the costs for appeal. . . I'm granting attorney fees for enforcement. So, reasonable attorney fees for enforcement of this will be granted." Plaintiff then asked for clarification about the period of time for which the fees were awarded, and the court explained, "I'm only going to agree to what's taken place in front of me. I have no idea what Judge Adair may have already considered. But what has taken place since I've gotten the case, I'll consider attorney fees for enforcement." The court then ordered, in relevant part:

The defendant shall pay to plaintiff's counsel those court costs and attorney fees incurred by plaintiff to seek enforcement of the terms of the Judgment of Divorce against the defendant and which were incurred after this case was re-assigned to the Hon. Elwood L. Brown (on September 14, 2005).

Once again, the parties negotiated an agreement to enforce the provisions of the judgment by requiring the other party to pay the costs and fees of enforcing its provisions. While the record demonstrates that plaintiff had been attempting to collect the lump sum owed to her prior

to the case's reassignment, the trial court nevertheless limited the award of costs and fees. Because the specific language in the judgment leaves no room for interpretation, the trial court's limitation constituted an abuse of discretion. See *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

In the motion hearing, the trial court indicated that the award for costs and attorney fees would not include the costs for plaintiff's previous appeal. The divorce judgment is silent regarding appellate costs, but does not limit the fees and costs associated with enforcing the award to trial court costs. Plaintiff's attorney fees and costs associated with seeking enforcement of the order included a prior appeal. The costs and fees for this appeal in pursuit of enforcement should be a part of the award provided for in the judgment for the same reasons that the defaulting party was responsible for costs and fees in the trial court.

Plaintiff next contends that the trial court abused its discretion in awarding interest on the defaulted amount for only a six-month period rather than for the entire four-year period the payment had been in default. This Court reviews an award of interest in equity for an abuse of discretion. *Olson v Olson*, 273 Mich App 347, 349; 729 NW2d 908 (2006). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *In re Temple Marital Trust*, *supra* at 128.

The statutory interest on money judgments, MCL 600.6013, does not apply to divorce judgments, but in appropriate circumstances a court may award interest in its exercise of equitable powers. *Olson*, *supra* at 351. In its discretion, a trial court may award a party interest where the payments due on a property settlement are overdue. *Reigle v Reigle*, 189 Mich App 386, 394; 474 NW2d 297 (1991).

Here, the lump sum payment from defendant to plaintiff was due on May 25, 2004. When the payment was not made, plaintiff immediately sought enforcement of the judgment. On December 8, 2005, plaintiff filed a motion for an award of interest on the unpaid settlement amount. On December 15, 2005, the trial court ordered seven percent interest to be applied to the unpaid balance of the lump sum beginning on December 15, 2005. Here, plaintiff contests the court's May 8, 2008 order that stated, in relevant part:

IT IS FURTHER ORDERED that plaintiff's motion for continuing interest on the outstanding principal balance of the cash award owed by the defendant is **GRANTED BUT LIMITED** for the reasons stated on the record. The defendant shall pay 7% per annum interest on the outstanding principal balance of the cash award from December 15, 2005 forward as previously ordered on such date. By order of April 16, 2006, said interest was suspended during the pendency of plaintiff's appeal "until the final decision of the Court of Appeals" which was on September 19, 2007. The order of April 16, 2006 is hereby amended to extend the suspension of interest to the date the Michigan Supreme Court denied Defendant's application for leave to appeal (February 19, 2008). The Defendant shall pay 7% per annum interest on the outstanding principal balance of the cash award prospectively from February 19, 2008.

Plaintiff argues that the trial court should have ordered interest from the date of default, and during the time of the previous appeal. Plaintiff states that these orders resulted in plaintiff

receiving interest for only 6 of the 47 months that defendant had been in default. However, plaintiff did not appeal the December 15, 2005 order granting interest on the balance from that date and the order was not modified by the current order appealed. Further, the trial court ordered interest to begin to accrue on December 15, 2005 in response to plaintiff's December 8, 2005 motion. An interest award in a divorce action is not intended to compensate a party for lost use of funds. *Reigle, supra* at 394. The purpose of awarding interest is to prevent the defaulting party from receiving a windfall and to encourage the prompt compliance with court orders. *Id.* It was a reasonable outcome that the trial court ordered interest to begin on December 15, 2005 because it was in response to plaintiff's motion. Therefore, beginning interest on December 15, 2005 was not an abuse of discretion. See *In re Temple Marital Trust, supra* at 128.

Plaintiff also argues that it is fundamentally unfair to have suspended her entitlement to interest during the pendency of her appeal. Again, the award of interest is at the discretion of the trial court. Further, this Court indicated in *Reigle, supra* at 395-396 that interest accrued during a delay caused by appeal did not have to be awarded. The trial court's excluding the time of the previous appeal from the time that interest would accrue was within the range of reasonable and principled outcomes and, therefore, not an abuse of discretion. See *In re Temple Marital Trust, supra* at 128.

Finally, plaintiff requests that this case should be assigned to a different trial judge on remand because the current judge has demonstrated that he is unable to enforce the consent judgment of divorce as written due to his personal views of the fairness of the agreement. Remand to a different judge is appropriate where the original judge would have difficulty putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication. *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). A case should be assigned to a different judge on remand if it would be unreasonable to expect the trial judge to be able to put previously expressed findings out of mind without substantial difficulty. *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998).

Here, plaintiff argues that the trial judge is unable to enforce the parties' consent judgment of divorce as it is written because he believes that it is unfair. Plaintiff notes that this Court reversed the trial court's previous modification of the agreement by holding that the trial court was limited to enforcing the judgment as written because it was unambiguous and freely agreed to. See *Slota I, supra* at 2, 4. Plaintiff asserts that the trial court again disregarded the terms of the judgment in this appeal despite this Court's clarity in pronouncing its enforceability. However, our review of the entire record does not demonstrate that the trial judge will be unable to put his previous rulings out of his mind, and justly resolve the issues at a subsequent hearing. *Pillar, supra* at 271; *Bayati, supra* at 603.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens