

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAVID D. WARTINGER,

Plaintiff/Counter-Defendant-  
Appellant/Cross-Appellee,

v

LISA M. WARTINGER,

Defendant/Counter-Plaintiff-  
Appellee/Cross-Appellant.

UNPUBLISHED  
February 4, 2014

No. 310719  
Ingham Circuit Court  
LC No. 11-001863-DM

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Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Plaintiff/Counter-Defendant David D. Wartinger appeals as of right, and Defendant/Counter-Plaintiff Lisa M. Wartinger cross-appeals, the spousal support provisions of a judgment of divorce. We affirm in part, vacate in part, and remand.

**FACTS**

The parties began dating in 1991 and began cohabiting in the summer of 1993. Plaintiff is a urologist employed by Michigan State University (MSU),<sup>1</sup> and defendant was employed in medical billing at Ingham Regional Medical Center. Their first child was born in January 1994. The parties married in June 1998 and the parties mutually agreed at that time that defendant would resign her employment to be a stay-at-home mother. Their second child was born in October 2000. Plaintiff filed for divorce on May 27, 2011. Before trial, the parties participated in mediation. The parties resolved all matters regarding custody of the one remaining minor child and all property issues. The issue at trial, and pertinent in this appeal, is the determination of income for the purpose of spousal support.<sup>2</sup>

**A. PLAINTIFF'S EMPLOYMENT**

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<sup>1</sup> Plaintiff also received his Juris Doctorate degree from Thomas M. Cooley Law School, but never took the bar examination.

<sup>2</sup> Plaintiff does not challenge the award of child support.

In 2004, plaintiff suffered a heart attack, but apparently had no lingering effects from that attack.<sup>3</sup> In 2005, plaintiff suffered a spinal injury as a result of tripping over an electrical cord while at work at Sparrow Hospital. Although the injuries he suffered are permanent, he underwent surgery in 2007 in an attempt to prevent further deterioration of his spine. He returned to work in February 2008. According to plaintiff, he cannot perform surgery as a result of his injuries and cannot “treat patients in any meaningful capacity due to the necessary use of a computer to input and track patient data.” Consequently, he asserted that he is limited to a standard teaching position and cannot perform the clinical work that had provided him with additional income. He also asserted that the speaking engagements that also had provided additional income to him are no longer available. Thus, plaintiff maintained that that he has reduced wages and earning capacity as a result of his physical limitations and that spousal support should be based on his current nine-month academic salary.<sup>4</sup> He also maintained that income should be imputed to defendant because she has the ability to work, and had been earning \$35,000 annually before she resigned her employment.

According to defendant, plaintiff continued to earn substantial income after his accident in 2005. She asserted that she and plaintiff had discussions about his need to reduce his income before the trial in the lawsuit against Sparrow Hospital because the lawsuit was “income based.” She provided documentation of plaintiff’s income from 2005 through 2010. The total annual income is summarized as follows:

2005: \$265,388.00

2006: \$345,000.00

2007: \$466,467.00

2008: \$221,804.00

2009: \$236,710.00

2010: \$149,813.00

Defendant testified that even though plaintiff claimed his income was reduced as a result of his physical limitations, during the same time frame he bought a distance road bike for his own use and took sailing lessons in California. She testified that the drop in his income in 2010 was intentional in an effort to increase the settlement in the lawsuit against Sparrow Hospital.

## B. DEFENDANT’S EMPLOYMENT

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<sup>3</sup> Plaintiff received a settlement of \$300,000 as a result of a lawsuit against Merck, the manufacturer of the drug Vioxx, as a result of his heart attack.

<sup>4</sup> Plaintiff previously had a 12-month academic contract.

Defendant had not worked since 1998. She testified that she could not resume work as a medical biller because that occupation now requires certification and testing and she would not qualify for the position without further education. She has some college credits but does not have a degree. She had not yet applied for any jobs. She testified that her youngest son, who was 11 years old, suffers from adolescent migraines two to three days per week. She testified that she has to be available at any time to pick him up from school one or two days per week due to the headaches. If she was employed, she would require specialized child care for her son at a cost of \$250 to \$300 a week during the school year.

### C. SPARROW HOSPITAL LAWSUIT SETTLEMENT

Plaintiff received approximately \$1.6 million as a result of the settlement from the lawsuit against Sparrow Hospital.<sup>5</sup> Plaintiff alleged that he used part of the funds to give an interest-free loan in the amount of \$1,000,000 to friends who started a company that he believed would ultimately be successful.

### D. FAULT

At trial, plaintiff denied having an extra marital relationship. Defendant admitted having an affair in the summer of 2010. Defendant testified that during the course of the marriage she discovered credit card statements listing purchases of lingerie from Victoria's Secret, expensive flowers, candy, and gifts that were not given to her. When defendant confronted plaintiff about the purchases, he neither admitted nor denied engaging in an extra marital affair. Defendant sought counseling in 2005 in an attempt to repair the marriage. Plaintiff engaged in some marriage counseling, but the marriage was never repaired. At the time of trial, the parties had not had sexual relations for six or seven years.

### E. TRIAL COURT'S FINDINGS

The trial court made detailed findings of fact on the record as follows in pertinent part:

The plaintiff has objected to the referee's recommendation regarding the manner in which his income is calculated for purposes of spousal support and child support. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either of the parties based on what is just and reasonable under the circumstances of the case.

There are factors the court uses in determining spousal – if spousal support should be granted. Number one is the past relations and conduct of the parties. Both parties in this case have testified that the other engaged in extramarital relationships. Defendant admits that she has, while defendant [sic: plaintiff] denies that he has. But the court did not find his denial to be credible and finds that both have engaged in extramarital affairs.

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<sup>5</sup> Defendant received \$250,000 of the settlement monies.

Plaintiff's affair appears to have been the cause of the marital breakdown. Defendant's appear to have been reactive. Defendant did engage in marital therapy in an attempt to salvage the relationship. Defendant's testimony is credible.

The length of the parties' marriage is factor two, the parties were married in June of 1998. They have a 13 year marriage. They began dating in 1991. Defendant became pregnant in 1993 only to discover plaintiff had a wife that she did not know about. Eventually plaintiff divorced that person, and defendant and plaintiff married in 1998.

The abilities of the parties to work, both parties have the ability to work. Defendant has far less earning potential than plaintiff. Plaintiff has doctorate degrees in medicine and law, and defendant has had a long hiatus from the job market with limited job skills and little education. Her testimony is that she has several college credits hours from Lansing Community College.

Number four, the source and the amount of property awarded to the parties, the parties have settled their property issues pursuant to their mediation agreement dated February 7<sup>th</sup>, 2012, which the court adopts. The mediator, Robin Omer, shall retain jurisdiction to resolve any post-judgment property disputes that may arise.

Five, the ages of the parties, plaintiff is 55, defendant is 49.

Six, the ability of the parties to pay alimony, the court finds plaintiff has the ability to pay alimony to defendant. He has two doctorate degrees. She has very little education, limited skills and has been out of the job market for 14 years.

The present situation of the parties, defendant is in the marital home. Plaintiff has moved to an apartment.

Eight, the needs of the parties, neither has extraordinary needs. Both have monthly expenses. Defendant has testified to hers.

Number nine, the parties' health, plaintiff has claimed disabilities for which he has been compensated via lawsuits but is otherwise in good health and able to earn. Defendant is in good health and also able to earn.

Ten, the standard of living of the parties and whether either is responsible for the support of others, the parties are both affluent. Neither is responsible for the support of another, except for the minor child for whom plaintiff pays child support.

And eleven, the general principles of equity, defendant should not be required to deplete her property settlement to support herself, and the plaintiff has the ability to pay spousal support.

Specifically, plaintiff objected to the way that the support was calculated by friend of the court because they averaged his past three years of income instead of simply looking at his previous year's wages. The court affirms the referee's three year averaging method.

Plaintiff claims that he will never be able to earn the same amounts again as those years with higher salaries, but there is a general lack of credibility in his testimony. And the court is not convinced he can't continue to earn a substantial income. Plaintiff was argumentative and evasive, and his testimony left the court with the impression that he has something to hide regarding his income and his earning abilities.

The plaintiff says he should not be credited with income for speaking and consultation fees or surgeries he can no longer perform, but the court's not convinced that's a full representation of his earning capabilities. Therefore, the fairest way to compute his income is by three year averaging.

He did specifically testify regarding as to whether he'll see patients that it is not currently the plan, which implies there could be change.

He also testified that MSU will not allow him to do surgeries, but he further testified his limitation is primarily being – due to being unable to use the computer mouse to document patient contacts on the computer.

And he did in fact continue to perform patient surgeries until 2007, which was two years after his personal injury in 2005. So the court is of the impression he can continue to produce income similar to what he has in the past.

The Michigan Child Support Formula under 2.01(B) says, the objective of determining net income is to establish as accurately as possible how much money a parent will have available for support. All relevant aspects of a parent's financial status are open for consideration.

It further states in 2.02(B), where income varies considerably year to year due to the nature of the parent's work, then you use the three year information to determine income.

Defendant has testified plaintiff voluntarily reduced his income due to his pending personal injury litigation, which has now been settled. Her attorney argues that he also reduced his income for purposes of the divorce he was planning. The court is of the impression plaintiff will resume generating income in the amount similar to what he formerly has.

The conciliator's support calculations were \$97,487 based on his employment contract at MSU. The referee then added plaintiff's HSRC pay and averaged the years of '08, 09, and '10 together. That averaging fits the court rule because those years vary due to the nature of plaintiff's work.

She also – the referee also averaged speaker fees plaintiff received in ‘08, ‘09 and ‘10 and then the income from the lithotripsy. I have made the adjustment so that each party is credited with \$14,350 as they had apparently agreed in the mediation agreement. The court’s adopting those recommendations, making the modification with the lithotripsy.

Additionally, the court is crediting plaintiff with income in the amount of three percent of 1.6 million dollars or \$39,000 a year from his personal injury litigation settlement, which was transferred to Denali in an apparent intent to insulate that money from the court’s consideration as income to him. It just simply isn’t believable that he gets no interest from that transaction. That’s not a credible bit of testimony. It does appear to the court to have been a sham transaction.

So the totals the court is using for calculating both child support and spousal support for the plaintiff is 187,333 minus 14,350, that’s the lithotripsy, which equals 172,983 plus 39,000, which is the income from Denali, equaling a total of \$211,983.

Regarding imputation, income should be imputed to the defendant because she does have the ability to work. She has been a homemaker and mother for the past 13 years. Previously she worked earning \$35,000 in 1998. The decision is determined by the Michigan child support formula 2.01(G). I’m also crediting her with her portion of the lithotripsy income, \$14,350.

It does not appear to the court that she would be able to earn the amount she had previously earned, \$35,000, without further education or training. But regarding the calculation of potential income where a parent’s voluntarily unemployed or underemployed or has an unexercised ability to earn, income includes the potential income a parent could earn, subject to the parent’s actual ability.

The amount of potential income imputed she be sufficient to bring the parent’s income up to a level it would have been had she not voluntarily reduced her income.

The relevant factors in making that determination are her prior employment experience and history, she worked in medical management and last worked in 1998 earning \$35,000.

Her educational level or special skills or training, she doesn’t have any current skills, but she did achieve quite a bit when she was working with that same limited skill set, so the court’s confident she, with some additional education, could become recertified and employed.

(C), medical or physical disabilities that would affect her, defendant is healthy and able to work.

Her availability, she is generally available to work.

The opportunities in the local geographical area, there isn't any testimony on that, but the court does take judicial notice of the fact that it's currently challenging to get work in mid-Michigan.

The prevailing wage in the local area, there was no testimony on that.

Diligence exercised in seeking employment, she has not sought it.

Evidence that she's able to earn, again, her testimony is that she's not trained for the current market, but given her age and her previous employment history, it does seem likely she would be able to earn.

Her personal history, she has been financially supported by the defendant – excuse me, by the plaintiff for the past 14 years. They had a traditional marriage where she worked as a homemaker and was the primary parent.

The presence of the parties' children in her home that would impact her earnings, her child, their child, is 11 years old. He has migraine headaches, requires some additional parental support. But the court doesn't believe that would significantly hinder her earning abilities.

Whether there's been a significant reduction in income compared to the period that preceded the filing of the complaint, that doesn't apply.

The court must also consider additional costs associated with her employment like child care. The child in question will be turning 12 in October and no longer will be in need of child care. Therefore, the court imputes an amount of \$15,000 a year to the defendant plus the \$14,350 for a total of \$29,350.

That calculates out to alimony in the amount of \$39,108 a year or \$3,259 a month and child support of \$1,546 a month, payable – both payable to defendant. The spousal support will not be modifiable for a period of seven years. It's terminated upon death or remarriage of the defendant or until further order of this court.

The judgment of divorce provided as follows:

NON-MODIFIABLE ALIMONY IN GROSS (SPOUSAL SUPPORT)

***IT IS FURTHER ORDERED AND ADJUDGED*** that Plaintiff, David D. Wartinger, whose taxpayer identification number is XXX-XX-1708, shall make alimony (spousal support) payments to Defendant, Lisa M. Wartinger, whose taxpayer identification number is XXX-XX-3877, as follows:

Plaintiff, David D. Wartinger, shall pay alimony (spousal support) in the amount of Three Thousand Two Hundred Fifty Nine Dollars

(\$3,259.00) per month commencing on February 22, 2012, to continue for a period of 84 months, the last payment being on January 22, 2019.

***IT IS FURTHER ORDERED AND ADJUDGED*** that the above payments shall constitute non-modifiable alimony (spousal support) in the amount of Two Hundred Seventy Three Thousand Seven Hundred Fifty Six Dollars (\$273,756.00). Said payments shall be for a limited term, namely 84 months, with the last payment being made January 22, 2019.

***IT IS FURTHER ORDERED AND ADJUDGED*** that the alimony (spousal support) shall continue as set forth above, but shall terminate upon the death or remarriage of the payee spouse. This Court shall reserve no jurisdiction with respect to alimony other than enforcement of the terms of this paragraph entitled Non-Modifiable Alimony in Gross (spousal support).

#### ANALYSIS

##### I

Plaintiff argues that the trial court clearly erred when it found plaintiff to be at fault for the breakdown of the marriage. He contends that plaintiff presented no evidence regarding plaintiff's infidelity, aside from defendant's testimony regarding receipts for several items not given to her, yet defendant admitted her own infidelity.

We review the trial court's findings of fact relating to an award of spousal support for clear error, *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000), and reviews the ultimate award for an abuse of discretion. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). When reviewing the trial court's findings of fact, this Court affords deference to the special opportunity of the trial court to judge the credibility of the witnesses. *Woodington v Shokoohi*, 288 Mich App 352, 357-358; 792 NW2d 63 (2010). If a trial court's findings of fact are not clearly erroneous, this Court must determine whether the trial court's ruling was fair and equitable in light of the facts." *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231 (2003). This Court will affirm a trial court's award of spousal support unless it is firmly convinced that the award was inequitable. *Id.*

An award of spousal support should be based on what is just and reasonable, with the goal of balancing the parties' incomes and needs so neither will be impoverished. *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). One of the factors a court should consider in determining if spousal support is appropriate is a party's fault in causing the divorce. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

Defendant testified that in 2005 she found receipts for lingerie and flowers that had not been given to her. She testified that plaintiff did not deny having an affair when she confronted him about it. She also testified that she engaged in marital counseling in an attempt to repair the marriage, and that parties had not had a sexual relationship since she discovered the receipts. She admitted that she had an extramarital affair in the summer of 2010.



The trial court faulted plaintiff for the breakdown of the marriage because of his infidelity.<sup>6</sup> The court noted that defendant had also been unfaithful, but found plaintiff's denial of infidelity not to be credible. The court found that both parties had engaged in extramarital affairs and that plaintiff's affair in 2005 appeared to be the cause of the marital breakdown and that defendant's later affair was "reactive." The court found that defendant engaged in marital counseling in an attempt to salvage the marriage, and that her testimony in that regard was credible. The trial court's challenged finding has support in the record and was based on credibility determinations with which this Court declines to interfere. We are not left with a definite and firm conviction that a mistake was made.

## II

Plaintiff contends that the trial court clearly erred in its determination of plaintiff's income for purposes of calculating spousal support. The determination of income is a finding of fact that is reviewed by the Court for clear error. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

It is not disputed that plaintiff's base rate of pay as a professor and urologist at MSU was \$117,000 based upon a 12 month academic teaching year for the 2007, 2008, and 2009 academic school years. It is also not disputed that plaintiff's base rate of pay was \$97,487 based upon a 9 month academic year beginning with the 2010 academic school year. Plaintiff also received additional annual income in the form of HRSC pay (income received from the performance of surgical and clinical work). The amount of HRSC pay depended upon the number of patients treated and surgeries performed.

In determining plaintiff's income, the trial court utilized a base salary of \$97,487 based upon plaintiff's current employment contract. Plaintiff does not dispute this figure. The trial court added in an additional \$14,350, representing plaintiff's 50% share of monies earned from Great Lakes Lithotripsy, LCC. Defendant was credited with the other 50% share as a component of her income. Plaintiff does not dispute this income. The trial court also added in the additional sum of \$44,407, representing a three-year average (2008, 2009, and 2010) of HRSC pay. Plaintiff disputes this income. The court also added in the additional sum of \$16,739, representing a three-year average (2008, 2009, 2010) of speaking fees that plaintiff had earned. Plaintiff disputes this income.

Thus, in determining a net income figure to be utilized for purposes of calculating child and spousal support, the trial court took plaintiff's base salary plus the lithotripsy fees, and added in a three year average of the HRSC pay and speaking engagement fees, plus an interest amount, to arrive at a net income of \$211,983 per year. Plaintiff contends that his income should be based solely on his base salary plus the lithotripsy fees because the other components of his income are no longer available to him. He contends that the evidence at trial established that he

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<sup>6</sup> The trial court did not appear to place much emphasis on the factor of fault in awarding spousal support.

can no longer treat patients or perform surgery and therefore can no longer earn HRSC pay. He also contends that his testimony showed that he no longer has speaking engagement opportunities available to him. Thus, he contends that the trial court erred by utilizing a three-year average income approach under Michigan Child Support Formula Manual (MCSF) in determining his net income for support purposes.

“A trial court must strictly comply with the requirements of the MCSF in calculating the parents’ support obligations unless it ‘determines from the facts of the case that application of the child support formula would be unjust or inappropriate. . . .’” *Borowsky v Borowsky*, 273 Mich App 666, 673; 733 NW2d 71 (2007), quoting MCL 552.605(2). “Where income varies considerably year-to-year due to the nature of the parent’s work, use three years’ information to determine that parent’s income.” MCSF 2.02(B). A review of plaintiff’s income reveals that his income varied from year to year. Thus, income averaging is consistent with the MCSF. Plaintiff contends, however, that income averaging was not appropriate because plaintiff no longer has the ability to earn HRSC pay or speaking engagement fees. In support of his argument regarding HRSC pay, plaintiff relies on the testimony of his friend and colleague, Dr. Michael Andary. Dr. Andary treated plaintiff after his injury and determined that plaintiff had a spinal cord injury as a result of his fall. According to Dr. Andary, the injury affected the nerves in plaintiff’s arms, causing pain and weakness. Plaintiff testified that he has weakness in his arms and hands and cannot operate a computer mouse. Following plaintiff’s surgery in 2007, Dr. Andary observed little improvement and noted that the injuries plaintiff suffered are permanent. Dr. Andary opined that plaintiff could no longer perform complex surgeries. Plaintiff contends that defendant failed to produce any evidence to dispute Dr. Andary’s testimony. He argues that the trial court erred by failing to reference Dr. Andary’s expert medical opinion when determining plaintiff’s earning abilities.

Defendant contends that Dr. Andary’s opinion regarding plaintiff’s earning abilities is called into question by plaintiff’s actual HRSC pay after his injury and after his surgery. Plaintiff testified that his HRSC pay after his accident was the result of “residual” pay that he received in the years after he performed the actual services due to the manner in which HRSC pay is distributed to employees. He asserted that he had not performed any surgeries after 2007.

With regard to speaking engagement fees, plaintiff also contends that the trial court erred in adding in a three year average for these fees because plaintiff testified that there had been a reduction in the availability of this type of work and that he had not given a lecture since 2011. He maintained that there was “a change in the pharmaceutical market” that resulted in a diminished demand for lecturers. Plaintiff presented no evidence to support this contention. Defendant, on the other hand, testified that she and plaintiff had discussed the need for plaintiff to voluntarily reduce his income as of 2010 due to the pending lawsuit against Sparrow Hospital.

The trial court once again found a lack of credibility in plaintiff’s testimony regarding his reduction in income. The court stated:

Plaintiff claims that he will never be able to earn the same amounts again as those years with higher salaries, but there is a general lack of credibility in his testimony. And the court is not convinced he can’t continue to earn a substantial income. Plaintiff was argumentative and evasive, and his testimony left the court

with the impression that he has something to hide regarding his income and his earning abilities.

Giving substantial deference to the trial court's credibility determination, and considering the evidence of plaintiff's actual income following the accident, the trial court's finding that plaintiff had the ability to earn HRSC pay and speaking engagement fees consistent with his earnings in 2007 through 2009 is not clearly erroneous.

Plaintiff also argues that the trial court erred by including interest on the loan given to Denali Organics, LLC. He asserts that he loaned the money, which was awarded to him as part of the parties' consent property agreement, to the company with no interest. At trial, defendant challenged plaintiff's allegation that he used part of the settlement against Sparrow Hospital to loan \$1 million dollars to Denali Organics, LLC, in the form of an interest-free loan. This Court gives special deference to the trial court's finding that plaintiff's testimony regarding the loan was not credible. The trial court found that the money was transferred to Denali in an attempt to insulate the money from the court's consideration as income to plaintiff. The court found that "it just simply isn't believable that he gets no interest for that transaction. That's not a credible bit of testimony. It does appear to the court to have been a sham transaction."<sup>7</sup> The trial court's finding has support in the record and was based on credibility determination with which this Court declines to interfere.

### III

Plaintiff argues that the trial court's dispositional ruling regarding spousal support is inequitable because the trial court abused its discretion in attributing fault for the divorce to plaintiff and in failing to consider plaintiff's health status. When deciding whether to award spousal support, courts generally consider, among other factors, the parties' health and fault for the divorce. *Berger v Berger*, 277 Mich App at 726.

The issue of fault has been discussed in Issue I. While the trial court considered fault, it was not a significant factor. With regard to plaintiff's health, plaintiff asserts that the trial court erred by finding that plaintiff is "otherwise in good health (other than the injury from his accident) and able to earn." Plaintiff contends that the trial court failed to recognize that plaintiff's injury prevents him from earning the amount of income he had earned in the past. This argument has been addressed in Issue II. The trial court noted that plaintiff continued to earn substantial income after his injury and after his surgery and found that plaintiff continued to have the ability to earn a substantial income. Although plaintiff has not challenged the court's factual findings regarding the remaining twelve factors, see *Berger*, 277 Mich App at 726, the trial court made detailed findings of fact on each factor. The trial court relied on the length of

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<sup>7</sup>In the alternative, plaintiff contends that it was inequitable for the court to not also charge defendant with interest income on her income producing assets. Plaintiff did not raise this issue in the trial court.

the parties' marriage, defendant's contributions to the marriage as a stay at home mother, and her diminished earning potential result from her lack of education and her need to continue her education in order to be certified to work in the type of employment she had been employed in before the marriage, to determine that spousal support was appropriate. The record clearly supports the trial court's findings, and the trial court did not abuse its discretion in awarding spousal support in light of its findings.

#### IV

Plaintiff argues that the trial court abused its discretion by awarding non-modifiable spousal support for seven years. We agree.

The present case involves adjudication by the trial court of the issue of spousal support as opposed to a negotiated settlement between the parties. After addressing the spousal support factors, the trial court awarded defendant "Non-Modifiable Alimony in Gross (Spousal Support)." The judgment of divorce provided that defendant would receive "\$3,259.00 per month commencing on February 22, 2012, to continue for a period of 84 months, the last payment being on January 22, 2019," for a total non-modifiable spousal support award of "\$273,756.00." The judgment further provided that the spousal support "shall terminate upon the death or remarriage of the payee spouse" and that the court "shall reserve no jurisdiction with respect to alimony other than enforcement of the terms of this paragraph entitled Non-Modifiable Alimony in Gross (spousal support)." Similarly, the transcript of the trial reveals that the trial court clarified "non-modifiable for seven years."

Relevant to this case is MCL 552.28, which provides:

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 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.

Also relevant is the trial court's specific reference to alimony in gross. The general rule is that alimony in gross is not modifiable absent a showing of fraud. *Macoit v Macoit*, 165 Mich App 390; 418 NW2d 476 (1988).

Plaintiff relies on *Staple v Staple*, 241 Mich App 562, 569; 616 NW2d 219 (2000), in which this Court stated in dicta that MCL 552.28 "will always apply to any alimony arrangement

adjudicated by the trial court when the parties are unable to reach their own agreement.”<sup>8</sup> Plaintiff also relies on *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231 (2003). In *Gates*, the trial court awarded the defendant \$200 a week in rehabilitative spousal support for a five-year period. On appeal, the defendant argued that the trial court’s award of rehabilitative spousal support to her was non-modifiable and therefore an abuse of discretion under *Staple*. This Court held:

[I]t is clear, both from the trial court’s opinion dated June 2, 2000, and the judgment of divorce, that the trial court intended to limit the duration of its award of rehabilitative spousal support to five years. However, we disagree with defendant’s assertion that this limitation of the award of spousal support renders the award non-modifiable. In *Staple, supra*, at 569, this Court made it clear that “MCL 552.28 . . . will always apply to any alimony arrangement adjudicated by the trial court when the parties are unable to reach their own agreement.”

Thus, under both *Staple, supra*, and MCL 552.28, because the spousal-support provision of the divorce judgment resulted from the trial court’s disposition rather than agreement of the parties, the judgment may not be interpreted to preclude defendant from seeking to continue spousal support, or, in other words, to modify the spousal support award, at the end of the five-year rehabilitative period established by the trial court. Additionally, the precise language of the divorce judgment does not specify that spousal support will forever cease at the end of five years, but instead only states that the rehabilitative *amount* established by the trial court, based on the evidence at trial, will end after five years.

\* \* \*

Accordingly, we reaffirm the principle that either party may seek a modification of an award of spousal support at any time, and that the party seeking the modification, whether upward or downward, bears the burden of proving the justification for the modified award. [*Gates*, 256 Mich App at 433-435.]

Although *Gates* involved adjudicated spousal support, *Gates* relied on the dicta in *Staple* as well as on the language in MCL 552.28. The judgment in *Gates* did not specify a date on which the spousal support would forever cease, nor did it include the words “modifiable.” However, in *Rickner v Frederick*, 459 Mich 371, 379; 590 NW2d 288 (1999), the Court, construing MCL 522.28, emphasized that “the statutory power to modify [spousal support] is not dependent on triggering language in the judgment.”

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<sup>8</sup> The statement is dicta because the *Staple* court recognized that its decision in that case “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.”

*Gates* arguably provides support for plaintiff's argument that the spousal support award in this case is modifiable under MCL 552.28. Further, defendant conceded at oral arguments in this matter that the trial court abused its discretion by ordering non-modifiable spousal support and agreed that support is modifiable under MCL 552.28 because the trial court adjudicated the issue of spousal support. She contends, however, that either party may seek modification of the award of spousal support at any time, even beyond the seven year period announced by the trial court. Plaintiff, however, argues that the trial court intended to limit spousal support to a seven-year period regardless of whether the award is modifiable or non-modifiable.

The distinction from *Gates*, and the problem in this case, however, lies in the fact that the trial court in the present case used the words "non-modifiable" in the judgment of divorce and also specified that spousal support would cease on a date certain. The judgment also referred to the spousal support as "alimony in gross" and calculated a total sum for the amount of spousal support to be paid over the course of seven years. The trial court also did not reserve jurisdiction to consider a motion to modify the spousal support award. Rather, the court only reserved jurisdiction to enforce the terms of the paragraph entitled "Non-Modifiable Alimony in Gross (Spousal Support)."

In *Staple*, this Court has explained that the term "alimony in gross" is misleading inasmuch as it is "not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property." *Staple*, 241 Mich App at 566. Hence, that is why alimony in gross is considered final and exempt from modification under MCL 552.28 even though the recipient spouse dies or remarries before all the payments are made. In the present case, however, the trial court expressly denominated the award as "alimony in gross" but added contingency provisions (the remarriage or death of the payee) that are inconsistent with a division of property in the marital estate. Further, the parties consented to the property division and there is no clear indication that the trial court intended the spousal support to be a form of property division. Consequently, the spousal support award is ambiguous and the intent of the trial court -- whether the court intended to award spousal support or alimony in gross -- is not clearly ascertainable.

In sum, the parties in this case agree that the trial court abused its discretion by awarding non-modifiable spousal support. See *Staple*, 241 Mich App 562, and *Gates*, 256 Mich App 420. Defendant suggests that this Court should simply strike the word "non-modifiable" from the judgment. However, simply striking "non-modifiable" from the judgment would not necessarily reflect the intent of the trial court with regard to its award of spousal support. Although the trial court's judgment appears clear that the trial court intended to limit the duration of its award of spousal support to seven years, it is unclear whether the trial court would have limited *modifiable* spousal support to a period of seven years. It is also unclear whether the trial court intended to award alimony in gross. Consequently, we vacate the spousal support provisions of the judgment of divorce and remand to the trial court for reconsideration of spousal support in light

of this Court's conclusion that MCL 552.28 precludes the court from awarding non-modifiable spousal support absent a consent agreement between the parties.<sup>9</sup>

## CROSS-APPEAL<sup>10</sup>

### I

MCSF 2.02(B) directs that the most immediate three years of income be averaged when a parent's income fluctuates due to the nature of the job. Defendant argues that the trial court erred by using plaintiff's 2010 income in calculating a three-year average of plaintiff's income because plaintiff voluntarily reduced his income in 2010 for the benefit of his lawsuit against Sparrow Hospital. She contends that plaintiff voluntarily reduced his income in that year, resulting in an unexercised ability to earn, and therefore the trial court should have calculated plaintiff's average income using plaintiff's 2007, 2008, and 2009 income. Defendant cites no authority in support of her argument that it would be appropriate to use anything other than the most immediate three years of income under MCSF 2.02(B). The trial court did not abuse its discretion by averaging plaintiff's income for the most immediate three years.

### II

Defendant argues that the trial court erred by imputing income to defendant without also accounting for the additional cost of child care associated with earning that potential income. See MCSF 2.01(G)(3). The trial court imputed income of \$29,250 per year to defendant. Defendant contends that the minor child's migraine headaches would necessitate child care costs of \$250 to \$300 per week.

According to the MCSF, it is presumed that the need for child care continues only "until August 31<sup>st</sup> following the child's twelfth birthday. At the court's discretion, the child care support obligation may continue beyond that date as a child's health or safety needs require." MCSF 3.06(D).

In this case, the child turned age 12 five months after entry of the judgment of divorce. Although defendant testified that the child suffers from migraine headaches, she offered no evidence regarding the severity of the headaches or of the frequency of his need to miss school because of them. Rather, she simply testified that the school contacts her when he gets a headache and that she occasionally picks him up from school because of the headaches. The trial court rejected defendant's request for child care costs beyond the child's 12<sup>th</sup> birthday. The court noted that "The child in question will be turning 12 in October and no longer will be in need of child care." On this record, the trial court did not abuse its discretion in finding that child care was not necessary beyond the child's 12<sup>th</sup> birthday.

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<sup>9</sup> If the parties on remand were clearly to consent to non-modifiable spousal support, this would be permissible. *Staple*, 241 Mich App at 568.

<sup>10</sup> Defendant withdrew two of her issues on cross-appeal and only the three remaining issues will be addressed in this opinion.

### III

Defendant argues that the spousal support award is inequitable and that the amount of spousal support awarded is too low. Defendant presents her previous argument regarding income averaging to support her argument that the spousal support award is too low. However, this argument has already been addressed and, therefore, we will not reconsider it here.

Defendant also asserts that the trial court should have awarded spousal support for a longer duration than seven years. In light of our conclusion to vacate the spousal support provisions in the judgment of divorce and remand for reconsideration of spousal support, defendant is free to raise this argument on remand.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ William C. Whitbeck  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell