The State of the Law Regarding Modification of Spousal Support

By Mark A. Snover

During the past few years, there have been significant developments in the family law arena that have impacted spousal support awards as they relate to the issue of modification. A Michigan appellate court opinion during this period set forth clear language that attorneys should include in judgments of divorce to ensure the parties that their agreement is nonmodifiable. That same case decreed that all court-ordered awards can be modified. Is that opinion now eroding based on a recent unpublished opinion? Below is an analysis of the current state of the law.

What we do know is that when spousal support is barred by stipulation of the parties or court order in a judgment of divorce, no spousal support can be granted thereafter.[1] Also noteworthy is MCL 552.13(2), which provides for modification or termination of spousal support when a recipient remarries, unless a contrary agreement is specifically stated in the divorce judgment. The court in *Ackerman v Ackerman* stated that marriage in and of itself is not sufficient to terminate spousal support.[2]

It is also important to be mindful of 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 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.

Fast Facts:

If the parties consent to a settlement in which spousal support is awarded, the parties may consent to making the spousal support nonmodifiable. The judgment must be clear, unambiguous, and specifically state pursuant to *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000):

> The parties forego their statutory right to petition the court for modification and agree that the alimony provision is final, binding, and non-modifiable. *Staple, supra*, 616 NW2d at 229.

In the landmark case of *Staple v Staple,* a special conflicts panel of the Michigan Court of Appeals was convened to resolve a dispute between two panels of the court.[3] In that case, the court noted that MCL 552.28 "unambiguously gives either party to an alimony judgment the right to petition the court to modify an alimony provision and thus provides an important statutory exception to the standard final judgment rule."[4] In its analysis, the *Staple* court notes that the statute does not preclude the parties from waiving their rights to petition the court for modification. The court cited other statutes that specifically mandated that persons protected by these statutes cannot waive the rights they enjoy under those acts.

The *Staple* court also considered that the court in *Bonfiglio v Pring* held:

> [W]hen called upon to distinguish between modifiable and nonmodifiable alimony, courts should focus on the intentions of the parties in negotiating a settlement agreement, or of the trial court in fashioning an alimony award, and give effect to that intent.[5]

The *Staple* court also cited *Copeland v Copeland,* which held:

> [If] the judgment of divorce provided that no alimony shall be paid, the decree cannot be modified to require one party to contribute toward the maintenance of the other.[6]

In other words, if the parties agree in this settlement that neither party will pay alimony to the other, and a judgment is entered pursuant to the terms of that settlement, then neither party has the right to petition the court under MCL 552.28; MSA 25.106 to modify that agreement by adding an alimony provision where none existed before. If divorce litigants are permanently bound to an agreement to waive alimony altogether, then they should also be bound to an agreement to waive future modifications of the agreed-upon alimony arrangement.

The *Staple* court concluded by holding that the statutory right to seek modification of alimony may be waived by the parties when they specifically forgo their statutory right to petition the court for modification and agree that the alimony provision is final, binding, and nonmodifiable.

Another significant holding in the *Staple* case is that:

> [W]e emphasize that our decision applies only to judgments entered pursuant to the parties' own negotiated settlement agreements, not to alimony provisions of a judgment entered after an adjudication on the merits. MCL 552.28; MSA 25.106 will always apply to any alimony arrangement adjudicated by the trial court when the parties are unable to reach their own agreement.[7]

The *Staple* court seemed to bring certainty to modification issues that previously plagued counsel. Those of us who practice family law understood that all court-ordered spousal support awards were modifiable; and if the parties wanted certainty and finality, both could only be attained by an agreed-upon spousal support award.

Then along came the unpublished case of *Yunus v Yunus.*[8] In *Yunus,* the trial court awarded the plaintiff spousal support of $25,000 a month, and ordered that the first five years were to be *nonmodifiable,* except in the event of plaintiff's death. The defendant appealed by right from the judgment of divorce, arguing that spousal support is always subject to modification for changed circumstances. The appellate court then looked to the rationale of the court in *Bonfiglio,* which held:

> [W]hen called upon to distinguish between modifiable and nonmodifiable alimony, courts should focus on the intentions of the parties in negotiating a settlement agreement, or of the trial court in fashioning an alimony award, and give effect to that intent.[9]

What we do know is that when spousal support is barred by stipulation of the parties or court order in a judgment of divorce, no spousal support can be granted thereafter.

The court, in *Yunus,* went on to hold:

> It is apparent that *the trial court intended to make the spousal support award nonmodifiable for the first five years in order to compensate plaintiff for assisting defendant in reaching his professional stature.* Therefore, as a matter of law, the award of spousal support for the first five years properly could be made nonmodifiable, except in the event of plaintiff's death. (Emphasis added.)[10]

The *Yunus* decision, though not published, must give counsel pause. Its holding regarding the court's authority to enter a nonmodifiable spousal support award is contrary to the *Staple* ruling.

The *Yunus* trial court also set limitations on when the payer could seek modification of support after five years. The Court of Appeals ruled that the limitations by the trial court on the ability to request a modification based on a change in circumstance was improper. The court held:

> When the trial court entered the divorce judgment, there was no actual issue, nor could there be, regarding modification, and it was improper for the court to attempt to define what might constitute changed circumstances warranting modification in the future. Moreover, the trial court's limitations imposed focused only on defendant's circumstances and would preclude defendant from seeking modification based on a change of circumstances affecting plaintiff's income.[11]

Any decision to modify support should be based on circumstances as they exist at the time modification is sought. "The modification of an award of spousal support must be based on new facts or changed circumstances arising after the judgment of divorce."[12]

If divorce litigants are permanently bound to an agreement to waive alimony altogether, then they should also be bound to an agreement to waive future modifications of the agreed-upon alimony arrangement.

The most recent development related to the modification of spousal support is the holding in *Thornton v Thornton.*[13] Plaintiff was awarded permanent alimony of $125 per week, until further order of the court. The court, without the benefit of an evidentiary hearing, modified the award by reducing the monthly payments. Plaintiff, on appeal, argued there was not a sufficient change in circumstances to warrant modification of defendant's spousal support obligation, or in the alternative, she argued that, "at the very least, the trial court could not properly make such a determination without holding an evidentiary hearing."[14] The appellate court agreed with plaintiff's position and held that the trial court erred when it concluded that the spousal support should be modified without having held an evidentiary hearing.

The court also held that the changed circumstances (on which a modification is sought) must appear in the record. Clearly, if the parties appear on a motion for modification with stipulated facts, an evidentiary hearing is unnecessary. *Thornton* seems to indicate, when that is not the case, an evidentiary hearing should be held.

Conclusion

Counsel must carefully review spousal support agreement language. Courts are going to look to that language to ascertain the intention of the parties. Counsel should also be mindful that the law, pertinent to modification of spousal support agreements/awards, appears to continue to evolve. There is a need for additional appellate rulings to clarify ambiguities that exist. ■

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FOOTNOTES

1. *Ferrera v Ferrera,* 16 Mich App 661; 168 NW2d 475 (1969); MCR 3.211(B)(4).
2. *Ackerman v Ackerman,* 163 Mich App 796; 414 NW2d 919 (1987).
3. *Staple v Staple,* 241 Mich App 562; 616 NW2d 219 (2000).
4. *Id.* at 226.
5. *Bonfiglio v Pring,* 202 Mich App 61, 64; 507 NW2d 759 (1993).
6. *Copeland v Copeland,* 109 Mich App 683, 686; 311 NW2d 452 (1981).
7. *Staple, supra* at 569.
8. *Yunus v Yunus,* unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 270417).
9. *Bonfiglio, supra* at 64.
10. *Yunus, supra.*
11. *Id.*
12. *Gates v Gates,* 256 Mich App 420, 434; 664 NW2d 231 (2003).
13. *Thornton v Thornton,* 277 Mich App 453; 746 NW2d 627 (2007).
14. *Id.* at 458.