MCL 552.28: Modification of Alimony/Staple Waiver of Modification

Scott Bassett
Scott Bassett, Esq.

I. Modification of Alimony

A. MCL 552.28 Judgment for alimony or allowance or for appointment of trustees; revision or alteration.

> 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**.**

B. Preliminary Question - Is it "Alimony" or "Spousal Support"?

Many of Michigan's family law statutes are old. They often use inconsistent terms. For example, MCL 552.13 authorizes "alimony" during the pendency of a divorce action. It also provides that "alimony" may be terminated upon the recipient's remarriage (an odd provision to be included in what is seemingly a "temporary alimony" statute).

MCL 552.23, the statute authorizing support payments to a former spouse as part of a final divorce judgment, nowhere uses the term alimony. The operative term is "spousal support." The opposite is true of MCL 552.28 authorizing modification of "alimony or other allowance" for changed circumstances.

As a practical matter under Michigan law, the two terms are interchangeable. "Alimony" is an older term. "Spousal support" is more modern. What aren't modern are our divorce-related statutes. MCL 552.28 originated in 1846 and has been amended only infrequently (1857, 1871, 1897, 1915, 1929, 1948, 1970, and 1992). In recognition of our antiquated statutes, I will use the older term "alimony" in these materials.

C. Procedure for Modification of Alimony

MCL 552.28 authorizes modification of alimony. It provides that after entry of a judgment, "the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance . . . and may make any judgment respecting any of the matters that the court might have made in the original action."

NOTE: Alimony-in-gross (AIG) is actually property division. It should not be thought of as "alimony" for the support of the recipient. AIG is better understood as installment payments to effect a division of the marital estate. Absent the consent of both parties, AIG is not subject to modification. *Hall v Hall*, 157 Mich App 239, 403 NW2d 530 (1987).

1. Changed Circumstances Required. Alimony, like child support, is modifiable for changed circumstances. *Hall v Hall*, 157 Mich App 239, 403 NW2d 530 (1987); *Crouse v Crouse*, 140 Mich App 234, 363 NW2d 461 (1985). It is even possible to simultaneously appeal and seek to amend alimony. Generally, a pending appeal generally deprives the trial court of jurisdiction to amend the order or judgment being appealed. However, a motion to modify alimony based on changed circumstances may be filed during a pending appeal of the alimony order. *Lemmen v Lemmen*, 481 Mich 164, 749 NW2d 255 (2008).

2. Exception to Changed Circumstances Threshold for Reserved Alimony. There is an exception to the need to show changed circumstances. If alimony was reserved in the divorce judgment, a party seeking alimony need only petition the court. There is no threshold showing of changed circumstances required when alimony is reserved. *McCarthy v McCarthy*, 192 Mich App 279, 480 NW2d 617 (1991).

3. Burden on Moving Party. A party seeking modification of alimony must allege and prove new facts or changed circumstances arising since the judgment or prior order which justify the requested change. *Schaeffer v Schaeffer*, 106 Mich App 452, 460; 308 NW2d 226 (1981); *Graybiel v Graybiel*, 99 Mich App 30; 297 NW2d 614 (1980). The party moving for modification has the burden of showing sufficiently changed circumstances to warrant modification. *Graybiel v Graybiel*, *supra*, at 99 Mich App 33-34.

4. No Retroactive Modification. Once a change of circumstances occurs, it is important to promptly move for modification. In the late 1980's, the federal government mandated that states enact laws to prevent retroactive modification of child support. The concern, particularly in interstate cases, is that states where the payer of support resided were often retroactively modifying child support to erase large arrearages. In Michigan, our definition of "support" includes both child and spousal support (alimony). MCL 552.602(ee)(i). As a result, the statute barring retroactive modification of support, MCL 552.603(2), also bars retroactive modification of alimony (with an exception for pre-judgment interim and temporary orders).

5. Exception to Prohibition Against Retroactive Modification. The prohibition of retroactive modifications of support does not apply in situations in which a party knowingly and intentionally fails to report, refuses to report, or knowingly misrepresents his or her income. MCL 552.603b. This can be important in alimony modification cases. Many divorce judgments contain provisions for exchange of income information and tax

returns while alimony (or child support) remains payable. A party who fails to comply with this information exchange may set himself/herself up for retroactive modification of alimony due to a violation of the both the terms of the judgment and MCL 552.603b.

6. Reviving Expired or Terminated Alimony. Once alimony has been ordered by the court (or included in a divorce judgment by consent), the court retains authority to reinstate it even after it has been terminated by the court. *Rickner v Frederick*, 459 Mich 371, 590 NW2d 288 (1999).

a. Once ordered, can alimony be terminated and "forever barred"? A key question not answered by *Rickner v Frederick* is whether a judgment provision terminating alimony on a particular occurrence (e.g., expiration of a specified term of years, remarriage, cohabitation, or change in income) requires, allows, or prohibits a resumption of alimony when circumstances revert (e.g., a subsequent divorce, an end to the cohabitation, or a return to prior income level). In cases settled by the parties, it is crucial to carefully draft the alimony clause to reflect the parties' intent. In cases where alimony is ordered by the court after trial, it will be important to press the court to specify its intent concerning post-termination resumption of alimony so the judgment may be properly drafted.

b. Post-termination revival of alimony. It is a widely held, but mistaken, belief that a motion to modify or extend alimony must be made before alimony expires or is terminated. Recently in *Loutts v Loutts*, ___ Mich App ___, ___ NW2d ___ (COA No. 318468, decided 2/20/15), the Court of Appeal rejected this view. It held that the trial court erroneously refused to entertain a motion to extend alimony after it was terminated. However, the motion was denied for failure to meet the threshold showing of changed circumstances, raising doubts as to the binding nature of the holding authorizing post-expiration motions to extend alimony.

c. Alimony for a term of years. A related question is whether, in a case decided by the court rather than settled by the parties, the term of alimony may be limited to a specific number of years. We have no published decisions on point. However, there is an unpublished case, *Hatch v Hatch*, COA No. 218972 (1/26/01), where the Court of Appeals rejected the wife's argument that the trial court erred when it ordered alimony for a term of six years. She argued that all alimony under Michigan law must be indefinite in term (until death, remarriage, or further order of the court). The panel (Bandstra, C.J., and Hood and Cavanagh, JJ.) rejected her argument and affirmed the trial court, writing: "Review of the record reveals that the trial court awarded defendant $4,800 payable monthly for a period of six years. However, the trial court reserved the right to continue alimony payments under appropriate terms and conditions. We cannot conclude that the trial court abused its discretion in determining the alimony award."

D. Factors for Alimony Modification. The factors considered when modifying alimony include, but are not necessarily limited to, the factors that apply to an initial alimony award.

1. Initial Alimony Factors. The alimony factors (from *Olson v Olson*, 256 Mich App 619, 631, 671 NW2d 64 (2003)) are:

(1) the past relations and conduct of the parties,
(2) the length of the marriage,
(3) the abilities of the parties to work,
(4) the source and amount of property awarded to the parties,
(5) the parties' ages,
(6) the abilities of the parties to pay alimony,
(7) the present situation of the parties,
(8) the needs of the parties,
(9) the parties' health,
(10) the prior standard of living of the parties and whether either is responsible for the support of others,
(11) contributions of the parties to the joint estate,
(12) a party's fault in causing the divorce,
(13) the effect of cohabitation on a party's financial status, and
(14) general principles of equity.

Of these factors, a change in the recipient's need and/or the payer's ability to pay will be the most important. Ability to pay is relevant to a determination whether alimony should be increased or decreased, but it is not the sole criterion. *Boyer v Boyer*, 30 Mich App 623, 186 NW2d 842 (1971). For the payer to obtain a decrease in alimony, there must be diminished income rather than just a change in the form of income. *Eckhardt v Eckhardt*, 155 Mich App 314, 399 NW2d 68 (1986). A voluntary reduction in income does not always amount to a change in circumstances that warrants a reduction in alimony. *Couzens v Couzens*, 140 Mich App 423, 364 NW2d 340 (1985).

2. Additional Alimony Modification Factors.

a. Remarriage. Unless otherwise stated by agreement in the divorce judgment, the court may terminate alimony when the recipient remarries pursuant to MCL 552.13(2). That statutes states, "An award of alimony may be terminated by the court as of the date the party receiving alimony remarries unless a contrary agreement is specifically stated in the judgment of divorce. Termination of an award under this subsection shall not affect alimony payments which have accrued prior to that termination." However, remarriage alone is not sufficient to terminate spousal support. *Ackerman v Ackerman*, 163 Mich App 796, 414 NW2d 919 (1987).

b. Cohabitation. Unless expressly required by the divorce judgment, cohabitation alone is not sufficient cause for modification or termination of alimony. *Crouse v Crouse*, 140 Mich App 234, 363 NW2d 461 (1985). The payer in *Crouse* sought termination of alimony because the recipient's seven-year live-in relationship constituted a de facto marriage. The Court of Appeals rejected this argument, stating that it was not the Legislature's intent to include such relationships within the meaning of the statute terminating spousal support upon remarriage.

There is also a question as to what constitutes cohabitation. When drafting a judgment, be sure to define the term cohabitation. As held in *Smith v Smith*, 278 Mich App 198, 748 NW2d 258 (2008), the payer's motion to terminate alimony was denied because there was no authoritative Michigan cases defining the term cohabitation in the context of alimony termination. *Smith* held that unless the parties supply their own agreed-upon definition of cohabitation in the judgment, the analysis will be primarily economic and based on the totality of the circumstances. Factors to consider are:

> Whether cohabitation exists is a factual determination based on the totality of the circumstances. In making a finding on cohabitation, courts should consider many factors. The following are examples: First, courts may consider the living arrangements of the couple and the extent to which they shared a common residence. Did they both keep personal items such as clothing and toiletries at the residence? Did they both have keys to the residence? What mailing address did each party use? Did they share automobiles, or other personal property? Were household duties shared? How long did such arrangements exist? Second, courts may consider the couple's personal relationship and whether it appeared relatively permanent. Did they engage in sexual relations? Was their relationship monogamous? Was marriage contemplated? Did they spend vacations and holidays together? How did the couple represent their relationship to their family, friends, and acquaintances, and how did those people view the relationship? Third, courts may inquire into the couple's financial arrangements. Did they share expenses? Did they maintain joint accounts? Did they jointly own real or personal property? Did one party support the other? Whether cohabitation exists is a question for the finder of fact. Because no one factor defining a couple's relationship is dispositive on the question of cohabitation, the fact-finder should consider the totality of the circumstances in each particular case.

Smith, 278 Mich App at 203–204.

c. Retirement/Double-Dip Issues. Retirement is usually accompanied by a reduction in income. In many cases, the reduction may be substantial enough to constitute changed circumstances to modify or terminate alimony. *Walker v Walker*, 155 Mich App 405, 399 NW2d 541 (1986).

However, in other cases, it is primarily the income source, not amount, that changes. Income now comes from retirement assets, not active employment. If under all of the circumstances of the case, the payer retains the ability to continue paying alimony because only the source, not the amount of income has changed significantly, retirement may not justify modifying or terminating the alimony obligation. *McCallister v McCallister*, 205 Mich App 84, 517 NW2d 268 (1994); *Stoltman v Stoltman*, 170 Mich App 653, 429 NW2d 220 (1988); *Lang v Lang*, 169 Mich App 429, 425 NW2d 800 (1988).

The difference between the result in cases like *Walker* and cases like *McCallister* is the dreaded "double-dip" problem. In *Walker*, the payer's income from retirement assets awarded as property in the divorce judgment was excluded from the payer's income used in determining his continued ability to pay alimony. The panel declared that it was inappropriate to re-categorize a pension awarded as an asset at the time of divorce (where the other party presumably received a share of the pension or offsetting property) to income for the purpose of post-judgment alimony modification proceedings.

The result in *Walker* was based on agreed-upon (hence contractual) language in the divorce judgment which awarded the alimony payer/defendant his "pension and retirement benefits to which he may be entitled due to his employment … free and clear from any and all claims on the part of the Plaintiff."

In *McCallister*, the panel held that MCL 552.28 (alimony modification) and MCL 552.23 (alimony awards) required consideration of *all* of the parties' financial circumstances including income from retirement plans awarded as assets in the divorce judgment.

d. Avoiding the double-dip. To avoid a double-dip, counsel for the alimony payer will want to include in any negotiated divorce judgment a clause expressly excluding from consideration in post-divorce alimony modification or termination proceedings the retirement income received from pensions treated and awarded as assets in the property division portion of the judgment. In cases where the payer is still working and accruing benefits at the time of divorce, it may be appropriate to distinguish between retirement income accrued at the time of divorce and retirement income accrued as a result of continued post-divorce employment. Typically post-divorce accruals are not divided in the judgment. Therefore, it may

be reasonable to consider income from post-divorce pension accruals during post-judgment alimony modification proceedings.

E. Waiver of the Right to Seek Alimony Modification (*Staple*).

1. Pre-*Staple* Cases. As stated above, these materials are about alimony, not the ill-name alimony-in-gross (AIG), which is really payment of a fixed sum of property in installments over time. Alimony is for the support of the recipient. AIG is a division of the marital estate.

Still, several AIG cases form the precursor for the landmark Court of Appeals decision in *Staple v Staple*, 241 Mich App 562, 574; 616 NW2d 219 (2000). First, there was the ***bright-line*** rule that said subjecting any award of AIG to a contingency such as the death of the recipient (needed for favorable tax treatment under Section 71 of the Internal Revenue Code) transformed the AIG award to ordinary modifiable alimony. *Couzens v Couzens*, 140 Mich App 423, 364 NW2d 340 (1985). After much howling from practitioners, there were newer cases recognizing and enforcing the intent of the parties to create inherently non-modifiable AIG, but still get the tax benefits of alimony (deductible by payer, taxable to recipient). *Blake v Blake*, 178 Mich App 315, 443 NW2d 408 (1989). As stated in *Turner v Turner*, 180 Mich App 170, 446 NW2d 608 (1989), an award of AIG is not converted to modifiable alimony simply because it is subject to earlier termination on the recipient's death or remarriage. Goodbye ***bright-line*** rule.

2. *Staple* and agreements for non-modifiable alimony. The next ***bright-line*** rule to come under attack goes to the very heart of the statute discussed here, MCL 552.28. Under the statute, alimony ordered for the support of the recipient is inherently modifiable. But with contract law becoming more important in family law cases, what if the parties agreed (contracted) to waive their statutory right to seek alimony modification under MCL 552.28?

That is precisely the question that came up in *Staple v Staple*. The case was decided twice by the Court of Appeals. In the first round, 237 Mich App 805, the three-judge panel debated at length whether AIG was really alimony or property and eventually concluded that the alimony clause was non-modifiable. However, they stated that but for the prior binding holding in *Bonfiglio v Pring*, 202 Mich App 61; 507 NW2d 759 (1993), they would declare the alimony in Staple to be modifiable.

This decision triggered convening of a conflict resolution super-panel of seven Court of Appeals judges pursuant to MCR 7.215(H), now (J). That panel, at 241 Mich App 562, ruled that parties to a divorce judgment may voluntarily relinquish their statutory right to seek modification of a spousal-support agreement "and instead stipulate that their agreement regarding alimony is final, binding, and nonmodifiable." If divorcing parties negotiate a settlement in which they clearly and unambiguously forgo their statutory right

to petition for modification of spousal support, courts must enforce their agreement. *Id*. at 564, 581. The super-panel made it clear that no "magic words" are required to so long as the parties' intent to forgo their MCL 522.28 right to seek modification of alimony is clearly stated in their agreement.

3. The "Gotcha" problem with *Staple* waivers. There is an element of risk in agreeing to a Staple waiver of the right to seek modification of alimony. The payer is betting that he or she will not experience an income reduction making it more difficult or impossible to maintain the agreed-upon payments. The recipient is betting this his or her needs will not increase due to a disability, extreme cost-of-living increases, etc. When a party makes a bad bet, things can get very ugly very quickly.

The best example of this is *Rose v Rose*, 289 Mich App 45, 795 NW2d 611 (2010). At the time of divorce, the husband's business was valued at $6 million. Nonmodifiable alimony was used as a payout to the wife for her marital interest in the business. The husband turned the business over to his son, who subsequently ran the business into the ground. Despite the husband's rescue efforts, the business was reduced to scrap value. Still, based on *Staple*, the Court of Appeals enforced the nonmodifiable alimony provision as a binding contract between the parties. The husband was stuck with a worthless asset and insufficient income to pay the agreed-upon nonmodifiable alimony.

I wrote the AAML's amicus curiae brief in *Staple* and believe it was correctly decided. However, I also think there is a tendency to overuse the *Staple* waiver of modifiability in cases where it may not be appropriate. For example, I would not recommend it to a payer in a cyclical industry such as the auto industry. The desire for finality and to avoid future court battles over modification can outweigh common sense in determining whether a *Staple* clause makes sense in a given case.