

STATE OF MICHIGAN  
COURT OF APPEALS

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ELLA D. SIXBEY,

Plaintiff-Appellee,

v

JOSEPH K. SIXBEY,

Defendant-Appellant.

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UNPUBLISHED

March 6, 2001

No. 219676

Wayne Circuit Court

LC No. 98-802574-DO

Before: Hood, P.J., and Doctoroff and Collins, JJ.

PER CURIAM.

Defendant appeals as of right a division of property and award of alimony. The trial court ordered that defendant would be responsible for sixty-six percent of the marital credit card debt and would receive forty percent of the marital property. The court also awarded plaintiff \$225 of alimony per week for ten years. We affirm.

Defendant first argues that the non-modifiable nature of the alimony award created alimony in gross, which should be considered part of the marital property. According to defendant, the alimony award dramatically shifts the percentages of the property awarded in favor of plaintiff and destroys the equitable division. We review de novo a trial court's decision to award alimony, but we accept the court's factual findings unless they are clearly erroneous. *Thames v Thames*, 191 Mich 296, 308; 477 NW2d 496 (1991).

Alimony in gross is a sum certain and is payable either in one lump sum or by periodic payments of a definite amount over a specific period of time. *Turner v Turner*, 180 Mich App 170, 172; 446 NW2d 608 (1989). Alimony in gross is not truly alimony, but is in the nature of a division of property and is generally not modifiable. *Staple v Staple*, 241 Mich App 562, 566; - 616 NW2d 219 (2000). If alimony is not in gross, it is considered periodic alimony that is modifiable under MCL 552.28; MSA 25.106.<sup>1</sup> *Staple, supra* at 566. To determine whether an

<sup>1</sup> This Court in *Staple, supra*, modified the rule distinguishing between periodic alimony and alimony in gross by holding that parties may waive their statutory right to modification of an alimony award. *Id.* at 568. However, the *Staple* holding was specifically limited to cases where the parties have agreed to a settlement and does not apply to cases, such as the present, where the court enters a judgment following a trial. *Id.* at 569.

award of alimony is periodic or in gross, we look to the intention of the trial court in fashioning an alimony award and give effect to that intent. *Bonfiglio v Pring*, 202 Mich App 61, 65; 507 NW2d 759 (1993). In determining the court's intent, we may consider many factors, including whether the award is subject to a contingency, the specificity of the amount and number of payments in the award, the purpose of the alimony award, and whether the award is for a limited period of time. *Id.* at 64-65.

In this case, the court awarded plaintiff \$225 per week alimony for ten years or until plaintiff can receive social security benefits or her portion of defendant's railroad pension. The court also ordered that the alimony was not modifiable for five years, except in the event of the bankruptcy of either party. Although the language of this award is less than clear, the award is not compatible with the traditional definition of alimony in gross because it is not a sum certain. The award clearly leaves the option of modifying the amount or length of the award, or the number of payments, based on two possible contingencies, the bankruptcy of a party, or plaintiff's receipt of social security or pension benefits. Although it is not clear whether the trial court intended to award alimony in gross or periodic alimony, we conclude that this award was more in the nature of periodic alimony than alimony in gross. Because the award is not alimony in gross, we reject defendant's argument that the award constitutes an inequitable division of marital property.

Defendant also argues that the trial court erred in allocating a credit card debt solely to defendant. We review a trial court's findings of fact on division of marital assets or debt for clear error. *Dragoo v Dragoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997). The trial court is in the best position to determine whether a debt is joint marital debt or belongs to one individual. See *Lesko v Lesko*, 184 Mich App 395, 401; 457 NW2d 695 (1990), overruled on other grounds 194 Mich App 284 (1992). This Court gives special deference to a trial court's findings when they are based on witness credibility. *Dragoo, supra* at 429. In this case, the trial court found that plaintiff did not know of or use the credit card at issue. Because defendant failed to produce sufficient evidence to prove that plaintiff was aware of or had participated in creating the debt, we find no error in the court's conclusion that the debt belonged to defendant.

Finally, defendant argues that the sixty percent award of property to plaintiff, combined with the sixty-six percent division of debt to defendant, was inequitable. Equity, not equality, is the goal in property division. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). To reach an equitable division, the trial court should consider several factors, including (1) the duration of the marriage, (2) the contribution of the parties to the marital estate, (3) the age and health of the parties, (4) the life status of the parties, (5) the necessities and circumstances of the parties, (6) the earning abilities of the parties, (7) the past relations or conduct of the parties, and (8) general equitable principles. *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). The court in this case considered these factors and awarded a

higher percentage of the property to plaintiff after determining that the factors favored plaintiff. While the division was not equal, we agree with the trial court that it was equitable.

Affirmed.

/s/ Harold Hood

/s/ Martin M. Doctoroff

/s/ Jeffrey G. Collins