STATE OF MICHIGAN

COURT OF APPEALS

DUANE HAROLD BOWDITCH,

Plaintiff/Counter-Defendant-Appellee,

v

BARBARA JEAN BOWDITCH,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
October 23, 2007

No. 270647
Ottawa Circuit Court
LC No. 05-051948-DO

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce, entered by the trial court on April 5, 2006, specifically, portions of the property settlement, the spousal support award, and the amount of the award of plaintiff's pension. We affirm.

Defendant first argues that the trial court erred when it subtracted certain real property from the marital estate and awarded it to plaintiff as his separate property. We disagree. When reviewing a disposition of marital property, we first review the trial court's findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if, after a review of the entire record, we are left with the definite and firm conviction that a mistake has been made. *Beason v Beason,* 435 Mich 791, 805; 460 NW2d 207 (1990). If we uphold the findings of fact, we then determine if the final disposition of marital assets is "fair and equitable in light of those facts." *Sparks, supra* at 152. We will affirm the trial court's dispositional ruling unless we are "left with the firm conviction that the division was inequitable." *Id.*

To divide the marital estate, the trial court must first determine which property owned by the parties is part of the marital estate and which property, if any, remains separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Assets earned by a spouse during the marriage are generally considered to be part of the marital estate. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). Property that a spouse owned before marriage or acquired during the marriage by inheritance or gift is generally considered to be separate property. *Dart v Dart*, 460 Mich 573, 585; 597 NW2d 82 (1999); *Reeves, supra* at 495-496; *Postema v Postema*, 189 Mich App 89, 109; 471 NW2d 912 (1991). Separate property can, however, become marital property by commingling or joint use. *Reeves, supra* at 496-497.

Further, the appreciation of premarital property is included in the marital estate if the parties actively contribute to the gain in value, but it is not included if the appreciation is due to wholly passive appreciation. *McNamara, supra* at 184; *Reeves, supra* at 497.

The parties do not dispute that the real property at issue was owned by plaintiff before the marriage or received by him as an inheritance or gift after the marriage. Defendant argues, however, that all of plaintiff's real property was commingled and became marital property because plaintiff transferred the ownership of the properties into joint title with defendant a year or two after they married. Transfer of title into joint names can indicate the parties' intent that separate property has become marital property. *Polate v Polate,* 331 Mich 652, 654-655; 50 NW2d 190 (1951). Nevertheless, title alone is not dispositive; rather, the parties' intent to make separate property marital property is the determining factor. *Id.*

After reviewing the record, we conclude that the trial court did not clearly err when it determined that plaintiff did not intend to make his separate property marital property when he redeeded the property into joint names. Although defendant claims that they intended to "share and share alike" all the assets each brought to the marriage, plaintiff testified that although he re-deeded the property in joint names, he did not intend that his property become marital property. Further, less than two years after plaintiff deeded the real property at issue into joint ownership, the couple redeeded the properties to their individual trusts. Because the trial court, who observed the witnesses and judged the credibility of each, determined that plaintiff did not intend that the property at issue would become marital property, and we are not left with a firm conviction that it erred, we will defer to the trial court's finding. *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990).

Likewise, we find unpersuasive defendant's contention that, because plaintiff executed a will and wrote a letter explaining his wish to ensure defendant's financial well-being should he predecease her, his separate property became part of the marital estate. Defendant provides no authority to support her contention that testamentary intent is relevant to whether or not property is commingled during life, and we found no such authority. We do not believe that testamentary intent is indicative of the intent to commingle property in life.

Defendant also argues that because the parties regularly sold real property acquired before and after the marriage to support their lifestyle, the property plaintiff owned before the marriage became commingled according to this Court's ruling in *Pickering v Pickering,* 268 Mich App 1; 706 NW2d 835 (2005). Again, we disagree. The settlement check at issue in *Pickering* was made payable to both parties. Clearly, it was commingled marital property. Here the properties were in separate trusts, and even if jointly titled, there was no intent to commingle. Although the proceeds from the sales of the various properties throughout the years may have become marital assets because they were used jointly, the properties were separate property until the land was sold at which point the proceeds were commingled as marital property. The property at issue herein does not include any proceeds from the sale of real property.

Finally, we note that unlike the parties in *McNamara, supra* at 183-184, who made additional contributions during the marriage to the retirement funds at issue in the divorce, plaintiff and defendant did not make any additional contributions to the disputed property. There is no evidence that any improvements were made to the undeveloped land or that any mortgages on the property at issue were paid off with marital funds. Even if marital assets paid the property

taxes and insurance, such minimal contributions are not "significant" and insufficient to make separate property marital property. *Grotelueschen v Grotelueschen*, 113 Mich App 395, 400-401; 318 NW2d 227 (1982), superseded in part by statute, 10 USC 148(c)(1). Further, the Court in *McNamara, supra* at 185, noted that the funds were commingled because it was impossible to separate the premarital from marital appreciation in the accounts, but here, the appreciation of the individual parcels could be determined.

We conclude that the trial court did not clearly err when it ruled that the Fillmore Street and Bowditch subdivision properties were not marital property because they were jointly titled only briefly and remained in plaintiff's trust for the remainder of the marriage. Thus, because that property was separate property, subtraction from the marital estate was proper. *Reeves, supra* at 494.

We also affirm the trial court's conclusion that because Parcels A and D, and the Pierce Street property remained in the defendant's trust for 10 and 15 years, respectively, the property was commingled and became marital property. Although title is not dispositive, the fact that plaintiff allowed the property to remain in the defendant's trust for so many years is strong evidence that he intended that property to become marital assets.

Defendant also argues, in her reply brief, that the trial court erred when it valued the marital portion of the Pierce Street property at one-half its current value based on the number of years it was in joint ownership. Defendant did not raise the issue in her brief on appeal, and issues raised for the first time in a reply brief are not properly presented for review. MCR 7.212(G); *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004). Thus, we decline to address the issue and affirm the trial court's valuation of the property.

Defendant also argues that if the trial court properly excluded plaintiff's separate property, it erred in not invading that property to provide for defendant's reasonable living expenses. We disagree. A trial court may invade the separate property of one spouse to distribute to the other spouse under two circumstances. First, separate property or a portion of it may be awarded to the other spouse where the other spouse "contributed to the acquisition, improvement or accumulation" of the separate property. MCL 552.401; *Reeves, supra* at 494-495. Second, separate property may be awarded to the other spouse when the marital estate is insufficient for the suitable support and maintenance of the other spouse. MCL 552.23; *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976).

In this case, defendant's argument that she contributed to the acquisition, improvement or accumulation of the separate property is not supported by the record. The record shows that defendant assisted plaintiff in giving gifts to his children and allowed plaintiff to put his property into her trust. Those minimal contributions are not a significant contribution to the accumulation of the assets. *Grotelueschen, supra* at 400-401. Further, although the property appreciated in value over the 18 years of the parties' marriage, such wholly passive appreciation of separate property does not become marital property. *Reeves, supra* at 497.

In her reply brief, defendant argues that she was actively involved in maintaining the properties, developing the subdivisions, and paying taxes for 18 years, but we could find no support in the record below for those claims. At best, the evidence at trial shows that defendant

kept the couple's check book and paid bills and that the two decided together which properties to sell to finance their expenses. In light of the lack of evidence in the lower court record that supports defendant's claims, we do not have a firm and definite conviction the trial court made a mistake when it failed to find that defendant contributed to the acquisition, improvement, or accumulation of the property.

Defendant also failed to show that the award of marital property is insufficient to meet her reasonable living expenses. Although she argues on appeal that she is unable to maintain an adequate standard of living with the trial court's existing award, she provided no evidence of her living expenses. Because defendant failed to provide the lower court with any evidence, the trial court presumed reasonable living expenses. Given the dearth of evidence in the record, we cannot say the court clearly erred when it found that defendant's social security benefits, investment income, and spousal support was sufficient to meet her needs. Thus, the trial court did not err when it failed to invade plaintiff's separate property for her support. MCL 552.25; *Charlton, supra* at 94.

Defendant also argues that even if the disputed property was plaintiff's separate property, the division of assets was inequitable because she received a small fraction of the total assets of both parties. The argument is without merit because "it does not matter if the division of the entire holdings appears one-sided, what is important is the division of the marital estate." *Reeves, supra* at 497.

Defendant additionally argues that the trial court erred when it failed to consider and make adequate findings of fact on the record regarding the appropriate factors when dividing the marital estate. We disagree. To reach an equitable division, the trial court should consider the applicable factors and must make specific findings regarding the factors it determines are relevant. *Sparks, supra* at 158-160. Those factors include: the duration of the marriage; the contribution of each party to the marital estate; each party's station in life; each party's earning ability; each party's age, health and needs; fault or past misconduct; and any other equitable circumstance. *Id.* While the trial court's opinion may be a bit terse, we find it to be adequate.

Defendant next argues that the trial court erred as a matter of law when it ruled that defendant could sell her home and move to less expensive quarters if she needed additional funds to support herself. Defendant is correct that a spouse should not be required to invade his or her marital capital or property award to pay daily living expenses. When determining spousal support, the trial court "should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves." *Hanaway v Hanaway,* 208 Mich App 278, 296; 527 NW2d 792 (1995). Nevertheless, after reviewing the record, we find that the trial court's comment was made in the context of explaining its spousal support award and expressed its concern that she have a debt-free place to live. The trial court did not intend that defendant would have to sell her home to meet daily living expenses. Rather, the trial court intended that defendant's income be sufficient to meet her daily living expenses and awarded her what it determined was adequate support to meet her daily needs. We further note that the trial court properly considered the income-earning potential of the couple's assets, because it awarded defendant the only income-producing asset the couple owned.

Defendant next argues that the trial court abused its discretion when it failed to consider the *Thames*[1] factors and reduced defendant's total spousal support. We disagree. The trial court correctly awarded spousal support to defendant because her portion of the marital estate is insufficient to provide for her support. MCL 552.23. The main purpose of spousal support "is to balance the incomes and needs of the parties in a way which will not impoverish either party," and spousal support must be based on "what is just and reasonable under the circumstances of the case." *Olson v Olson,* 256 Mich App 619, 631; 671 NW2d 64 (2003). The trial court should consider the following factors:

> (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. [*Id.*]

It is apparent from the trial court's opinion that it considered the defendant's ability to work, the source and amount of property awarded to defendant, the ages of the parties, the ability of plaintiff to pay spousal support, the needs of defendant, and the parties' health and awarded defendant spousal support sufficient to meet her needs. However, the trial court must make specific findings of fact regarding all of the relevant factors, *Korth v Korth,* 256 Mich App 286, 289; 662 NW2d 111 (2003), and it did not do so in this case. Nevertheless, because our review of the record indicates that we would not have reached a different result, we will not reverse the trial court's decision. *Lee v Lee*, 191 Mich App 73, 80; 477 NW2d 429 (1991).

Defendant insists that she is entitled to, at least, the same amount that she was receiving in temporary support, but she offers no argument in support of that assertion. She provided no indication of her actual living expenses, below or on appeal, and simply argues that her income is insufficient to cover her expenses. Because defendant failed to present any evidence of her living expenses, the trial court presumed what her reasonable living expenses would be and awarded sufficient spousal support to meet those presumed needs. In light of defendant's failure to provide any facts regarding actual expenses for the record or this Court's review, we conclude that the trial court's estimates are not clearly erroneous and that the award was just and reasonable under the circumstances. Because we would not have reached a different result, reversal is not required despite the trial court's failure to explicitly state its findings regarding each *Thames* factor on the record. *Lee, supra* at 80.

Defendant's final argument on appeal is that the trial court erred when it awarded her only $205 per month from plaintiff's pension benefit. We disagree. The portion of vested

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[1] *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).

pension benefits that are earned by a party during the marriage are part of the marital estate and are subject to award upon divorce. MCL 552.18(1); *Pickering, supra* at 7-8; *McNamara, supra* at 187-188. The allocation of a pension benefit that accrued both before and during the marriage should be based upon the ratio of the years the parties were married while the spouse earned the pension to the total years that the spouse worked to earn the pension. *Pickering, supra* at 8.

Plaintiff is receiving benefits from his "30-year" pension. The trial court found as fact that plaintiff worked or received credit during the marriage for approximately five years of service; thus, the marital portion of his pension was five-thirtieths, and defendant's share was one-half of that fraction. The record supports that plaintiff and defendant were married for three years and ten months before plaintiff retired. Plaintiff purchased 21 months' military service retirement credits with defendant's assistance after they married. Defendant claims on appeal that plaintiff purchased fifteen years of credit with her assistance, but that claim is not supported by the record and defendant conceded at trial that plaintiff only received 21 months' credit. Thus, plaintiff earned 67 months' or a little more than five and one-half years' credit during the marriage. The trial court's determination that one-sixth of plaintiff's pension was marital property was not clearly erroneous.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray