

STATE OF MICHIGAN
COURT OF APPEALS

HARPER HENDERSON,

Plaintiff-Appellee,

v

TRACI ANNE HENDERSON,

Defendant-Appellant.

UNPUBLISHED

June 9, 2011

No. 295765

Oakland Circuit Court

LC No. 2007-735091-DM

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of divorce, issued on December 21, 2009. On appeal, defendant asserts that the trial court erred in failing to classify the appreciation of plaintiff's business interest as a marital asset. Defendant further asserts that the trial court erred in failing to invade plaintiff's separate property when it reduced his child and spousal support allegations. We reverse and remand for further proceedings.

The underlying facts of this matter are essentially undisputed. The parties wed in 1999, at which point plaintiff was employed as a published by BNP Media, which is a publishing business that is wholly owned by plaintiff's family. Prior to the parties being married, plaintiff had been gifted a 20 percent share of ownership in the company. He shared ownership with his two brothers, one sister and his father, James Henderson. During the course of the parties' eight-year marriage, plaintiff held several positions in the company. After working as a publisher, plaintiff assumed the position of marketing manager. Then, in 2001, plaintiff and his two brothers were named co-CEOs of the company. In that role, plaintiff and his brothers each had specific responsibilities. Plaintiff was initially in charge of support systems, though his role evolved over time. In his capacity, plaintiff is responsible for hiring and firing employees who work below him. Plaintiff is directly responsible for the company's marketing, publishing, accounting, human resources, graphic design and IT departments. Plaintiff's salary peaked at \$2.5 million in 2007 before being reduced to \$1.5 million in 2008. Plaintiff's income was further decreased to \$400,000 in 2009.

According to James Henderson, plaintiff's position primarily involves conflict management. Plaintiff did not have any involvement with making decisions regarding growth, acquisitions and expenditures. Rather, those decisions were exclusively made by James

Henderson, who holds the title of Chairman. As Chairman, Henderson does not maintain an office at BNP. Rather, he works from home for five to ten hours each week.

While plaintiff worked at the family company, defendant asserts that she ran the parties' household and raised their three children. Defendant testified that her daily routine was very busy and required her to provide transportation to and from the children's daily activities, clean the home, prepare meals and attend to the children's general needs. Defendant testified that plaintiff was not involved with the children. In contrast, plaintiff asserts that he is an involved parent and that defendant is embellishing upon her responsibilities. In support of his claim, plaintiff cites the various support services that the parties were able to afford. The record demonstrates that the parties utilized a cleaning service, a housekeeper, a babysitting service, a nanny, a dog walker, personal trainers and personal shoppers. Plaintiff contends that these various support services demonstrate that defendant was not actively taking care of the home and children.

In 2007, BNP acquired Ascend Media. James Henderson testified that plaintiff had nothing to do with the acquisition and that he was opposed to it. Following that acquisition, the company's revenue exceeded \$100 million. The acquisition was made possible by a loan provided by Comerica Bank. After the downturn in the economy, BNP's debt ratio began to rise to levels that were inconsistent with the covenants with Comerica. Comerica informed BNP that it was in default. Therefore, Comerica had the option of calling the loan, which would have caused BNP to have to sell a large portion of the company. As a result, the company was required to cut its expenses. James Henderson met with plaintiff and his other sons in order to determine how to properly reduce costs in order to avoid default. It appears that the necessary cuts were made and that the crisis was averted.

Plaintiff filed for divorce on June 27, 2007. Plaintiff contends that the divorce filing was the natural result of years of marital problems. Plaintiff further asserts that neither party had ever had an extramarital affair. In contrast, defendant asserts that plaintiff filed for divorce after he began having an affair with the nanny that the parties had hired.

The parties proceeded to a bench trial in August 2008. The parties' pretrial briefs demonstrate that one of the major points of contention was whether the appreciation of plaintiff's interest in BNP during the marriage, which the parties stipulated amounted to an \$8.2 million increase, could be classified as marital property. The trial court subsequently issued its opinion on February 5, 2009. Regarding the appreciation of the value of BNP, the court held that defendant was not entitled to any portion of that appreciation in value because the appreciation was "passive." According to the trial court, the appreciation in value was attributable to all of the company's employees "of which [plaintiff] was only one." The court further emphasized that plaintiff did not have any special training and that he was co-CEO merely because he was a member of the family.

On May 13, 2009, plaintiff filed a motion for a new trial to recalculate child and spousal support in light of his decreasing salary. The trial court ultimately granted the motion and the parties proceeded to a second trial. Following trial, the trial court issued its opinion, in which it reduced plaintiff's child support payment from \$22,900 per month to \$10,600 per month. The court also reduced plaintiff's spousal support payment from \$15,000 per month to \$5,000 per

month. The trial court denied defendant's request to invade plaintiff's separate property to make up for the reduction in support.

On appeal, defendant argues that the trial court should have classified the \$8.2 million appreciation in BNP as marital property or, in the alternative, that the trial court should have invaded that separate property. Defendant offers several theories in support of her arguments. We find it unnecessary to address each of defendant's theories because we conclude that the appreciation of the interest was not wholly passive and that it should have been classified as marital property.

In reviewing a judgment of divorce, this Court first reviews the trial court's factual findings and accords substantial deference to those findings. *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Id.* If the trial court did not commit clear error in making its factual findings, this Court must determine whether the court's ruling was fair and equitable. *Id.* at 717-718.

In general, premarital property is considered separate property for the purposes of a property division. However, the appreciation of value of that premarital property is classified as marital property unless the appreciation was "wholly passive". *Reeves v Reeves*, 226 Mich App 490, 497; 575 NW2d 1 (1997). Here, the trial court concluded that the appreciation of plaintiff's interest in BNP was wholly passive and, consequently, was not marital property. For the reasons described below, we disagree with that conclusion.

In holding that the appreciation in this case was passive, the trial court concluded that the plaintiff in this case was analogous to the relevant parties in *Uygur v Uygur*, unpublished opinion per curiam of the Court of Appeals, issued June 8, 2006 (Docket No. 258207) and *Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999). Regarding *Uygur*, which plaintiff's brief on appeal refers to as "controlling," we note that we are not bound by the unpublished opinions of this Court and we are not persuaded that it is necessary to rely on that opinion in this instance. Regarding *Dart*, we cannot conclude that that the appreciation in value in this case is analogous to the appreciation in that case. The primary issue in *Dart* was whether "the parties' English divorce judgment is entitled to full faith and credit under the principle of comity, and whether res judicata bars the action." *Dart*, 460 Mich at 574-575. The Court only briefly addressed the concept of appreciation of premarital property. The defendant in *Dart* was a beneficiary of a trust valued at approximately \$500,000,000 and the son of the founder of Dart Container Company. *Id.* at 575-576. The Court held that the plaintiff was not entitled to a share of the trust property despite the fact the defendant worked for Dart Container Company during the course of the marriage. *Id.* at 585. The Court reasoned that "[t]he Dart fortune and defendant's interest in it exist independently of defendant's workplace activities or the marriage partnership." *Id.*

Because the Supreme Court's opinion in *Dart* was primarily focused on whether the proceedings in England were binding, it is essentially devoid of a factual description of the nature of the trust property and its appreciation. It is unclear whether the defendant's work for the family company had any impact on the value of the company. It is also unclear how long the defendant worked for the company and what his role was. More importantly, it is unclear

whether the value of the trust property was dependent on the value of the company. Consequently, it is not possible for this Court to analogize the facts of the present case with the facts of *Dart*.

In contrast to *Dart*, the factual record in this case was sufficiently developed in relation to plaintiff's role at BNP and is properly before this Court. Plaintiff occupied a significant position in the company hierarchy. He worked a regular schedule and maintained an office at the company. He oversaw multiple departments and performed necessary functions. He worked with his father and siblings when the company defaulted on its covenants with Comerica and was facing potential financial peril.

Much of plaintiff's argument regarding the nature of the appreciation focuses on his lack of qualification for his position and his lack of participation in the company's growth strategy. Whether plaintiff was qualified for his position is entirely irrelevant to whether the appreciation of his interest in BNP was wholly passive. Though others may have been qualified to serve in that position, it was plaintiff who actually did. Furthermore, the mere fact that plaintiff's position did not require him to make decisions regarding growth does not result in a conclusion that plaintiff played no role in the appreciation of BNP's value. Although plaintiff implies that the company's growth was the result of the purchase of Ascend, which he allegedly opposed, the record does not concretely establish whether that purchase accounts for the entire appreciation. Further, even if that acquisition was the sole source of the company's growth, we would still not be able to conclude that the appreciation in this case was passive. Surely, BNP would have been in no position to make a major acquisition if the various departments plaintiff supervised were not properly functioning.

Contrary to the trial court's finding, plaintiff was not merely one of many employees at BNP. As co-CEO, the record demonstrates that plaintiff bore responsibility for many of the company's major functions. Unlike the defendant in *Reeves*, plaintiff's involvement with the interest in question was not "wholly passive at all times." *Reeves*, 226 Mich App at 497. As a result, the trial court clearly erred in finding that the appreciation was passive and could not be properly classified as marital property.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

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TALBOT, J. (*concurring*).

While I concur in the result I am compelled to write separately to further explain why the trial court erred in failing to recognize that the appreciation in Harper Henderson's premarital interest in his family's publishing business was active and, therefore, subject to division in this divorce action.

Traci Anne Henderson asserts the trial court erred in failing to include, as part of the marital estate subject to distribution, the stipulated \$8.2 million appreciation in the business interest inherited by Harper Henderson. This Court has recognized:

In any divorce action, a trial court must divide marital property between the parties and, in doing so, it must first determine what property is marital and what property is separate. Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage. Once a court has determined what property is marital, the whole of which constitutes the marital estate, only then may it apportion the marital estate between the parties in a manner that is equitable in light of all the circumstances. As a general principle, when the marital estate is divided "each party takes away from the marriage that party's own separate estate with no invasion by the other party."¹

¹ *Cunningham v Cunningham*, 289 Mich App 195, 200-201; 795 NW2d 826 (2010) (citations omitted).

The ability to invade separate property is governed by statute.² Specifically, an individual's separate estate may be invaded under two recognized circumstances:

(a) “[I]f the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.”³

or

(b) “The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property.”⁴

While the wife asserts that an award under either statutory provision would be appropriate, herein I intend to address only the trial court's determination that entitlement to a share in the appreciation of the business interest is not available as it was solely the result of passive accumulation and/or the failure of the wife to actively contribute to the increase in value.

At the outset, I would observe that neither of the parties in this action particularly engenders our sympathy or compassion. To their good fortune, they have achieved an enviable lifestyle and financial security without having to endure years of struggle or effort. Regardless, it is necessary to address the circumstances as they exist and the parties do not dispute the significant appreciation of the husband's interest in the family business during the term of this relatively short marriage. Rather, they only dispute whether the appreciation of this asset during the term of the marriage is subject to invasion and division.

“[A] spouse's separate assets, or the appreciation in their value during the marriage, may be included in the marital estate.”⁵ This Court has recognized that when an asset appreciates during a marriage due to the efforts of one spouse to put forth time and effort in the development or maintenance of the asset, which is facilitated by the other spouse's efforts in managing the

² MCL 552.401; MCL 552.23(1).

³ MCL 552.23(1).

⁴ MCL 552.401.

⁵ *Dart v Dart*, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999), citing *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995).

marital home and providing child care, the amount of the asset's appreciation is to be included in the marital estate and, therefore, is subject to distribution.⁶ Any alternative outcome would be deemed inequitable simply because,

[t]he fruits of [husband's] efforts in the business were both the increase in the value of the business . . . and the salary he drew over the years. The parties were building an asset as well as enjoying its fruits on an ongoing basis. That [wife's] contribution to the asset came in the form of household and family services is irrelevant. The marriage was a partnership. . . . [T]he asset at issue did not increase in value simply by earning interest. Rather, it appreciated because of [husband's] efforts, facilitated by [wife's] activities at home.⁷

In the circumstances of this case, although downplayed by testimony that may be construed as self-serving, it is readily acknowledged that the husband was an active employee, in a high-ranking capacity, at the family business. While perhaps not the most dynamic or adept of the management staff, the husband's active involvement in the company was buttressed by his wife's maintenance of the marital home and oversight of the minor children. The fact that their lifestyle allowed them to afford domestic assistance in performing these tasks is irrelevant. It is also irrelevant that the husband, his siblings and father, inherited their interests in this company and that this benefit was not contingent on his employment with the business.

I believe the trial court lost sight of the fact that the focus of the issue is not the interest that the husband inherited in his family's business, but rather the very significant appreciation in value of that interest during the marriage. It is difficult to discern how the trial court could construe the husband's acknowledged involvement in the business through day-to-day employment in a management capacity as lending itself only to "passive appreciation" of the asset. Based simply on the definition of the term "passive" as meaning "[n]ot involving active participation; esp., of or relating to a business enterprise in which an investor does not have immediate control over the activity that produces income,"⁸ the husband's participation in the family business with wife's support in maintaining the home and children should have led the trial court to construe the appreciation in the business as a marital asset subject to distribution. Based on this outcome, it is unnecessary to address the wife's commensurate argument asserting the propriety of invading the husband's separate property based on need.

/s/ Michael J. Talbot

⁶ *Id.* at 293-294.

⁷ *Id.* at 294.

⁸ Black's Law Dictionary (9th ed).