STATE OF MICHIGAN

COURT OF APPEALS

REGINALD G. POWERS,

Plaintiff-Appellee,

v

CECYLIA Z. POWERS,

Defendant-Appellant.

UNPUBLISHED
June 5, 2012

No. 301868
Lapeer Circuit Court
Family Division
LC No. 10-042623-DO

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from the parties' judgment of divorce, arguing that much of what the trial court identified as plaintiff's separate property the court should have found to be marital property subject to division. Defendant also argues that the court abused its discretion in denying a motion for attorney fees. We affirm the court's rulings but remand for a separate award pertaining to certain fixtures in plaintiff's Florida condominium.

I. FACTS

The parties married in August 1994, and plaintiff was 65 and defendant 62 at the time of the divorce proceedings in 2010. It was a second marriage for each. Plaintiff lived his entire life on a 150-acre parcel that had long included a farmhouse, which plaintiff had bought from his parents. In the 1970s plaintiff built a second house on the land and lived there ever since, including during his marriage to defendant. During the course of the marriage, plaintiff rented the farmhouse and farmland to others, then sold the farmhouse by land contract. Plaintiff testified that he did not work the farmland himself during the marriage.

Plaintiff had many certificates of deposit and other financial accounts, and testified that he went to great lengths to keep them as his separate property and that defendant never contributed anything to the accounts. Defendant's testimony comported with plaintiff's in this regard.

Plaintiff testified that he cashed out several certificates of deposit and purchased a condominium in Florida with the proceeds, all expenses attendant to which he personally covered, but for defendant's having contributed a new refrigerator and a granite slab counter, which plaintiff invited her to reclaim as a consequence of the divorce. The testimony of both

parties indicated that defendant made significant contributions to the maintenance and improvement of the marital home, however.

The parties agreed that some of their respective assets were separate property, including plaintiff's pension from General Motors. Plaintiff agreed before trial to pay defendant spousal support until she began collecting Social Security benefits, which were understood to be commencing in February or March of 2011. Plaintiff also agreed before trial to pay defendant $1,500 in attorney fees.

The trial court held that the marital home was marital property and awarded it to plaintiff, with the requirement that he pay half its equity value to defendant. However, the court concluded that the 150-acre parcel was plaintiff's separate farm property and awarded it and its proceeds to plaintiff. The court also awarded plaintiff, as his separate property, the condominium in Florida, plus all the various financial accounts held in plaintiff's name alone.

However, the court, recognizing that its judgment would leave defendant in a state of some financial inequality as compared to plaintiff, elected to invade plaintiff's separate property by way of ordering him to pay defendant $15,000 "that she can hopefully invest in her annuity to provide herself with a better return on a monthly basis so that she can survive." The court denied defendant's motion for an additional $5,000 in attorney fees.

II. SEPARATE PROPERTY

We review the trial court's factual findings in divorce proceedings for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "[F]actual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. . . . [T]he dispositional ruling . . . should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks*, 440 Mich at 151-152.

When dividing a marital estate, the goal is to make an equitable division of the marital property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). "Assets earned by a spouse during the marriage are properly considered part of the marital estate." *Id*. at 110. This does not include "passive" appreciation in value during the course of the marriage of what was initially a separate asset, meaning appreciation that the owner did nothing to bring about but for letting time pass. See *Reeves v Reeves*, 226 Mich App 490, 497; 575 NW2d 1 (1997). However, a court may award one spouse some of the other's separate property if the spouse needs it for suitable support and maintenance, or if one spouse has significantly assisted the other in the acquisition or growth of that other's separate asset. *Id.* at 494-495.

When spouses agree to keep their respective acquisitions, before or during the marriage, as separate property, a court should give effect to that agreement. See *Reed v Reed*, 265 Mich

App 131, 147; 693 NW2d 825 (2005) (discussing this concept within the context of a prenuptial agreement).

In this case, plaintiff testified that he was determined since the failure of his first marriage to keep his investments and accounts as separate property, such that he and defendant "kept separate everything." Defendant in turn testified that she never gave plaintiff money for investing in his many certificates of deposit, did not know where plaintiff obtained the money to invest in a municipal bond, and did not know what plaintiff did with the down payment resulting from the sale of the farmhouse. Further, defendant offered little protest when asked to confirm that she and plaintiff never shared a financial account but for a single brief instance that plaintiff attributed to a mistake. The trial court no doubt credited these indications in determining that plaintiff, with defendant's understanding, maintained his various accounts as separate assets that were thus presumptively not subject to division. See *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) ("An appellate court recognizes the . . . judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony."). We conclude that the trial court did not clearly err in so determining.[1]

The trial court did recognize defendant's substantial contributions to the maintenance and improvement of the marital home, and thus held that it was a commingled marital asset subject to division, but held that the rest of the home's 150-acre farming estate, as well as the Florida condominium, were plaintiff's separate property.

Concerning the farmland, defendant suggests that the court acted arbitrarily in treating only the house as a marital asset, as opposed to the farming acreage upon which it stood. We conclude that the trial court did not clearly err in recognizing major differences in character, usage, and defendant's involvement in connection with the house and the farming estate. Plaintiff endeavored to keep the farmhouse, including proceeds from its rental and sale, as his separate property, and testified that he had done nothing himself to develop or work the farmland during the marriage. The trial court did not clearly err in declining to regard defendant's financial and other contributions to the marital home as bringing the entire farming acreage and farmhouse proceeds within the marital estate.

Concerning the Florida condominium, the court acknowledged that defendant had contributed "minimal investment" in it, but held that "it was the intent of the parties that that would be [plaintiff's] separate property." Again, in light of the testimony suggesting that the parties always understood that they were inclined to hold their respective assets as separate property, the court did not clearly err in concluding that that intention carried over to the condominium. Indeed, defendant provided insufficient evidence of commingling with regard to

[1] Defendant argues that the appreciation or change in character of plaintiff's assets should inure, in part, to her benefit. Defendant cites *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995). We find *Hanaway* distinguishable, however, in light of the evidence that the parties kept their assets separate. This was not a situation like in *Hanaway*, *id*. at 293-294, where the parties were essentially building joint financial assets based on mutual efforts.

the condominium. However, even though the condominium itself is not a marital asset, in light of plaintiff's admission that defendant bought a refrigerator and granite counter slab for the property, defendant must be awarded the value of these items, and we remand this case for the trial court to do so.

III. ATTORNEY FEES

This Court reviews for an abuse of discretion a trial court's decision regarding a motion for attorney fees. See *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). An abuse of discretion occurs when a trial court chooses a result falling outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"[A]ttorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). Fee shifting in divorce cases is authorized by MCL 552.13(1): "In every action brought . . . for a divorce . . . the court may require either party . . . to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency." See also MCR 3.206(C). Significantly, attorney fees in a divorce action are not recoverable as a matter of right, but may be awarded only where necessary to preserve the receiving party's ability to maintain or defend the action. *Stoudemire*, 248 Mich App at 344.

Again, plaintiff initially agreed to contribute $1,500 toward defendant's attorney fees, but in the end defendant requested $5,000. The court denied the motion, explaining, "I do not find that either party, in addition to what I've already done can afford to pay the other party's attorney fees anymore than you already have so I'm not awarding any additional attorney fees." We cannot conclude that this decision produced a result lying outside the range of principled outcomes.

Although plaintiff is emerging from the divorce in better financial condition than defendant, the court took that into account by invading some of plaintiff's separate property; it ordered him to pay defendant $15,000 in hopes that defendant might use it to boost her annuity income. The trial court obligated plaintiff to provide additionally for defendant's support; it recognized her need for some additional assets, and we cannot conclude that the trial court abused its discretion in declining to order plaintiff to pay additional money as attorney fees. Defendant is able to cover her attorney fees.

Affirmed, but remanded for an award to defendant pertaining to fixtures in the Florida condominium. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Pat M. Donofrio

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GLEICHER, P. J., (*dissenting*).

Reginald and Cecylia Powers married in 1994, a second marriage for both. They lived together for the next 16 years in a home located on 150 acres of Lapeer County farmland. During most of the marriage Cecylia Powers worked at Henry Ford Hospital, earning more than $30,000 each year. Reginald Powers, a retiree, received a monthly General Motors pension payment, social security benefits, and a Veterans Administration disability benefit. In 1994, the year the parties wed, Reginald's taxable income was $23,287, while Cecylia earned $36,048.

When the marriage failed, Reginald claimed as separate property the marital home and surrounding acreage, bank accounts holding $70,000 that he opened and funded during the marriage, a Florida condominium acquired during the marriage, and a $70,000 annuity he purchased ten years into the marriage. The trial court awarded Reginald virtually everything he asked for, finding that other than the house in which the parties had resided, Reginald's claimed assets constituted separate rather than marital property. The majority affirms, holding that by maintaining assets in his name alone, Reginald created separate property "presumptively not subject to division." *Ante* at 4. Thus, according to the majority, the acreage surrounding the marital home, the condominium purchased during the marriage, the bank accounts established during the marriage, and the annuity funded during the marriage all constitute Reginald's separate property. The majority credits Cecylia with having supplied the condominium with a refrigerator and marble countertop, and awards her the value of these items. *Ante* at 6.

Michigan law governing separate and marital property contemplates that throughout a marriage, the mutual efforts of husband and wife build combined equity in their partnership. Both invest in the marriage through monetary and in-kind contributions. In the event of divorce, the parties divide equitably the fruits of their labors. The majority opinion recasts marriage as a

union of two competing business enterprises funded by two separate "investors." Upon dissolution, the spouse who most successfully segregates property reaps the spoils. Because the majority's analysis is inconsistent with governing law, I respectfully dissent.

I. GUIDING LEGAL PRINCIPLES

In a divorce action, a trial court divides property by first determining whether the contested assets are marital or separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). "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." *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010), citing MCL 552.19. Income earned by one spouse during the marriage is marital property. *Byington v Byington*, 224 Mich App 103, 112; 568 NW2d 141 (1997). The mere fact that one spouse holds property individually is not dispositive of whether the property qualifies as separate or marital. *Cunningham*, 289 Mich at 201-202.

A court may invade a party's separate assets "if it appears from the evidence in the case that the [other] party contributed to the acquisition, improvement, or accumulation of the property." MCL 552.401. In *Hanaway v Hanaway*, 208 Mich App 278, 293; 527 NW2d 792 (1995), this Court recognized that spousal contributions to separate property may assume various forms. In that case, one spouse added to the accumulation of property by administering a household and taking care of the children while the other devoted himself to the family business.

> While the source of defendant's interest in the company was his father's annual gifts of stock, the financial yield over time from the interest and the increased value of that interest necessarily reflected defendant's investment of time and effort in maintaining and increasing the business, an investment that was facilitated by plaintiff's long-term commitment to remain at home to run the household and care for the children. [*Id.*]

The work performed by the stay-at-home spouse enabled her husband to "cultivate and nurture" his business interests. *Id.* at 293-294. "[T]he asset at issue did not increase in value simply by earning interest. Rather, it appreciated because of defendant's efforts, facilitated by plaintiff's activities at home." *Id*. at 294.

Although "[p]roperty received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution[,]" a spouse's active management of separate assets renders the appreciation marital property. *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). Separate assets also "transform into marital property if they are commingled with marital assets and 'treated by the parties as marital property.'" *Cunningham*, 289 Mich App at 201, quoting *Pickering v Pickering*, 268 Mich App 1, 11; 706 NW2d 835 (2005). Similarly, a spouse's assistance in converting potentially valuable separate assets into a source of income qualifies as a contribution to the marital estate. *McDougal v McDougal*, 451 Mich 80, 90 n 8; 545 NW2d 357 (1996).

"The end sought in the division of property is a fair and equitable distribution under all of the circumstances." *Ripley v Ripley*, 112 Mich App 219, 227; 315 NW2d 576 (1982).

Accordingly, our Legislature has empowered courts to invade the separate property of one spouse when "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party. . . ." MCL 552.23(1).

II. THE BANK ACCOUNTS

The trial court found that the substantial bank accounts held in Reginald's name constituted separate property. The bank accounts contained certificates of deposit (CDs) that Reginald purchased during the marriage and, according to the trial court, "transferred pretty frequently" throughout the marriage. According to the trial court, Reginald purchased the CDs with his own income. That income included proceeds from the sale of a farmhouse he had inherited from his parents, his GM pension and his VA benefits. The trial court ruled that "the appreciation that occurred during the marriage of all of these assets was either passive appreciation or appreciation due to Mr. Powers." The trial court opined that Cecylia had made no contribution to the growth of the money in Reginald's accounts.

The trial court's findings are clearly erroneous for three reasons. First, by commingling potentially separate assets with marital property, Reginald transformed his pension and benefit income into marital property. Second, no evidence supported that the accounts were merely passive investments. To the contrary, the trial court acknowledged and the evidence supports that Reginald moved money around "pretty frequently." Finally, Cecylia's contributions to the marriage permitted Reginald to fund his individual accounts. In large measure, the money available for Reginald's investments accrued due to Cecylia's willingness to defray day-to-day marital expenses. The trial court's failure to acknowledge Cecylia's critical role in the accumulation of her husband's accounts constitutes clear error.

Disentangling the various streams of money used to fund Reginald's accounts is no easy feat, given that the trial court forbade the parties from filing exhibits containing social security or account numbers. The parties' mutual failure to provide this Court with most of the exhibits introduced during the trial has also unduly complicated this task. Moreover, the trial court substantially interfered with the creation of a complete record by repeatedly interrupting Cecylia's counsel whenever she sought to establish Cecylia's contributions to the marital estate. For example, while cross-examining Reginald, Cecylia's counsel attempted to inquire regarding Cecylia's work in the home:

> Q. . . . And . . . she lived in the house with you; correct, moved in with you when you got married?
>
> A. Yes.
>
> Q. Okay. Did she clean?
>
> A. For two years.
>
> Q. Did she cook?
>
> A. Some. She was still working, too, when she got married.

Q. As a matter of fact she worked downtown Detroit, correct?

A. That's correct.

Q. And that was about a two hour there about drive one-way - -

A. Yes - -

THE COURT: Just a minute. Let me - - let me clarify something else?

MS. BARTON: Sure.

THE COURT: Cleaning and cooking do not factor in to separate property determinations. She's living there, of course she cleans. Everybody cleans. You cook, you clean don't you?

THE WITNESS: Uh-hum, yes.

THE COURT: So don't go there.

The trial court again articulated his incorrect view of the law during Cecylia's direct testimony, when her counsel sought to present evidence of her financial contributions to the marital home:

Q. Did you buy food for Mr. Powers as well?

A. Yes.

Q. Okay. Did he buy food too?

A. Ah, sometimes, not very much. . . . At the end, from the beginning I bought most of it.

Q. Okay. And what if you had a party at your house or you were going to an event, who paid for that?

A. I paid for it. Whenever --

Q. Can you give an example of what that would be?

A. Um, even when we have family gatherings, including mostly Reggie's family we would invite and schedule the party but I would pay for every single dime.

Q. For all the food and - -

A. Yes.

Q. - - whatever.

A. And prepare the food and then sometimes I have my own daughters actually help me prepare the food.

Q. What about if there was a birthday or Christmas or - -

A. They—I paid for the, I would say close to ten years for, Reggie has two daughters and I paid for their - - and they have four grandkids, we had four grandkids. I paid for their birthday presents and - -

THE COURT: Mrs. Powers, I can't reimburse you for any of this. The law - -

THE WITNESS: I'm - -

THE COURT: -- doesn't let me do that.

THE WITNESS: I'm just asking - - I'm saying that I - - I don't ask for reimbursement. I spent the money in the family home and in the marriage.[1]

THE COURT: But I can only determine that you have an interest in the Bowers Road property based on your contribution to that property. So let's stick to that. Birthdays, I'm sorry, I can't help you.

MS. BARTON: Your Honor, the reason I was bringing this up from my client is this is where her money went while he was saving his. That - - that's why I was asking what she did with the funds.

THE COURT: If she spent her money on things like that the law does not allow me to compensate her for it, does it?

MS. BARTON: I'm not asking you to compensate her for that, I'm saying that that money that Mr. [Powers] has in the bank, the PNC and the annuity were acquired during the marriage because she was paying for other things; birthdays, Christmas, you know, repairs - -

THE COURT: They were acquired from - - the source of that property was from his pension, his social security and the sale of his mother's home.

After invalidating Cecylia's household and family services as well as her monetary contributions, the trial court insisted that she present some "tracing" of "all of this money" she claimed to have spent during the marriage. Notably, the trial court never sought "tracing" from Reginald, and the record contains none.

[1] Through this simple statement, Cecylia Powers, a lay person, exhibited a better understanding of *Hanaway* and Michigan divorce law than the trial judge.

Ultimately, however, there is no need to trace every nickel and dime spent by the parties due to Reginald's indisputable commingling of funds and his unchallenged assertion that he used "his" money to pay marital expenses. When the parties have combined their incomes to pay marital debt, tracing becomes unnecessary. Despite these facts, the trial court divided the property based on the notion that, because Reginald created separate accounts during the marriage using marital funds, he could keep those assets. Aside from being legally incorrect, the record evidence reveals that the accounts' growth in value was not simply attributable to accrued interest. Rather, the trial testimony established that Reginald saved because Cecylia earned and contributed her earnings to the marital expenses.

In 1994, the year they married, the parties filed separate tax returns. Reginald's return reflected checking account interest income totaling $135. The balance of Reginald's $23,287 income flowed from VA benefits, his GM pension, and rent paid by a farmer who leased farmland surrounding the marital home.[2] Cecylia reported $36,048 in wages, $15 in interest income, and received a tax refund of $2,203. She sold her premarital residence that year, netting $77,000. After spending $18,000 on a truck for Reginald, she placed the home sale proceeds in an account at the Dearborn Federal Credit Union (DFCU). These numbers supply a useful baseline of the parties' individual premarital earnings and assets. When Cecylia entered the marital enterprise, she was cash-rich, working full-time outside the home, and earning a reasonable salary. Reginald brought to the marriage pension and benefit income, a small amount of yearly rent from his farmland, and an account that earned $135 in annual interest.

In 1995, Cecylia earned $35,363 from her employment. The parties' joint tax return reported interest income of $2,657 from her DFCU account, $117 from two accounts owned by Reginald, and $1,357 from a joint bank account. Notably, as in 1994, Reginald's individual accounts yielded little interest, and his income remained essentially unchanged.

In 1996, Cecylia earned $31,526 in wages. She continued to accrue interest in her DFCU account; that year it amounted to $2,778. The parties also maintained a joint checking account that earned $54.72 in interest. For the first time, the jointly filed tax return reflected interest earned in individual accounts owned by Reginald. A First of America bank account in Reginald's name generated interest of $1,338, including $1,248.89 earned from a CD. Reginald supplied no documentation of the source of the money placed in this interest-bearing account.

In 1997, Cecylia earned $31,465 from her employment, while Reginald's pension, benefit, and farmland rental income remained steady at approximately $24,000. That year, Reginald entered into an $88,000 land contract for the sale of his parents' farmhouse, located on two acres abutting the 150-acre farmland. The buyers made a cash down payment of $13,669, and continued to make monthly payments that included interest. Reginald realized a capital gain of $51,457 on the sale, which the parties identified on their jointly-filed 1997 tax return. Rather than passively investing the cash down payment received from the buyers, Reginald loaned most

[2] Other than in 1994, the parties filed joint tax returns throughout the marriage and paid taxes on the rental income paid by the farmer who leased the land, thereby treating it as marital income. The rent totaled approximately $2,650 each year.

of the proceeds ($11,795) back to them so they could install new windows in the farmhouse. The buyers agreed to pay additional interest on the window loan.

The parties' 1997 interest income, apart from the land contract, included joint account interest of $155, and $1,230 in interest attributable to Cecylia's account at DFCU. Two CDs in Reginald's name paid interest of approximately $1,310. The 1997 return further reflects that Reginald purchased three additional CDs at the Lapeer County Credit Union, which together paid interest of $548, and a CD at Citizen's First which paid $239 in interest. For the first time as joint tax filers, Reginald and Cecylia owed taxes to the government. Their 1997 return stated a tax debt of $2,489.

In 1998, the land contract and window loans yielded interest income of $6,278. Reginald's CDs earned $2,953, while Cecylia's account at DFCU produced only $735. Her wages had also fallen; that year she earned $24,170. And in 1998, Reginald closed the parties' joint checking account; he testified at the trial that its existence had been a "mistake." By 1999, Cecylia's interest income had dwindled to $255, while Reginald earned $2,870 on his CDs. The land contract interest added $5,753 to the parties' joint income, and the window loan produced $598. The numbers were similar in 2000, although Cecylia's wages had risen to $32,463. Apparently Reginald purchased at least one additional CD that year, as well as a municipal bond fund.[3]

During the next nine years, Reginald bought more CDs, and Cecylia exhausted her account at DFCU. Cecylia used some of her DFCU savings to purchase materials for an addition to the marital home. By 2007, Reginald had accumulated 12 different CDs, and began collecting social security benefits. Cecylia no longer worked outside the home and made several withdrawals from her retirement accounts.

The trial court determined that all CDs purchased by Reginald, and the interest they earned, constituted his separate property. According to the trial court, these assets flowed from "either his income or his proceeds from the sale of the farmhouse or the interest that he earned on his investments." The evidence confirms that Reginald used marital income to stockpile his collection of CDs. At the outset of the marriage, he placed some of his potentially separate income into a joint checking account, transforming it into a marital asset. By continuing to use his potentially separate income to pay marital debt, Reginald treated his pension income in the same manner as Cecylia treated her Henry Ford Hospital wages: as marital property.[4] Furthermore, "savings, although accumulated from one party's earnings, are in reality acquired

[3] Reginald made other purchases during the marriage, including a vehicle for himself and one for Cecylia, a golf cart and a riding lawn mower. He also testified that although he "forgot a lot of stuff," he remembered that he paid all the household expenses from his pension and benefits, while Cecylia allegedly contributed nothing.

[4] The trial court viewed Reginald's income as his alone, to spend or invest as he chose, despite that Reginald actively managed "his" money. The logical corollary is that Cecylia should have been credited for the amount of her wages throughout the marriage as her own separate property.

from what would otherwise be income of the parties during the marriage and are properly part of the marital assets." *Ripley v Ripley*, 112 Mich App 219, 230; 315 NW2d 576 (1982). By commingling money he received from his pension and other sources, Reginald destroyed "any characteristic of [their] being separate property." *Pickering*, 268 Mich App at 13. And Cecylia's income made Reginald's investments possible.

Indisputably, Reginald began investing in CDs before he sold the farmhouse. Reginald's income remained constant during 1994, 1995 and 1996, and he was able to begin saving and investing because Cecylia's more substantial income defrayed marital expenses. Reginald advanced no other explanation for the source of the money he invested in the CDs purchased before he sold the farmhouse. Indeed, he could not recall owning any CDs prior to the marriage, and admitted that he "probably didn't have a lot because I just went through a divorce a couple years, three or four years before I married [Cecylia]."

The farmhouse was Reginald's separate inherited property. Had he truly separated its sale proceeds from the marital estate and maintained it in a passively-managed account, I would agree that those proceeds could have been construed as his separate property. But the evidence overwhelmingly demonstrates that Reginald treated the proceeds as marital income by commingling it with other income and liabilities, and that Cecylia "improved" her husband's investments by paying other marital expenses. *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976). Reginald elected to report the capital gain on the parties' joint tax return, thereby forcing Cecylia to share the tax liability resulting from the sale. Next, Reginald chose to loan most of the cash from the sale back to the buyers, creating a stream of rental income that he actively managed, and that appeared as jointly-earned income on the parties' tax return. Accordingly, Reginald commingled the funds with marital assets and actively managed the sum. Moreover, Cecylia's earnings aided Reginald's transformation from pensioner to successful investor. While the cash realized from the sale of the inherited farmhouse represented one source of Reginald's investments, other sources preserved and augmented his yield. Those sources included Cecylia's payment of the marital expenses and the work she performed in the home, both of which freed time and money for Reginald's use. In my view, the trial court's distribution to Reginald of the entirety of the accounts constitutes clear error.

III. THE ANNUITY

In 2003, Reginald purchased an annuity valued at $70,000. He testified that he cashed out United States savings bonds to fund this investment, and that he was in the habit of buying such savings bonds. On cross-examination Reginald admitted that he had no record of any savings bonds purchased before 2001. No evidence supports that Reginald bought the bonds with segregated and separate assets. Rather, as with the bank accounts, he commingled the premarital and marital assets used to buy the bonds and accumulated a cash cushion because Cecylia paid many of the marital bills. Thus, the annuity similarly constitutes marital property.

IV. THE FLORIDA CONDOMINIUM

In 2005, Reginald purchased the Florida condominium for $85,000. Cecylia purchased a refrigerator and a counter slab for the condo, and the parties apparently used it together until the marriage failed. The condo was placed in the parties' family trust. At the trial, Reginald

testified, "I know the only property that she was going to get was the condo in Florida if I passed away."

At the trial, Cecylia's counsel expressed willingness to stipulate that if the accounts and annuity were considered marital property, her client would agree to treat the value of the condo as representing Reginald's inheritance. Reginald rejected this equitable "swap." The trial court could have reached a fair and equitable result by awarding the condo to Reginald and half the remaining account assets to Cecylia. By viewing the entirety of Reginald's investments as his separate property, the trial court clearly erred. I would hold that Cecylia contributed to the condo by investing in its fixtures, and the parties treated the condo as marital property. Accordingly, the trial court should have divided equally the value of this asset.

V. THE MARITAL HOME

Both Reginald and Cecylia had been previously married, and both owned homes before they wed. Cecylia sold hers, netting $77,000, and moved into Reginald's house located on Bowers Road in Imlay City. The trial court ruled that Cecylia had substantially contributed to the improvement of the Bowers Road home and that the parties shared the upkeep and maintenance of the home. "All in all," the trial court ruled, "there is sufficient contribution by Mrs. Powers to create a joint ownership of that house." But the surrounding acreage belonged only to Reginald, the trial court ruled, because Cecylia did not have "anything to do with it."

Reginald grew up on the Bowers Road property and purchased it from his parents many years before his marriage to Cecylia. The marital home and the surrounding acreage share a single tax identification number. In 2007, Reginald and Cecylia quit claimed the entire property to "Reginald G. Powers and Cecylia G. Powers and their successors as trustees of the Reginald G. Powers and Cecylia Z. Powers Family Trust No. 1." The rental income paid by the farmer who leased some of the 150 acres offset a portion of the property taxes; by filing a joint tax return, both parties shared the income tax consequences of this rental income.

Reginald's appraiser presented a "hypothetical" appraisal of the home alone, divorced from the land. He valued it at $58,500 in January 1994, and $79,000 at the time of the trial. The appraiser offered no opinion concerning the value of the surrounding acreage. Cecylia's appraiser testified that the Bowers Road property had a current value of $200,000. The trial court determined that the parties would share the equity in the home alone, which the court valued at $70,000. The court added: "I don't have a specific acreage that goes with that house, I just can't make that determination."

In my view, the trial court clearly erred by limiting the value of the marital home to a purely hypothetical valuation of the marital *house*. For practical and legal purposes, the house and the land constituted one piece of real estate. The income stream generated by the acreage equally benefited and burdened both parties. During the marriage, Reginald actively managed the mechanics of the land rental, removing the acreage from the realm of a wholly passive asset. Two years before the divorce, the parties placed the entire parcel into the Reginald G. Powers and Cecylia Z. Powers Family Trust. No evidence supported that the parties ever contemplated selling the land separately from the home. Rather, the parties commingled income generated

from the acreage with their other assets. I would hold that the trial court's decision to limit the marital asset to the building alone was entirely arbitrary and artificial, and wholly inequitable.

VI. EQUITY

Cecylia emerged from her 16-year marriage with half the value of the marital house ($35,000) and an additional payment of $15,000 to "balance the equities." Reginald paid her $1,500 for her attorney fees. The trial court denied Cecylia's motion for $5,000 in additional attorney fees and the majority affirms, holding that Cecylia could "cover" her attorney fees with the $15,000.

Cecylia receives social security and other benefits of approximately $1,300 each month. Reginald collects approximately $2,100 each month from his GM pension and other benefits, and earns additional income through his annuity, the farmland rental, and interest on his CDs. A court may invade the parties' separate assets if one party demonstrates additional need. MCL 552.23(1). Given this grossly unbalanced and inequitable distribution of assets, I believe that the trial court abused its discretion by refusing to invade the assets it deemed Reginald's separate property, and by failing to award Cecylia reasonable attorney fees.

The record in this case substantiates that Cecylia contributed at least as much to the marriage as did Reginald. By failing to credit Cecylia for her day-to-day expenditures and her household services, the trial court ignored her equity in the marriage. The majority correctly observes that Reginald "went to great lengths" to keep his accounts separate. *Ante* at 2. Rather than rewarding his nefarious efforts, I would hold that Cecylia is entitled to share in Reginald's investment of their mutual labors.

/s/ Elizabeth L. Gleicher