STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH CONANT WILSON,

Plaintiff/Counterdefendant-Appellant,

v

SCOTT CHURCH WILSON,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
September 10, 2020

No. 349234
Jackson Circuit Court
LC No. 18-000868-DO

Before: CAVANAGH, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's divorce judgment, challenging the decision to award each party their respective 401(k) accounts. We affirm.

Plaintiff married defendant in October 2015, and filed for a divorce in April 2018. The parties were both employed by Consumers Energy. Plaintiff had worked for Consumers for six years and defendant had worked for Consumers for 26 years. Before their marriage, they both contributed to 401(k) plans that were managed by Fidelity Mutual. During their marriage, they both contributed $18,500 annually, the maximum amount allowed by federal law. The amount in plaintiff's 401(k) at the time of the parties' marriage was $63,453.85. It had appreciated to $169,565.58 when she filed for divorce (an increase of $106,111.73). Defendant had $400,061.16 in his account at the time of the marriage. It had increased to $612,722.09 when plaintiff filed for divorce (an increase of $212,660.93).

The contested issue in this appeal concerns the parties' individual 401(k) accounts. Plaintiff argued in the trial court that she was entitled to a portion of the appreciation that accrued to defendant's 401(k) during the marriage as a marital asset under MCL 552.18(1). That is, plaintiff claimed that she was entitled to a net award of about $53,000, at minimum, which was her half of the equity in defendant's account (about $106,000) off-set by defendant's half of the equity in her account (about $53,000). To the contrary, defendant argued that plaintiff was not entitled to any of his 401(k) because both parties contributed the same amount of money to their respective 401(k) plans during the marriage and defendant's 401(k) account only grew more because he started out with more—which was his premarital, separate property. Defendant argued

that the growth experienced by his 401(k) account was caused by passive appreciation, and thus, excludable from the marital estate as his separate property. See *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997). The trial court agreed with defendant, holding that plaintiff was not entitled to any portion of defendant's 401(k) because the growth was the result of passive appreciation of his premarital asset. Plaintiff appeals.

Plaintiff argues that the trial court erred by awarding each party their individual 401(k) account because she was entitled to a portion of the appreciation that accrued to defendant's 401(k) account during their two-year marriage. We disagree.

"In a divorce action, this Court reviews for clear error a trial court's factual findings on the division of marital property and whether a particular asset qualifies as marital or separate property." *Hodge v Parks*, 303 Mich App 552, 554-555; 844 NW2d 189 (2014). "Findings of fact are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made." *Id*. at 555 (quotation marks and citation omitted). We consider whether a trial court's dispositional rulings are fair and equitable in light of its findings of fact and will reverse only if convinced that the disposition is inequitable. *Id*. (citation omitted).

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Id*. at 560-561 (quotation marks and citation omitted). Before dividing marital property between parties in a divorce action, the trial court must first determine what property is marital versus separate property. *Cunningham v Cunningham*, 289 Mich App 195, 200-201; 795 NW2d 826 (2010). Typically, each party will be awarded their own separate property without division with the other party. *Reeves*, 226 Mich App at 494. "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*, 289 Mich App at 201, citing MCL 552.19. For example, income earned during the marriage is generally presumed to be marital property. *Id*. Similarly, MCL 552.18(1) provides:

> Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.

There is no dispute in this case that the amount of defendant's 401(k) account that accrued up until the parties were married was defendant's separate property and not subject to division as marital property. However, plaintiff argues that the amount of appreciation that accrued between when they were married and when the divorce was filed did constitute marital property subject to division as part of the martial estate, as set forth in MCL 552.18(1).

Defendant opposed distributing to plaintiff an equal share of the appreciation that accrued and relied on the case of *Reeves*, 226 Mich App at 496-497, in the trial court and does so here on appeal. Defendant argues that when a premarital asset increases in value because of passive appreciation during a marriage, that amount of appreciation does not become part of the marital estate subject to distribution in divorce proceedings. But the asset at issue in *Reeves* was the defendant's ownership interest in a shopping center—not a 401(k) plan—that he had acquired

before the parties were married. *Id*. at 492. The defendant's interest in the shopping center had increased by $100,000 during the marriage but this Court held that the defendant's interest in the center was "wholly passive at all times." *Id*. at 497. In other words, neither the efforts of the defendant nor the plaintiff contributed to the appreciation of that asset; thus, the amount of appreciation could not be considered part of the marital estate. *Id*.

The facts in this case are distinguishable. Again, the asset at issue is a 401(k) plan, not a piece of real property. And financial contributions were made to the 401(k) plan with income earned by defendant during the marriage—income which is presumed to be marital property. See *Cunningham*, 289 Mich App at 201. Those financial contributions certainly impacted the amount of appreciation that accrued. Thus, the growth of defendant's 401(k) plan was not achieved in a "wholly passive" manner. It was achieved with contributions from marital property. But more importantly, MCL 552.18(1) specifically mandates that vested retirement benefits accrued during the marriage must be considered part of the marital estate. Nevertheless, the statute does not preclude the court from awarding each party their own 401(k) accounts during the division of the marital estate—which would include the amount of appreciation that accrued to each party's 401(k) account during the marriage. In other words, we disagree with the trial court to the extent that it considered the value of appreciation that accrued to defendant's 401(k) as his separate property on the ground that it was "passive appreciation" that occurred without efforts from either party; it was part of the marital estate.

But we conclude that, under the circumstances of this case, the trial court's decision to award each party their own appreciated 401(k) plan was fair and equitable. As the trial court noted, both parties contributed the same amount of *marital* funds—$18,500 a year—toward their respective 401(k) accounts during the marriage. The fact that defendant's account grew more than plaintiff's account was simply because he had substantially more in his account *before* the parties were married. There was no evidence that either party did anything else to cause the significant growth of defendant's 401(k) account. In other words, it would have achieved the same growth even if the parties were not married. And plaintiff's 401(k) account also appreciated during the marriage though the use of the exact same amount of marital funds. The amount of appreciation to their respective 401(k) accounts was in proportion to the value each had as premarital assets. But contrary to the case relied upon by plaintiff in support of her argument, *McNamara v Horner*, 249 Mich App 177, 184; 642 NW2d 385 (2002), both plaintiff and defendant in our case contributed identical dollar amounts of marital income toward the growth of their personal 401(k) accounts during the marriage. Under the circumstances of this case, by awarding each party their own appreciated 401(k) accounts, the trial court achieved a fair and equitable settlement. See *Hodge*, 303 Mich App at 555.

And we reject plaintiff's claim that the trial court failed to make sufficient factual findings to allow appellate review of its disposition of the parties' 401(k) accounts. The court's factual findings were sufficient in that regard and plaintiff has failed to identify what additional facts

should have been considered. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (a party may not assert an error and leave it up to us to discover and rationalize her claim).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello
/s/ Jonathan Tukel