

STATE OF MICHIGAN
COURT OF APPEALS

AMY K. WOLCOTT,

Plaintiff-Appellee,

v

EDGAR J. WOLCOTT,

Defendant-Appellant.

UNPUBLISHED

March 11, 2021

No. 351918

Saginaw Circuit Court

Family Division

LC No. 15-027889-DM

Before: LETICA, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right the trial court’s order on remand determining that plaintiff’s 10% ownership in Hammer Building & Restoration, Inc. (“Hammer”) was separate property and not subject to division in the parties’ divorce action. We reverse.

I. FACTUAL BACKGROUND

In July 1999, plaintiff’s father gifted to plaintiff a 10% interest in Hammer.¹ Shortly thereafter, in August 1999, plaintiff and defendant were married. Throughout the marriage, plaintiff and defendant maintained separate bank accounts. When plaintiff received distributions related to the Hammer stock, she would deposit them into her individual checking account. In 2015, plaintiff filed for divorce.

During the divorce proceedings, plaintiff moved for partial summary disposition, arguing that the Hammer stock was not a part of the marital estate and was not subject to division. The trial court granted the motion and subsequently awarded the 10% interest in Hammer to plaintiff. Defendant appealed and we reversed, noting:

We agree with defendant that a genuine issue of material fact exists as to whether the 10% ownership interest in Hammer was a marital or separate asset.

¹ The only other shareholders at the time were plaintiff’s father and plaintiff’s brother.

First, we agree that the evidence presented does not conclusively show whether the entire 10% was gifted to plaintiff at one point in time or divided into two 5% interests. Second, we conclude that the trial court failed to consider whether the funds had been intermingled, and third, whether defendant had contributed to the value of the stock. [*Wolcott v Wolcott*, unpublished per curiam opinion of the Court of Appeals, issued April 26, 2018 (Docket No. 336472), p 3 (footnote omitted).]

We remanded for the trial court to further analyze whether the Hammer stock was marital or nonmarital property. *Id.*

On remand, the trial court held an evidentiary hearing. Following the hearing, the court concluded as noted above that the Hammer stock was acquired in its entirety in July 1999—prior to the marriage. The court further held that defendant failed to establish that he had contributed to the value of the stock. On that basis, the court again held that the property was not a marital asset and was not subject to division. Defendant now appeals for a second time.

II. ANALYSIS

Defendant argues that the trial court erred by concluding that the Hammer stock was separate property and was not part of the marital estate without considering whether the Hammer stock was commingled with marital property during the marriage. We agree. Additionally, on the basis of the evidence collected on remand, we further conclude that the Hammer stock was part of the marital estate and must be divided accordingly.

We review for “clear error a trial court’s findings of fact regarding whether a particular asset qualifies as marital or separate property.” *Woodington v Shokoohi*, 288 Mich App 352, 357; 792 NW2d 63 (2010). Clear error occurs when “this Court is left with the definite and firm conviction that a mistake has been made.” *Id.* We also give “special deference to a trial court’s factual findings that were based on witness credibility.” *Id.* at 358. We review de novo questions of law. *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010).

When dividing marital property, the trial court must first determine what property is marital and what property is separate. *Id.* “[M]arital assets are subject to division between the parties but the parties’ separate assets may not be invaded.” *Woodington*, 288 Mich App at 364. In general, separate property is acquired or earned before the marriage and marital property is property acquired or earned during the marriage. *Cunningham*, 289 Mich App at 201. Separate property may be transformed into marital property if it is “commingled with marital assets and treated by the parties as marital property.” *Id.* (quotation marks and citation omitted). The fact that the property was held jointly or individually is not dispositive of whether the property is separate or marital. *Id.* at 201-202. The “actions and course of conduct taken by the parties are the clearest indicia of whether property is treated or considered as marital, rather than separate, property.” *Id.* at 209.

Plaintiff testified that she and defendant maintained separate bank accounts throughout the marriage, and that she at all times deposited distributions from the Hammer stock into her individual checking account. However, plaintiff did not testify that she kept distributions from the Hammer stock separate from any other funds in her bank account, including her income as a

Hammer project manager. Notably, the latter undoubtedly constituted marital funds. See *id.* at 201 (noting that income earned by one spouse during a marriage is generally presumed to be part of the marital estate). Plaintiff also testified that she used distributions from the Hammer stock—in addition to her other income—to pay certain marital expenses and household bills. Plaintiff’s conduct, including her failure to separate the proceeds related to the Hammer stock from other marital funds and her use of the funds to pay marital expenses, indicates that the Hammer stock was a marital asset. See *id.* at 209.

In light of the above, we conclude that the trial court clearly erred by failing to consider the issue of whether funds were commingled such that the Hammer stock could be included in the marital estate. We further conclude that the parties’ conduct demonstrates that the stock was, in fact, part of the marital estate.²

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

² Because we conclude that the Hammer stock was commingled with marital property such that it was a part of the marital estate, we need not consider the alternative bases for relief raised in defendant’s brief.