Separate and Marital Property

By James J. Harrington III

Michigan cases involving separate and marital property are constantly evolving and reflect the studied application of prior precedent to the unique factual circumstances present in every divorce case. Whereas *published* opinions of the Court of Appeals are binding on the trial courts, it is both interesting and significant to observe widespread use of *unpublished* decisions of the Court of Appeals; although an unpublished decision does not set precedent under stare decisis,[1] it may be considered for its "persuasive reasoning."[2]

The state of the law regarding separate and marital property can be evidenced by a careful culling of significant decisions involving property awards in divorce cases. Of the scores of recent appellate decisions, the following cases may be significant not just to family law attorneys, but to practitioners in other fields of law including workers' compensation, personal injury, and estate planning.

Separate property

The determination by a trial court that certain property in a divorce case is "separate property" means that (1) it is not considered as part of the marital estate, (2) it will not be divided by the divorce court, and (3) it will be awarded to the party prevailing upon a separate property claim, but for limited statutory exceptions. There can be enormous financial consequences from a separate-versus-marital property determination.

Workers' compensation award

The *Cunningham v Cunningham*[3] published decision involved multiple issues arising out of claims of "marital" versus "separate" property associated with receipt of monthly workers' compensation benefits as well as a retroactive award of $150,000. The Court of Appeals reversed the trial court:

- A retroactive award of workers' compensation benefits is marital property only to the extent it reflects earnings during the marriage.
- If a portion of an award was placed into a joint bank account and used to purchase a marital home, it lost its character as separate property; the landmark *Reeves v Reeves*[4] case was distinguished because it involved payment on premarital property from separate funds during the marriage.
- Even if a portion of the award was separate property, the trial court was directed to consider whether invasion of this asset was appropriate in accord with MCL 552.23 (the "need" statute) and MCL 552.401[5] (the "commingling/contribution" statute).

Personal injury award and pain and suffering

In the *Gocha v Gocha*[6] case, proceeds from an award for pain and suffering in a personal injury case were separate property.

Citing *Pickering v Pickering*,[7] the Court of Appeals held that settlement proceeds from a horrific medical malpractice case were separate property. It further noted that (1) there was no claim of "loss of consortium" in the malpractice case, (2) the settlement check was not jointly payable to the parties, (3) the husband was not requesting alimony, and (4) he did not contribute greatly to relieving the suffering of his wife. This case is a reminder to practitioners that procedural and substantive issues in unrelated areas of the law such as personal injury litigation can significantly affect a subsequent divorce case. Can joint representation of a husband and wife with evident marital difficulties give rise to either a conflict of interest or professional negligence liability in a personal injury case?

Title not determinative

The unpublished *Kaiser v Kaiser*[8] decision in November 2013 reiterates the important principle (citing *Cunningham*) that "whether an asset is held jointly or individually" is not dispositive in determining the nature of the property as marital or separate. Assets are not separate simply because they are owned by one spouse individually. *Kaiser* involved an interesting history of a transfer of assets, evidenced by quitclaim deeds, to a spouse in an effort to avoid creditors. Also, monies were borrowed by a spouse from a relative to purchase another piece of property. The trial court was affirmed and the Court of Appeals noted that the husband made no meaningful contribution to these properties after their acquisition.

Inheritance and commingling

Lagola v Lagola[9] is fully consistent with both *Kaiser* and *Cunningham*, emphasizing the importance of a party's treatment of separate property lest it lose its protected status through commingling or contribution. Inheritances are a classic form of separate property. Unless preserved intact, inheritances may be regarded as marital property. Mr. Lagola received an inheritance of $125,000 during his 37-year marriage; the funds were put into a joint account and $95,000 was used to pay off the marital home. The trial court was reversed when it did a carve-out of the $95,000 to the husband. *Lagola* may be read as consistent with a trend of cases narrowing the "tracing" in *Reeves*. If an estate planning attorney is involved in the transfer of inherited assets, is there a duty to advise the recipient regarding separate versus marital property? Is there a duty to advise of the legal significance of commingling inherited money with marital assets?

Commingling—summary disposition

In *Golowic v Golowic*,[10] the Court of Appeals was presented with a classic recipe for separate property: a short-term marriage, a premarital interest in oil and gas leases, and no contribution by the wife. This issue was addressed by way of a motion for summary disposition per MCR 2.116(C)(10). In affirming the granting of summary disposition by the trial court, the Court of Appeals did not find the joint signing of the oil leases to be dispositive, and cited *Cunningham* for the proposition that holding property jointly or individually is not dispositive of whether it is classified as separate or marital. The case was remanded for further findings regarding whether the contributions of the spouse justified invasion in accord with § 401.

Intent—separate/marital property

An emerging trend in separate property cases is for the trial court to consider the intent of the parties. The *Powers v Powers*[11] case is only one of several recent cases considering intent; it involved a second marriage and testimony by the husband that after his first marriage he was determined to keep his investments and accounts as separate property. Relying on *Reed v Reed*,[12] a premarital agreement case, the Court of Appeals held that when parties agree to keep their respective acquisitions—before or during the marriage—as separate property, the court should give effect to that agreement. The problem with intent in separate property cases is that the issue may be the subject of self-serving testimony. How should the court handle conflicting testimony regarding intent? Prudent trial counsel will aggressively litigate for or against intent proofs at trial.

Intent—marital home

The 2013 case of *Boots v Vogel-Boots*[13] likewise considered the intent of the parties when they purchased a home in anticipation of marriage to be used as the marital home; it was titled as joint tenants with rights of survivorship. While the premarital contributions of the parties from their separate property assets were not disputed, the finding of the trial court that the couple acted as a *single economic unit* barred any restoration of premarital monies to the husband.

Fast Facts

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Marital property

Once separate-versus-marital property issues are resolved, the trial court must value the assets and liabilities of the marriage and make an equitable (not necessarily equal) division. It is a rare opinion that does not refer to the "*Sparks* factors," which include (1) the length of the marriage, (2) the source of the property or the parties' contributions toward its acquisition, (3) the ages of the parties, (4) the parties' health, (5) the parties' life status, (6) the parties' needs and circumstances, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) any other equitable circumstances or principles of equity.[14]

The *Sparks* factors are almost interchangeable with "spousal support factors." There are additional factors set forth in the *Myland v Myland*[15] and *Olson v Olson*[16] cases involving spousal support, which arguably apply with equal force to property awards. These include a specific finding regarding fault and the effect of cohabitation on a party's financial status, and whether either is responsible for the support of others. One would anticipate that the expanded role of domestic violence allegations in custody and parenting time cases will find its way into independent consideration in property awards.

Not surprisingly, there has been considerable refinement of the "rules of construction" regarding the *Sparks* factors. These include the "no punishment" rule prohibiting giving disproportionate weight to any one factor;[17] the prohibition against "significant departure from congruence, unless clearly explained;"[18] and "no need for mathematically equal portions of the marital estate."[19] Of the scores of recent decisions involving marital property, the following are among the most significant.

Business valuations

For many years, attorneys and CPAs have argued over whether the inclusion of excess compensation of an owner in a business valuation and using the same income for either child support or spousal support purposes constituted a double dip or "double counting" of the same income. In *Loutts v Loutts*,[20] a published opinion released on September 20, 2012, the Court of Appeals adopted a case-by-case approach to double-dip issues and refused to adopt the bright-line test used in the *Heller v Heller*[21] cases from Ohio. To the extent that double-dip issues affect spousal and child support, they are a must-know for judges and referees.

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Double dip permitted

The *Alexander v Alexander*[22] case was decided one year after *Loutts* but made no mention of the earlier case. However, the decision was perfectly consistent with the case-by-case analysis of double-dip issues. The Court of Appeals held that the husband could be ordered to pay spousal support from future income of the business, and that a party can be required to invade the award of separate assets when one party is well established and the other party is not. *Alexander* also reminds us that even when a marital estate is equally divided, the trial court must still analyze the *Sparks* factors.[23]

Enforcement of settlement agreements

Buyer's remorse regarding a settlement frequently occurs. The Court of Appeals aggressively affirmed a mediation settlement in the *Vittiglio v Vittiglio*[24] case. It refused to set aside a valid settlement agreement on grounds of fraud, duress/severe stress, or claims of substantive or procedural unconscionability. Attorney fees and sanctions of $17,695 were sustained.

Judgments of divorce: merger versus incorporation

The *Thursfield v Thursfield*[25] case in October 2013 sent shock waves throughout the family law community. For decades in Michigan, meticulous attention had been paid to the legal significance of incorporation and merger language in settlement agreements. If a settlement was merged and incorporated, the family court had exclusive responsibility to enforce the settlement with a one-year statute of limitations. Conversely, if a property settlement agreement was not merged, enforcement required an independent action for breach of contract and was subject to a six-year limitation period. In *Thursfield*, the judgment of divorce provided that the trial court "retained jurisdiction" to enforce the judgment; accordingly, the independent circuit court action that had been pending for five years was dismissed. There is some indication that this issue was never raised by either party and emerged sua sponte in oral argument at the Court of Appeals.

Property earned after the marriage

The 2009 case of *Skelly v Skelly*[26] controls Michigan law today. Assets earned during a marriage are marital assets, whether received during or after the marriage. Assets earned after the marriage are separate property. The Court of Appeals ruled that a retention bonus paid in three installments, both during and after the marriage, was not marital property. A possible future, unearned asset is neither a marital asset nor a separate property asset.

Post-judgment bonuses

The *Skelly* rule was specifically applied in the 2013 *Hoskins v Hoskins*[27] case, holding that future speculative bonuses do not fit into the category of marital assets or separate assets because they do not yet exist. The case was remanded for further findings.

Qualified domestic relations orders—timeliness

In *Neville v Neville*,[28] the Court of Appeals held that a motion to modify a qualified domestic relations order 14 years after entry of judgment and 13 years after entry of the order was time barred. The Court of Appeals also noted that in *Thornton v Thornton*,[29] a motion to amend a 1993 qualified domestic relations order that was filed in 2005 was untimely and unreasonable, and relief would not be afforded per MCR 2.612.

Conclusion

An unspoken thread in nearly all of these cases is application of fundamental fairness arising out of equitable principles. Prudent counsel would be well advised to apply this litmus test well in advance of an appeal and inquire as to whether the case will rise and fall on a strict application of legal principles creating a harsh result or whether, given the totality of circumstances, the trial court's decision was a fair one. A more even-handed evaluation might result in fewer appeals. ■

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ENDNOTES

1. MCR 7.215(C)(1).
2. *Beyer v Verizon North, Inc*, 270 Mich App 424; 715 NW2d 328 (2006).
3. *Cunningham v Cunningham*, 289 Mich App 195; 795 NW2d 826 (2010).
4. *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997).
5. These two statutes are independent bases to "invade" separate property. A § 23 claim involves financial "need"; a § 401 claim involves claims of "contribution" to or "commingling" of separate property and marital assets.
6. *Gocha v Gocha*, unpublished opinion per curiam of the Court of Appeals, issued October 28, 2010 (Docket No. 292422).
7. *Pickering v Pickering*, 268 Mich App 1; 706 NW2d 835 (2005).
8. *Kaiser v Kaiser*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2013 (Docket No. 311014).
9. *Lagola v Lagola*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2012 (Docket No. 303929).
10. *Golowic v Golowic*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2011 (Docket No. 298973).
11. *Powers v Powers*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2012 (Docket No. 301868).
12. *Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005).
13. *Boots v Vogel-Boots*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 2013 (Docket No. 309265).
14. *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992).
15. *Myland v Myland*, 290 Mich App 691; 804 NW2d 124 (2010).
16. *Olson v Olson*, 256 Mich App 619; 671 NW2d 64 (2003).
17. *Welling v Welling*, 233 Mich App 708; 592 NW2d 822 (1999).
18. *McNamara v Horner*, 249 Mich App 177; 642 NW2d 385 (2002).
19. *McNamara*, *supra*.
20. *Loutts v Loutts*, 298 Mich App 21; 826 NW2d 152 (2012).
21. *Heller v Heller*, unpublished opinion per curiam of the Court of Appeals of Ohio, issued June 30, 2008 (Docket No. 07AP-871) [*Heller I*]; followed by *Heller v Heller*, unpublished opinion per curiam of the Court of Appeals of Ohio, issued December 14, 2010 (Docket No. 10AP-312) [*Heller II*].
22. *Alexander v Alexander*, unpublished opinion per curiam of the Court of Appeals, issued September 10, 2013 (Docket No. 310917; 311896).
23. *Alexander* relied on *Sands v Sands*, 442 Mich 30; 497 NW2d 493 (1993), in reaching this conclusion.
24. *Vittiglio v Vittiglio*, 297 Mich App 391; 824 NW2d 591 (2012).
25. *Thursfield v Thursfield*, unpublished opinion per curiam of the Court of Appeals, issued October 8, 2013 (Docket No. 302186).
26. *Skelly v Skelly*, 286 Mich App 578; 780 NW2d 368 (2009).
27. *Hoskins v Hoskins*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2013 (Docket No. 309237).
28. *Neville v Neville*, 295 Mich App 460; 812 NW2d 816 (2012).
29. *Thornton v Thornton*, 277 Mich App 453; 746 NW2d 627 (2007).