STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND FRANK MORA,

Plaintiff-Appellant,

v

LINDA M. MORA,

Defendant-Appellee.

UNPUBLISHED
December 29, 2009

No. 284992
Livingston Circuit Court
LC No. 05-002877-DO

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiff Raymond Mora appeals as of right an April 3, 2008 amended judgment of divorce. We affirm.

I. Basic Facts and Proceedings

The parties were married on November 2, 1991. They had each been married once before. The parties did not have children together. Plaintiff has two children from his previous marriage, and defendant Linda Mora has one child from her previous marriage. At the time of trial, plaintiff was 70 years old and defendant was 60 years old. Plaintiff filed for divorce on August 15, 2005, seeking to end the 14-year marriage.

Three days before the marriage, the parties executed a prenuptial agreement. The agreement states, in relevant part, that:

> All interests of both parties in any assets or property of any kind real, personal, or mixed, owned or acquired by each party prior to the time of their marriage, the proceeds of any such assets or property, and any assets or property acquired with the proceeds of such assets or property, shall remain or become the separate property and estate of that respective party and upon the termination of the marriage shall be retained by that party. Upon the death of the parties, each party's separate property and estate shall be conveyed pursuant to the terms of each party's respective Will.

Appendices attached to the agreement listed assets to be controlled by the above paragraph, and specifically included plaintiff's "House with Life Insurance ([$]165[,000] Sale – [$]15[,000] Selling Cost)" "[t]hrough 1/20/92" at "[$]150[,000]" and "[a]fter 1/20/92" at "[$]150[,000]."

At the time the parties were married, plaintiff had been recently retired from Unisys and received a six-month salary stipend. On February 12, 1991, however, plaintiff began work as an engineer at Oakland University until again retiring in 2001. At the time the parties were married, defendant worked at Comerica Bank. Defendant continued to work at Comerica Bank (and subsidiaries) until 1996 when she began work at DHL. Defendant worked at DHL until she was laid off during these proceedings. From February 1992 until 2000, the parties were covered under plaintiff's health insurance plan, and then they were covered under defendant's health insurance plan. Defendant testified that, according to the parties' tax returns, she earned $615,512 over the course of the marriage. She also testified that plaintiff earned $545,559 over the course of the marriage and contributed $100,771 to his pension fund and social security.

At the time the parties were married, plaintiff lived in the Farmington Hills home on Skye Court, and defendant lived in a modular home. After the parties married, defendant sold her modular home and moved into the Farmington Hills home. Defendant spent the $6,000 proceeds that resulted from the sale of her modular home. Relying on tax records, defendant testified that, at the time of the marriage, the Farmington Hills home was subject to a $43,129 mortgage. The parties lived in the Farmington Hills home until moving to Howell in 2002. Plaintiff sold the Farmington Hills home for $260,000, and paid the $15,125 mortgage balance. Plaintiff used $187,000 of the proceeds to purchase a home in Howell for $277,000, located on Musson Road. He mortgaged this property in the amount of $87,000. Plaintiff testified that he used $30,000 from the sale of the Farmington Hills home to landscape the Howell home. Title to the Howell home was solely in plaintiff's name, which defendant testified was done to protect plaintiff's ego and to protect defendant against the new mortgage.[1]

The trial court conducted a contentious seven-day bench trial over a span of approximately six months. The trial largely consisted of testimony from defendant and plaintiff. The only other witness was Jessie Collins, a financial advisor at Smith-Barney. She testified that she was familiar with an account held by defendant's mother, Helen Klaus. She testified that the account was presently titled jointly to Helen and her two daughters with rights of survivorship. Collins testified that the account balance was $285,000.

Defendant testified at length in regard to her contributions during the marriage. She testified that during the marriage she deposited all her earnings, which she testified were over $615,000, into a joint checking account shared with plaintiff. She testified that plaintiff paid the mortgage, taxes, and utilities from the joint checking account. When asked whether her funds were used "to reduce the principle mortgage balance," defendant replied "[e]verything that I made went into our joint checking account, and all those payments were made out of our joint checking account." Defendant also testified that plaintiff used the joint checking account for

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[1] There was no actual valuation of the Howell home during the divorce proceedings, but defendant "vaguely" believed the home was worth $340,000. In defendant's trial brief and brief on appeal, defendant proffered values of $333,000 and $310,0000, respectively. The trial court, in a June 22, 2007, opinion, discussed *infra*, found there was $43,000 equity in the Howell home. Considering this finding in conjunction with the purchase price $277,000, it appears that as of June 22, 2007, the trial court valuated the Howell home at $320,000.

home repair, to repay loans, support his son Adam while living in their home, and to make payment on life insurance policies. Defendant produced every checkbook register for the joint checking account. Defendant's testimony highlighted that while, for instance, she deposited a $7,668 bonus into the joint checking account, plaintiff deposited only his Oakland University salary, and, after retiring, only pension and social security proceeds. Defendant testified that without her contributions there would not have been sufficient funds to pay the bills. She testified that the joint checking account was also used to purchase groceries and home furnishings, make car payments and for entertainment expenses.

Plaintiff testified that his son, Adam, lived at the Farmington Hills home while in college (1991-1997). Plaintiff testified that he and defendant, "had our separate accounts, and we pretty much maintained what we had before we were married." Plaintiff testified that he deposited his entire Oakland University earnings into the joint checking account. In regard to how bills were paid, plaintiff testified:

> when you get a monthly statement, she would get a bill for her accounts and I would get a bill for my accounts. Um, she had her own car payment, I had my own car payment. We had independent accounts. She would write checks against everything she owed, and she was very good at that. And she would not write checks over the amount of her income for that month. I did the same. I, I paid the bills that came to me out of the income that I earned from Oakland University, not exceeding that amount that, uh, I was paid.

Plaintiff testified that leftover amounts would be used to pay for groceries, restaurants, and ATM withdrawals.

Plaintiff testified that when he was about to retire from Oakland University, he changed his investment portfolio from growth orientated assets to income producing assets. He established a retirement account that initially paid him $800 a month, $684 after taxes, but later increased to $1,200, $900 after taxes. Plaintiff testified that his Unisys pension paid him $864 a month. He testified that he also received social security. Plaintiff testified that, after he retired, he deposited his pension check and social security check into the joint checking account. His other retirement funds went into his separate accounts. In sum, plaintiff testified that after he retired,

> I normally get about $2,000 a month deposited into the [joint checking account.] Most months that's sufficient to pay my obligations for the month. Some months I get an insurance bill which comes quarterly or semi-annually. Some months other things happen that you have other things, major expenses, a car repair or something like that. This other Standard Federal checking account is used to cover that. In the winter, to cover the heating bills, excessive bills.

During cross-examination, defense counsel established that plaintiff sometimes invested money that he had earned during the marriage into accounts under his sole name. For instance, plaintiff admitted that he used his earnings from Oakland University to purchase a CD titled to him and one of his sons. Plaintiff agreed with defendant's counsel that, "because the account is solely in your name . . . all the funds in that account belong to you and only you."

The trial court entered a judgment of divorce on December 26, 2006. The judgment divided the parties' assets simply by awarding each party the assets that were held in their name. In regard to the homes titled to plaintiff during the marriage, the judgment provided that plaintiff "shall be the sole and separate owner . . . free and clear of any claim or interest of defendant."

On January 12, 2007, defendant filed a motion for a new trial and relief from judgment. Plaintiff responded to the motion for a new trial on February 12, 2007, and agreed in part with defendant that the court "entered a Judgment without making any findings of fact." Plaintiff noted that MCR 2.517(A)(1) requires courts to make findings of fact and that defendant would likely appeal and findings of fact would be necessary for appellate review.

At the February 21, 2007 hearing, defendant's counsel complained that the trial court became frustrated with him at trial and did not accept any of his arguments. Defendant's counsel also complained that the trial court adopted plaintiff's proposed judgment with little or no changes. After defendant's counsel presented his argument, the trial court asked to see the parties in chambers. An hour later the hearing resumed, and the trial court indicated that many issues had been discussed. The trial court also indicated that it would reschedule the hearing and allow plaintiff's counsel time to address issues raised by defendant's counsel.

At the March 14, 2007 hearing, defendant's counsel addressed the trial court and spoke at length in regard to how the trial court had prevented him from introducing evidence. Defendant's counsel then reiterated defendant's position that plaintiff contributed money that he earned during the marriage to his premarital investments, some of which he then invested separately. Defendant's counsel further argued that throughout the marriage plaintiff used marital funds to pay the mortgage and taxes on his homes. Plaintiff's counsel responded, asserting that the proceedings were fair and that the judgment was equitable. At the end of the hearing, the trial court indicated that settlement should be encouraged. The trial court also indicated to plaintiff that "Um, Mr. Mora, I want you to know that, um, I may be re-doing the, uh, judgment. It may not be so much in your favor." The trial court then indicated to plaintiff, "The point is, that I'm trying to make, is that you could put an end to this, um, if you wanted to."

On June 22, 2007, the trial court issued an opinion. The opinion recognized that "there was a mistake of fact" and that the trial court was "making new findings of fact and conclusions of law." The June 22, 2007 judgment of divorce differed markedly from the December 26, 2006 judgment of divorce. The trial court continued to find the prenuptial agreement valid. However, in regard to the appreciation of the marital homes, the trial court found that:

> Plaintiff tried unsuccessfully to keep the home separate. Plaintiff mortgaged his home and had only his name on the title. Plaintiff also had his home in the [pre]nuptial agreement as separate property. The Plaintiff alleged that he paid all taxes, maintenance, mortgage on the home by paying funds from a joint checking account. Plaintiff is very familiar with financial assets. It was clear at the trial that Defendant was not the active financial person in the family. The Plaintiff maintains that since he placed enough in the joint account to pay for his debts, he kept the real property separate.
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> This Court does not agree with the Plaintiff's position. Plaintiff and Defendant both made income working, and both deposited their checks into a

joint account. The problem with this is that Plaintiff says his money went to his home, a valuable asset, and Defendant's income paid for other things (items that were disposable). Therefore, Plaintiff would end up with the home and Defendant would have few assets, if any. Defendant and Plaintiff are educated and employed until Plaintiff retired and Defendant was laid off. While it is true Plaintiff had in the prenuptial agreement separate property naming the Farmington Hills home or proceeds, it would be fair to give Plaintiff the money paid on the Farmington Hills home before they were married. After the marriage, however, money was co-mingled, and therefore, Defendant should have some interest in the Farmington Hills home and [Howell] home because Plaintiff and Defendant's money was co-mingled.

In dividing the equity in the marital homes, the court stated:

> This Court finds that the Plaintiff, Mr. Mora, owned a home in Farmington Hills prior to the marriage, and that it is covered by the prenuptial agreement. The Court further finds that this house was sold in June of 2002 for . . . ($187,000.00),[2] and that it had a mortgage balance of . . . ($15,000.00) at the time of the sale. The testimony also proved that . . . ($28,000.00) in equity was acquired during the marriage through payments from joint marital assets. As such, this Court finds that the Plaintiff's value from the sale of the home in Farmington Hills is . . . ($144,000.00) covered by the [pre]nuptial agreement. The Court finds that, based upon the testimony and exhibits, the proceeds from the sale were used to purchase the [Howell] home in Howell, Michigan. This home was purchased for . . . ($277,000.00) on June 4, 2002. Based upon the evidence, the Plaintiff owes . . . ($90,000) on the mortgage on his home. There was no testimony or other evidence as to the value of the home on any other date than the date of purchase. Therefore, based upon the evidence before the Court, the Court finds that there is . . . ($43,000) in equity in the [Howell] property that this Court finds to be a martial asset because all the payments, insurance, taxes and upkeep were paid from marital assets. Therefore, this Court awards the [Howell] home to the Plaintiff and one half equity to each of the parties. The Defendant and the Plaintiff have . . . ($28,000.00) in equity in the Farmington Hills home, and . . . ($43,000) in the [Howell] home. Each party will receive one half of the equity in each home.

On July 3, 2007, plaintiff filed a motion for reconsideration, arguing that the trial court committed several errors. In regard to the marital home, plaintiff objected to the trial court's conclusion that defendant was entitled to the equity in the marital homes and also objected to the amount that the trial court awarded defendant for the equity in the marital homes. On July 5, 2007, defendant filed a motion for reconsideration and clarification. Defendant's motion did not

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[2] This figure is incorrect, as plaintiff's counsel later clarified that the Howell home was purchased for $260,000, which defendant does not dispute.

address the division of equity in the marital homes. Defendant also filed an answer to plaintiff's motion for reconsideration. Defendant argued that she "believes the Court's determination of $43,000 is less than the amount which would be an appropriate award for her contributions to the [Howell home], but Defendant accept [sic] this Court's value with respect to the same."

After an August 15, 2007 hearing, the trial court issued an October 4, 2007 supplemental opinion. The supplemental opinion, while not changing the amount awarded to defendant, changed the basis for the award. In short, instead of supporting the award to defendant on the theory that it represented one half of the appreciation of the marital homes during the course of the marriage, it awarded defendant a refund of one half of the mortgage, taxes, and insurance payments made during the marriage. The supplemental opinion states:

> It is this Court's opinion for all the reasons stated in the previous opinion that Defendant is to receive some interest in the two homes which are the subject of the parties' pre-nuptial agreements. It was always this court's intention to divide the payments made on both the Farmington Hills Home and the [Howell] Road home because these payments were made with co-mingled funds toward a non-marital asset. It is for that reason that all of the payments made on both homes from the date of marriage to September 30, 2006, including interest, principal, and taxes be divided equally by the parties, and that Plaintiff pay that amount to Defendant. The Court is dividing the co-mingled payment on the two homes in this manner because there was no other credible evidence as to the value of the homes, and the Court feels that this award to Defendant is necessary for all the reasons stated in this Opinion.

On April 3, 2008, the trial court entered an amended judgment of divorce. The amended judgment provided that plaintiff "shall be the sole and separate owner of the [Howell] home." However, the trial court ordered that plaintiff must pay defendant "one half of the mortgage payment (principal and interest) and taxes that were paid on the Farmington Hills property and the [Howell] Road property from the date of the marriage to the date to [sic] July 31, 2005. The sum total of the mortgage and taxes totals $125,814.75 and Plaintiff shall pay Defendant one half of this sum which is $63,253.15."

II. Division of Assets

A. Standard of Review

The interpretation of a contract is a question of law reviewed de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

In addition, this Court reviews the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *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. *Johnson v Johnson*, 276 Mich App 1, 10-11; 739 NW2d 877 (2007). This Court gives special deference to a trial court's findings when based on the credibility of the witnesses, *id*. at 11, and the determination of the proper time for valuation of an asset is in the trial court's discretion. *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). If the trial court's findings of fact are

upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Sparks*, *supra* at 151-152; *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

B. Analysis

Plaintiff argues that the trial court committed error in not dividing marital assets in accordance with the prenuptial contract.

"'The trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets.'" *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005), quoting *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). "Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded." *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). Also, assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate, and the appreciation of a premarital asset during the marriage is subject to division as part of the marital estate unless the appreciation was wholly passive. Id. at 183-184.

1. Interpretation of the prenuptial agreement

Here, a valid[3] prenuptial agreement was executed by the parties. Prenuptial agreements governing the division of property in the event of a divorce are recognized in Michigan. *Booth v Booth*, 194 Mich App 284, 288; 486 NW2d 116 (1992). In *Reed*, *supra* at 144-145, this Court reiterated that, if valid,

> [pre]nuptial agreements are subject to the rules of construction applicable to contracts in general. [Pre]nuptial agreements, like other written contracts, are matters of agreement by the parties, and the function of the court is to determine what the agreement is and enforce it. Clear and unambiguous language may be [sic] not rewritten under the guise of interpretation; rather, contract terms must be strictly enforced as written, and unambiguous terms must be construed according to their plain and ordinary meaning. If the agreement fairly admits of but one interpretation, even if inartfully worded or clumsily arranged, it is not unambiguous [sic]. [Citations omitted.]

The prenuptial agreement here provides, in relevant part, that:

> All interests of both parties in any assets or property of any kind real, personal, or mixed, owned or acquired by each party prior to the time of their marriage, the proceeds of any such assets or property, and any assets or property acquired with

[3] The parties agree that the prenuptial agreement is valid.

> the proceeds of such assets or property, shall remain or become the separate property and estate of that respective party and upon the termination of the marriage shall be retained by that party. Upon the death of the parties, each party's separate property and estate shall be conveyed pursuant to the terms of each party's respective Will.

As mentioned, the appendices to the prenuptial agreement list plaintiff's Farmington House as his separate property with a current value of $150,000 (specifically, $165,000 fair market value less $15,000 in closing costs). It further identifies plaintiff's equity in that home as being $150,000 "through" and "after" January 20, 1992.

The agreement provides that "[a]ll interests of both parties in any assets or property of any kind real, personal, or mixed, owned or acquired by each party prior to the time of their marriage . . . shall remain or become the separate property . . . ." Thus, plaintiff retains "all interests . . . in . . . [the Farmington Hills home] owned or acquired . . . prior to the time of their marriage. . . ." The agreement simply does not specifically address whether the appreciation of the Farmington Hills home during the marriage is plaintiff's separate property or marital property. As noted in a Michigan treatise, a prenuptial "agreement should state whether the parties wish to distinguish between property acquired before and after the marriage and, if so, how appreciation on property acquired before the marriage, which can be significant, is affected." 1 Kelly, Curtis & Roane, Michigan Family Law, § 4.14; see also *Id*. Form 4.1, at ¶ 4(a).

As stated above, the prenuptial agreement identifies only the current value of plaintiff's home as his separate property. While the prenuptial agreement refers to "proceeds," it is not at all clear that the referenced proceeds include appreciation of the property. To the contrary, the statement in the appendices that the assigned value of $150,000 shall apply after January 20, 1992, strongly cuts against plaintiff's interpretation of the agreement.

Further, cases in which prenuptial agreements have been interpreted to allow recovery of appreciation on assets acquired before marriage often contain specific language limiting the spouse's ability to make any claim on the asset. For instance in *Rinvelt v Rinvelt*, 190 Mich App 372, 373-374; 475 NW2d 478 (1991), the agreement provided in relevant part, "the absolute and unrestricted right to dispose of such property free from any claims that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them." In *Reed*, *supra* at 146, the prenuptial agreement provided that the party "may enjoy and dispose of such property in the same manner as if the marriage had not taken place." Thus, the language in the instant prenuptial agreement that limits defendant's ability to make a claim on plaintiff's real property would not preclude a monetary award for appreciation of that property during the course of the marriage.

Here, plaintiff sold the Farmington Hills home for $260,000. From the sale proceeds he satisfied a mortgage in the amount of $15,000. Pursuant to the prenuptial agreement, plaintiff reserved for himself the $150,000 equity in the Farmington Hills home that he owned at the time of the marriage. Thus, there was at least $95,000 appreciation in the value of the property during the marriage.

In the June 22, 2007 opinion, the trial court also addressed the appreciation in the Howell home, all of which accrued during the marriage. The trial court noted that plaintiff purchased the Howell home for $277,000. The trial court also noted that "[t]here was no testimony or other evidence as to the value of the home on any date other than the date of purchase." Thus, even assuming the lowest of estimated value of the Howell home proffered by plaintiff, $310,000, the Howell home appreciated at least $33,000 during the marriage. Thus, there was at least $124,000 in appreciation in the marital homes during the course of the marriage.

2. The Trial Court's Award

Plaintiff argues that the trial court had no legal basis to "refund" defendant's alleged mortgage payments. Defendant maintains that the division of property was nonetheless equitable. We agree with plaintiff that the trial court's method of distribution as set forth in the June 22, 2007 supplemental opinion appears arbitrary. However, we need not address the trial court's method of distributing marital property if "the trial court reached the right result for the wrong reason." *FACE Trading, Inc v Dep't of Consumer and Industry Services*, 270 Mich App 653, 678; 717 NW2d 377 (2006) (quotation and citation omitted).

Due to the ambiguous nature of the prenuptial agreement with regard to the present and future value of plaintiff's equity in the Farmington Hills home, we conclude the appreciation of the real estate that occurred during the course of the marriage was properly subject to distribution as a marital asset. While the trial court's conclusion to refund defendant one half of the payments made on the real estate was arbitrary and without legal foundation, the trial court's findings support the conclusion that the appreciation of the subject real estate was not wholly passive, and thus subject to marital distribution. *McNamara*, *supra* at 183-184. The trial court found:

> Plaintiff and Defendant both made income working, and both deposited their checks into a joint account. The problem with this is that Plaintiff says his money went to his home, a valuable asset, and Defendant's income paid for other things (items that were disposable). Therefore, Plaintiff would end up with the home and Defendant would have few assets, if any. Defendant and Plaintiff are educated and employed until Plaintiff retired and Defendant was laid off. While it is true Plaintiff had in the prenuptial agreement separate property naming the Farmington Hills home or proceeds, it would be fair to give Plaintiff the money paid on the Farmington Hills home before they were married. After the marriage, however, money was co-mingled, and therefore, Defendant should have some interest in the Farmington Hills home and [Howell] home because Plaintiff and Defendant's money was co-mingled.

The record evidence establishes that everything except the initial down payment on the Howell home was paid from the parties' joint checking account. Here, however, plaintiff's initial $150,000 equity in the Farmington Hills home was preserved by the prenuptial agreement. The Farmington Hills home appreciated at least $95,000 during the marriage, and the Howell home appreciated at least $33,000. Half the sum of the least appreciation is $64,000. The trial court awarded defendant $63,253.15 for the equity in both the Farmington Hills and Howell homes, which is less than half the appreciation of the marital homes. Thus, plaintiff cannot show that

the trial court erred in awarding defendant $63,253.15 in dividing the appreciation of the marital homes.

We affirm.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra