

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA S. WRAY,
Plaintiff-Appellee,

UNPUBLISHED
December 13, 2012

v

KENNETH SCOTT WRAY,
Defendant-Appellant.

No. 307714
Ionia Circuit Court
LC No. 2010-028157-DM

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant, Kenneth Scott Wray, appeals as of right the trial court's judgment of divorce involving plaintiff, Patricia S. Wray. We affirm.

I. FACTUAL BACKGROUND

The parties married in 1982 and had three children together. One of the parties' daughters, who resided with plaintiff, was mentally impaired. This daughter was susceptible to different illnesses and cognitively functioned as an eight or nine year old. She received social security benefits, and plaintiff received a check from the state for taking care of the daughter.

During the marriage, defendant operated a sandwich manufacturing and delivery company. Despite his relative success, he was convicted of tax evasion, spent a year in jail, and significant tax liens were placed on the parties' property including the marital home. Defendant claimed that he did not hide his income from the IRS and only pleaded guilty because he was coerced.

The parties' alleged different causes for the breakup of the marriage, including plaintiff's smoking and defendant's extramarital affair. Plaintiff claimed that defendant failed to pay the monthly mortgage payment for the marital home, the house was in foreclosure, and the house had been sold at a sheriff's sale. Little value was expected to result from the sale of the marital home worth \$260,000 because of the significant tax liens on the property. Plaintiff also claimed that she was paying some of the tax liens out of the check she received for taking care of the disabled daughter.

The parties also owned an annuity, with the remaining value of approximately \$99,000. A dispute arose between the parties because defendant alleged that plaintiff agreed to pay him a

portion of the annuity payment, but failed to do so. Plaintiff claimed that she paid defendant and he was lying. Another asset the parties owned involved the sale of the business in 2000 to Jim and Sue Dudek, with the purchase price of \$217,500. But, due to the Dudek's fraud, the sale fell through and defendant obtained a judgment for approximately \$200,000 against them. Defendant believed that he would be unable to collect any amount from this judgment. A final asset involved in the property division was defendant's inheritance, as defendant was a beneficiary of his father's estate worth \$479,000. However, defendant testified that there were many claims against the estate and that it was worth far less than \$479,000. Defendant expected that he would receive nothing from the estate.

The trial court entered the judgment of divorce and divided the marital property. The trial court held that defendant was entitled to all of the Dudek judgment amounting to \$193,500 and interest, even if it was uncollectible. Since defendant was awarded that asset, the court awarded plaintiff the remainder of the annuity, which would be disbursed in four payments of \$20,000, and her retirement annuity and her 401(k), worth approximately \$3,000. The trial court divided defendant's inheritance equally, with plaintiff receiving 50 percent. The trial court specified that it was taking into consideration defendant's fault in the breakup of the marriage as well as plaintiff's smoking, and plaintiff's role and responsibility in taking care of their mentally disabled daughter. Defendant was awarded all of the business. While the trial court awarded plaintiff the marital home, it stated that no redemption value was expected considering all of the tax liens. Defendant now appeals.

II. DIVISION OF MARITAL PROPERTY

A. Standard of Review

"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). We also review for clear error a trial court's findings of fact in divorce cases. *McNamara v Horner*, 249 Mich App 177, 182; 642 NW2d 385 (2002). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 182-183. "If the trial court's findings of fact are upheld, we then must decide whether the dispositive ruling was fair and equitable in light of those facts." *Id.* at 183. "The dispositional ruling is discretionary and should be affirmed unless [we are] left with the firm conviction that the division was inequitable." *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003) (internal quotations and citation omitted).

B. Equitable

"The goal behind dividing marital property is to reach an equitable distribution in light of all the circumstances." *Washington v Washington*, 283 Mich App 667, 673; 770 NW2d 908 (2009). "However, an equitable distribution need not be an equal distribution, as long as there is an adequate explanation for the chosen distribution." *Id.* Thus, the mere fact that property was not divided equally does not mean that the property division was inequitable. *Id.*

Defendant contends that he received only worthless assets like the business and the Dudek judgment, while plaintiff received the annuity worth \$99,000 and the marital property. Contrary to defendant's arguments, we find that the overall division of marital property was fair and equitable. Although the Dudek judgment may have been worthless, so was the marital property awarded to plaintiff. The marital property was in foreclosure with significant tax liens encumbering it and making it extremely unlikely that plaintiff would receive any value from the property. Furthermore, while plaintiff was awarded the annuity of \$99,000 in four separate payments, defendant was awarded the entirety of his business and the business property. Though the business may have decreased in value due to defendant's tax evasion, "[f]ault is a legitimate consideration in arriving at a property division in a divorce matter." *Burkey v Burkey*, 189 Mich App 72, 78; 471 NW2d 631 (1991). The business and the marital property were devalued because of tax liens resulting from defendant's illegal conduct, which resulted in a significant decrease in the overall value of marital estate. Therefore, in light of defendant's fault in devaluing the marital assets, the trial court did not clearly err in dividing the marital property and the division was fair and equitable.

C. Inheritance

Defendant next argues that the trial court erred in dividing his inheritance as part of the marital estate. We disagree. "In any divorce action, a trial court must divide marital property between the parties and, in doing so, it must first determine what property is marital and what property is separate." *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010). Marital property is property that has been "acquired or earned during the marriage[.]" *Id.* at 201. In contrast, separate property has been "obtained or earned before the marriage." *Id.* Only marital property "is subject to apportionment . . . and it is this property that comprises the marital estate." *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997).

Generally, "an inheritance received by one spouse during the marriage and kept separate from marital property is separate property." *Cunningham*, 289 Mich App at 201. However, two statutory exceptions exist that allow the invasion of separate property: "when one party demonstrates additional need" or "when one party significantly assists in the acquisition or growth of the other party's separate asset[.]" *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009) (internal quotations and citations omitted); see MCL 552.23; MCL 552.401.

In the instant case the statutory exception of additional need, MCL 552.23, is applicable. In justifying its decision to divide the inheritance between the parties, the trial court referenced the unique circumstances of this case. The trial court also stated that the mentally disabled daughter's care fell mostly to plaintiff, and that "invading what could otherwise be argued as separate property" was "warranted and needed in order to adequately provide for [plaintiff] and the special needs child." The evidence at trial supports the trial court's finding. Plaintiff testified that her daughter had Shwachman-Diamond Syndrome, rendering her susceptible to frequent illness, and had the cognitive functioning of an eight or nine year old. This daughter lived with plaintiff, who was the primary caregiver. While this daughter received money from social security and plaintiff received money from the state for taking care of her daughter, a portion of that money was being garnished to pay off the tax liens. Although plaintiff testified that this daughter may be able to live on her own with outside assistance, there is no evidence that this theoretical living arrangement would have lessened the financial burden on plaintiff.

Thus, the trial court did not err in finding that invading this separate property was “warranted and needed in order to adequately provide for [plaintiff] and the special needs child.” This was a proper basis to invade the separate property pursuant to MCL 552.23, and the trial court’s reference to fault does not alter the sufficient evidence supporting its finding of additional need.

III. ANNUITY PAYMENTS

Lastly, defendant claims that plaintiff had the burden of proving that she paid defendant his portion of the annuity, a burden she failed to satisfy. Even if plaintiff bore the burden of proof, she satisfied this burden. Plaintiff testified that she paid defendant his portion of the money, and provided a detailed account of her encounter with defendant. Defendant denied receiving any money from plaintiff. Regardless of who bore the burden of proof, the question of whether plaintiff paid defendant was solely an issue of credibility. In recognizing this, the trial court stated that it found plaintiff’s testimony credible. “Special deference is given to the trial court’s findings when they are based on the credibility of the witnesses.” *Woodington*, 288 Mich App at 355. We find no reason to invade the province of the trial court, especially considering defendant’s past dishonest conduct in the context of tax evasion, which further supports the trial court’s finding that plaintiff, not defendant, was being truthful.

IV. CONCLUSION

The property division was fair and equitable, and properly included defendant’s inheritance. The trial court did not err in finding that plaintiff paid defendant his portion of the annuity. We affirm.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan