

STATE OF MICHIGAN
COURT OF APPEALS

BEVERLY L. KAISER,

Plaintiff-Appellee,

v

THOMAS A. KAISER,

Defendant-Appellant.

UNPUBLISHED
November 5, 2013

No. 311014
St. Clair Circuit Court
LC No. 11-001606-DO

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right the trial court's order distributing the parties' marital property. We affirm.

Plaintiff and defendant were married on August 1, 1986. On July 7, 2011, plaintiff filed a complaint for divorce. At the time of the divorce action, the parties owned three properties, including a residence located on Pointe Tremble in Fair Haven, Michigan (the "Pointe Tremble Property"), a commercial building located on Cricklewood in New Baltimore, Michigan (the "Cricklewood Property"), and a lot adjacent to the marital residence (the "Vacant Lot"). The division of these properties forms the basis of this appeal.

No special action was necessary to preserve the issues on appeal. *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005), citing MCR 2.517(A)(7). Moreover, the division of the three properties was the central issue of the action below. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).

In granting a judgment of divorce, the trial court must make factual findings and dispositional rulings. *Reed*, 265 Mich App at 150. This Court reviews a trial court's factual findings related to the division of marital property for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010). If the findings of fact are upheld, this Court must determine whether the dispositive ruling was fair and equitable in light of those facts. *Sparks*, 440 Mich at 151-152. The ultimate "dispositional ruling of the trial court is discretionary and will be affirmed unless this Court is left with the firm conviction that it was inequitable." *Reed*, 265 Mich App at 150.

First, defendant contends that the trial court clearly erred in awarding the three properties acquired during the marriage to plaintiff as separate assets. We disagree.

A trial court's goal when dividing a marital estate is to equitably apportion the property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The trial court's initial consideration when dividing property is to determine what property is included in the marital estate and what property is the separate property of a party. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Generally, marital property is divided between the parties, and a party's separate property is awarded to that party without invasion by the other party. *Id.* at 494. Usually, "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.

Nevertheless, there are occasions when property earned or acquired during the marriage may be categorized as separate property. For example, an inheritance received by one party during the marriage and kept separate from marital assets is deemed separate property. *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). Additionally, separate assets may lose their categorization as separate property and become marital property when they are commingled with marital assets and "treated by the parties as marital property." *Cunningham*, 289 Mich App at 201, quoting *Pickering v Pickering*, 268 Mich App 1, 10-12; 706 NW2d 835 (2005). Whether a property was held jointly or individually is not dispositive in determining the disposition of the property as separate or marital. *Cunningham*, 289 Mich App at 201-202.

Before awarding the three properties to plaintiff as her separate assets, the trial court made factual findings regarding the properties. The court found that plaintiff and defendant lived together for "nearly 25 years." Plaintiff held title to the Pointe Tremble Property, the Cricklewood Property and the Vacant Lot. "The Defendant voluntarily conveyed his interests in the P[ointe] Tremble residence and the Cricklewood property to the Plaintiff by execution and delivery in Quit Claim Deeds in the fall of 2003 for reasons personal to himself arising out of his debts and obligations and represents full consideration for the transfer." The trial court further found, "The Plaintiff has established her separate ownership, by testimony and exhibits, that these are her separate properties." Based on these findings, the trial court awarded plaintiff all three properties as separate assets of the estate.

We agree with the trial court. The court's factual findings were consistent with the evidence presented, and the distribution was fair and equitable in light of the facts. Regarding the Pointe Tremble and Cricklewood properties, the evidence presented shows that the parties purchased the Pointe Tremble residence shortly after their marriage. Subsequently, they purchased a lot and built a commercial building at Cricklewood. In October 2003, defendant transferred his ownership in both the residential and commercial properties to plaintiff by means of quit claim deeds. There was testimony that defendant had been sued by his parents, and there was an outstanding judgment against him that would be satisfied by a \$50,000 payment. Plaintiff testified that she used her future inheritance from her mother to pay the full amount owed. There was evidence that plaintiff was the remitter on two cashier's checks totaling

\$50,000 that were issued to satisfy the judgment. In contrast, defendant contended that he paid part of the judgment using money from a joint account with plaintiff and the remainder with money from plaintiff's mother. Defendant testified that he repaid plaintiff's mother using funds from the sale of a condominium he co-owned with a partner. Defendant offered no proof to support his testimony. This Court gives deference to a trial court's findings where they are based on witness credibility. *Draggool v Draggool*, 223 Mich App 415, 429; 566 NW2d 642 (1997). While the source of the money was disputed, there was sufficient evidence that the residence and commercial building were deeded to plaintiff for personal reasons relating to the judgment against defendant. Therefore, the trial court did not err in finding that defendant transferred his interest in the two properties to plaintiff for "full consideration."

Merely because defendant deeded the properties to plaintiff at some earlier point, it did not necessarily preclude them from being deemed marital property. Assets are not separate marital assets simply because they are owned by one spouse individually. *Cunningham*, 289 Mich App at 201-202. However, the fact that defendant voluntarily gave up his legal claim to the properties is significant when viewed in light of his actions following the transfer. Defendant continued to live with plaintiff at the Pointe Tremble Property, yet he provided no evidence that he took any financial responsibility for the residence after its conveyance and refinancing. Plaintiff testified that she refinanced the loans on the property in her name and made all subsequent payments relating to the mortgages, insurance, and taxes. There was evidence that defendant made some monthly payments of \$1,700 to plaintiff. He claimed that the payments were used to pay down the mortgage, but he also described the payments as "rent" for his use of a business facility at the Cricklewood Property. Although there was evidence of some repair work to the Pointe Tremble and Cricklewood properties, plaintiff offered appraisals and reports from a general contractor and property appraiser showing that the repairs resulted in damage to the properties and that further repairs were necessary. Thus, it was not clearly erroneous for the trial court to find that both properties were the separate assets of plaintiff.

Likewise, the trial court did not err in concluding that the Vacant Lot was plaintiff's separate property. There was evidence that, shortly before the complaint for divorce was filed, plaintiff purchased the Vacant Lot using funds borrowed from her sister and her sister's husband. Therefore, the lot was titled in the name of plaintiff and her sister. There is no evidence that plaintiff used marital funds to purchase the Vacant Lot. Moreover, defendant's work demolishing a cottage on the Vacant Lot was not a post-purchase contribution as there was evidence that defendant was paid \$1,000 for his work.

In *Woodington v Shokoohi*, 288 Mich App 352, 358; 792 NW2d 63 (2010), the plaintiff offered evidence that the real property at issue was a marital asset acquired by the defendant before the divorce action. However, the defendant presented contradictory evidence that he bought the property for and on behalf of his sister, utilizing his sister's money. This Court held that the issue was one of credibility and, deferring to the trial court's determination of witness credibility, concluded that the court did not clearly err in finding that the property the defendant purchased was not a marital asset. *Id.* at 357-358.

As in *Woodington*, the trial court in the instant case had discretion to give credence to plaintiff's testimony regarding the purchase of the Vacant Lot. See also *Draggoo*, 223 Mich App at 429. Therefore, the trial court did not err in concluding that the lot was not part of the marital estate.

Next, defendant asserts that the trial court failed to equitably divide the marital estate. We disagree.

A trial court's goal when dividing a marital estate is to equitably apportion the property in light of all the circumstances. *Byington*, 224 Mich App at 114. An equitable distribution of marital assets means that they will be roughly congruent. *Knowles v Knowles*, 185 Mich App 497, 501; 462 NW2d 777 (1990). Any significant departure from congruence must be clearly explained by the trial court. *Id.*

We have already determined that the trial court did not clearly err in awarding plaintiff the three properties as separate assets in light of the facts of this case. Furthermore, while there is equity in the Pointe Tremble and Cricklewood properties, it is not to the extent that defendant claims. In his brief, defendant asserts that the total value of the three properties less the encumbrances leaves equity totaling \$407,562. However, defendant's totals do not take into consideration that there is no evidence of equity in the Vacant Lot since plaintiff purchased the lot with money borrowed from her sister. Additionally, the property appraiser testified that the values were based on his assumption that the properties were in good condition and would be reduced if there were code violations and significant repairs. The general contractor testified regarding numerous repairs, maintenance and code violations existent on the Pointe Tremble and Cricklewood properties. He estimated the amount of repairs necessary to be just over \$78,000. Taking into consideration the lack of equity in the Vacant Lot and the numerous repairs, a fairer total of the equity would be approximately \$229,000, an amount much less than that proposed by defendant.

Regarding the remaining assets, the trial court awarded plaintiff the businesses she owns, Bev's Dance Studio and the Lily Pad, including the associated equipment and assets. The trial court awarded defendant the business he owns, Centre Ice Academy, including the associated equipment and assets. At trial, plaintiff presented evidence that her business assets were valued at \$51,293.50 and defendant's business assets totaled \$115,078.22. Plaintiff arrived at these amounts based on wholesale pricing of the retail inventory, in other words the lowest figures that a party would pay for the items. Defendant testified that some of the estimates were high but offered no exhibit detailing the amounts he paid for the business inventory. Each party was also to retain his or her own bank accounts, and they agreed to determine the division of the remaining personal property within 30 days of entry of the divorce judgment.

Granting plaintiff and defendant their respective businesses and accompanying inventories, along with all personal bank accounts and personal property as agreed to by both parties, shows no inequity toward defendant. Moreover, the three properties awarded to plaintiff were deemed separate from the marital estate in light of the facts of this case. An invasion into separate property requires proof of an appropriate statutory ground. *Reeves*, 226 Mich App at 494-495; see also MCL 552.23 and MCL 552.401. In sum, the evidence establishes that the marital assets were divided equitably.

Finally, defendant claims that the trial court erred in prohibiting him from invading the separate estate of plaintiff for statutorily acceptable reasons. We disagree.

Generally, when the marital estate is divided “each party takes away from the marriage that party’s own separate estate with no invasion by the other party.” *Reeves*, 226 Mich App at 494. However, a court may award one spouse some of the other’s separate property where the spouse requires it for suitable support and maintenance, or where one spouse has significantly assisted the other in the acquisition, improvement, or growth of that other’s separate asset. *Id.* at 494-495; see also MCL 552.23 and MCL 552.401.

The trial court concluded that defendant failed to satisfy the burden to prove by a preponderance of the evidence that he had a legal right to invade plaintiff’s separate assets. Regarding the statutory exception to invade a spouse’s separate property for suitable support and maintenance, the trial court awarded the parties their respective business interests. Moreover, there was testimony that defendant has worked for 12 years at a plastics company and has a real estate license. Plaintiff has income from her businesses that are currently providing just enough to pay the bills. Therefore, the evidence does not support defendant’s contention that the trial court’s award left him with insufficient income for his support.

Regarding the statutory exception to invade a spouse’s separate property based on the other spouse’s contribution to the acquisition, improvement, or accumulation of the property, the trial court found the evidence was insufficient. Defendant testified that he contributed funds toward the Pointe Tremble and Cricklewood properties before the transfer. However, plaintiff testified that, after defendant transferred his ownership and she refinanced the loans, defendant did not contribute to the expenses associated with the properties. Plaintiff then became the party solely responsible for payment of the loans. Regarding evidence that defendant made some monthly payments of \$1,700, he did not rebut plaintiff’s claim that the payments were rent for operating his business at Cricklewood. In fact, defendant also referred to the money as “rent” during his testimony. Plaintiff testified that defendant made repairs to the Pointe Tremble and Cricklewood properties but that the repairs only damaged the properties. Similarly, the general contractor and property appraiser testified that the repairs and maintenance issues caused damage and reduced the values of the properties. For instance, the improper installation of flashing and the lack of flashing on the roof of the residence caused water damage. Defendant offered no evidence to rebut plaintiff’s exhibits showing extensive damage to the properties and containing estimates for repairs. Although he initially invested in the Pointe Tremble and Cricklewood properties along with plaintiff, defendant showed no interest and made no significant contributions after deeding them to her for full consideration in 2003.

Similarly, the evidence establishes that defendant failed to show that he made any significant contributions to the Vacant Lot. There was evidence that plaintiff purchased the Vacant Lot shortly before filing for divorce using money from her sister and her sister's husband. Plaintiff testified that no marital funds were used. Defendant's sole contribution to the property was to demolish an old cottage located on it. However, there was evidence that plaintiff's sister paid defendant \$1,000 for his work. Accordingly, the trial court did not err in prohibiting defendant from invading the separate assets of plaintiff.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens