STATE OF MICHIGAN

COURT OF APPEALS

JAMES D. ROBINSON,

Plaintiff-Appellant,

v

PAMELA D. ROBINSON,

Defendant-Appellee.

UNPUBLISHED
May 15, 2001

No. 217271
Genesee Circuit Court
LC No. 96-182767-DO

Before: Bandstra, C.J., and Zahra and Meter, JJ.

PER CURIAM.

In this divorce case, plaintiff James D. Robinson appeals as of right the division of the marital estate as ordered by the trial court. We affirm.

Plaintiff and defendant Pamela D. Robinson were married in 1984 and separated in 1996. During the course of the marriage the parties accumulated a substantial amount of property, including a house and numerous investment, bank, and retirement accounts. At trial, plaintiff argued that he was entitled to 65 percent of the marital estate, as the 35 percent left for defendant would provide a division of assets roughly reflecting the relative income of the parties. Defendant, on the other hand, argued that the property should be divided evenly. Following the close of proofs, the trial court awarded defendant three investment accounts totaling approximately $300,000 in value, as well as her personal IRA, 401k, and bank accounts. In addition to the marital home, defendant was similarly awarded his personal retirement and bank accounts, as well as one investment account valued at between $10,000 and $11,000.

This Court has articulated the following standard for reviewing property distributions in divorce cases:

> In a divorce case, this Court must first review the trial court's findings of fact regarding the valuations of particular marital assets under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). 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 has been made. *Id*. This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496

> (1991). 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. [*Draggoo v Draggoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997).]

Plaintiff first argues that the trial court erred in setting the value of the marital home at $400,000, the worth of the home as testified to by plaintiff, rather than the $190,000 to $230,000 value placed on the home by the formal appraisals. We disagree.

Plaintiff cites no authority, and we are aware of none, requiring that a court accept the opinion of an expert over that of a layperson. To the contrary, it has long been the rule that in the event of a conflict in the evidence, the trier of fact is at liberty to choose for himself which facts to believe. See *Beason*, *supra* at 798. Here, the trial court questioned plaintiff with respect to the value of the home on more than one occasion during trial, and ultimately concluded that plaintiff's characterization was realistic.[1] We cannot conclude that the trial court's choice in this regard was erroneous.

Plaintiff next contends that the trial court erred in failing to award him $80,000 claimed by plaintiff to have been brought by him into the marriage. Again, we do not agree.

A trial court's first duty in a divorce case is to determine marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). Generally, the marital estate is divided between the parties, with each party taking their own separate assets with no invasion by the other party. *Id*. In the present case the amount of money brought by plaintiff into the marriage was disputed, with plaintiff's claim supported only by his testimony and documents that he had drafted. Although defendant did not provide an exact figure as to the amount claimed by her to have been brought into the marriage by plaintiff, she did characterize plaintiff's $80,000 figure as "highly inflated." In reviewing the parties' testimony on this issue the trial court, although finding that plaintiff "probably brought more money into the marriage [than defendant]," characterized plaintiff's $80,000 figure as "difficult to trace."

In an analogous area, this Court has held that if a party seeking to include an asset in the marital estate does not prove a reasonably ascertainable value for the asset, it should not be considered an asset subject to distribution. *Wiand v Wiand*, 178 Mich App 137, 149; 443 NW2d 464 (1989). We conclude that the same test applies to a party that wishes to have a portion of the parties' assets considered as separate property. If the party seeking to include this asset cannot *prove* a reasonably ascertainable value, the asset cannot be considered separate property unless the asset is separate and discrete, e.g., a separate account. Because plaintiff has failed to satisfy

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[1] In addition, counsel for plaintiff informed the trial court at the close of evidence that the house had been informally listed for $337,500. Plaintiff then corrected counsel, indicating that the house had been listed for sale at between $360,000 and 370,000.

this burden, we find that the trial court did not err in failing to award plaintiff the $80,000 as separate property.

Plaintiff next contends that the trial court should not have relied on defendant's testimony that she received only a $2,000 inheritance from her grandmother's estate. Instead, plaintiff argues, the trial court should have enforced a subpoena issued by plaintiff's attorney so that it could learn the full value of defendant's inheritance. Again, we disagree.

Initially, we note that there is nothing in the record to indicate that a subpoena was issued, or that a motion to enforce the subpoena was ever filed by plaintiff. Nonetheless, even were we to assume that a subpoena was in fact issued, plaintiff has failed to demonstrate any error requiring relief.

In rendering its judgment, the trial court ordered that defendant's inheritance be considered her separate property. The question of whether to include an inheritance in the pool of marital assets is a matter for the trial court's discretion. *Denman v Denman*, 195 Mich App 109, 112; 489 NW2d 161 (1992). "Normally, property received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution." *Dorr v Dorr*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). Here, there was no evidence that the inheritance was ever commingled with the marital assets, and as such, defendant's interest in that property "exist[ed] independently of . . . the marriage partnership." *Id*. at 585. Accordingly, the value of the inheritance was irrelevant to division of the marital assets and thus any error in the trial court's failure to consider additional evidence of its value would be harmless. See MCR 2.613(A).

We similarly find plaintiff's argument that the trial court improperly excluded evidence of defendant's marital infidelity to be without merit. In order to complain of the exclusion of evidence, one must show that the evidence was actually excluded. See *Kobmann v Ross*, 374 Mich 678, 681; 133 NW2d 195 (1965). Here, when asked by counsel why he sought this divorce, plaintiff stated that he had discovered "some information about [defendant,]" which led him to believe that she had been having an extramarital affair. In response, the trial court asked whether the parties would stipulate that there had been a breakdown in the marital relationship, "without going into all the finer, gory details?" Inasmuch as the trial court's response was nothing more than a question as to whether the parties would stipulate to the statutory grounds for a divorce, we cannot say that plaintiff has satisfied his burden of showing that evidence was in fact "excluded" by the trial court. *Id*.

Nonetheless, even assuming that the trial court's response constituted a ruling intended to exclude the disputed testimony, we again find no error requiring relief.

Trial courts are given broad discretion in fashioning dispositional rulings in divorce proceedings. *Sparks*, *supra* at 158-159. However, while "the conduct of the parties during the marriage may be relevant to the distribution of property, . . . the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Id*. at 158. In this case, the evidence plaintiff proposed to introduce consisted of his own allegations and those of an acquaintance. Plaintiff's allegations, however, were based not on fact but on suspicion, and there was no evidence that he had attempted, by subpoena or other means, to procure the

acquaintance's testimony at trial. Given defendant's testimony that she did not begin dating her current boyfriend until several months after plaintiff filed the complaint for divorce, and considering that the factual basis for plaintiff's claim was weak at best, the trial court could easily conclude that it would give only minimal weight to the factor of fault. Accordingly, we do not believe that plaintiff is entitled to relief on this claimed error.

Plaintiff next contends that the trial court erred in failing to consider his offer of videotaped evidence concerning the amount of jewelry acquired by the parties during the marriage. Again we do not agree.

Although plaintiff indicated during his testimony that such evidence was in his possession, the tape was never expressly offered into evidence. A party may not complain of the trial court's failure to consider evidence when the evidence in question was not offered into the proofs at trial. See MRE 103(a)(2). Moreover, the trial court, without contradiction from either side, informed the parties that it believed that the two had "already divided up their personal belongings and effects," and that therefore these items were not at issue at trial. Therefore, considering as well that counsel for plaintiff had ample opportunity to cross-examine defendant about the amount of jewelry she had in her possession, but did not take advantage of the opportunity, we find no error warranting relief.

Finally, plaintiff contends that the trial court abused its discretion in denying his motion for reconsideration. We disagree. A party seeking reconsideration of a decision "must demonstrate a palpable error by which the trial court and the parties were mislead," and must further "show that a different disposition . . . must result from correction of the error." MCR 2.119(F)(3). Here, in seeking reconsideration below, plaintiff advanced those same arguments as presented to this Court on appeal. As discussed above, we find these arguments to be without merit sufficient to warrant a disposition different from that reached by that trial court. Accordingly, we do not believe that the trial court abused its discretion in denying reconsideration.

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter