

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN DALY,

Plaintiff-Appellee,

v

JOHN DALY,

Defendant-Appellant.

UNPUBLISHED

June 8, 2001

No. 217638

Genesee Circuit Court

LC No. 97-185257-DM

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. Defendant challenges the trial court's determinations that certain real property known as Bay Mills Point and securities that plaintiff inherited were not part of the marital estate but were plaintiff's separate property, and the court's failure to open for redistribution, pursuant to statute, the Bay Mills Point property. We affirm.

"In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings." *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). On appeal, we first review the trial court's findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if the reviewing court, after a review of the entire record, is left with the definite and firm conviction that a mistake has been made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152.

The property that is subject to apportionment in a divorce judgment is referred to as "marital property," and it is this property that comprises the marital estate. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997), citing 2 Curtis, Bassett & Kidder, Michigan Family Law (4th ed) (ICLE, 1993), § 14.9, p 14-12. Thus, the trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997).

Here, after holding an evidentiary hearing for the express purpose of determining whether certain assets were part of the marital estate, the trial court concluded that Bay Mills Point and securities that plaintiff inherited from her mother were plaintiff's separate property. In

determining that Bay Mills Point was plaintiff's separate property, the court largely focused on the intent of the donors. See *Darwish v Darwish*, 100 Mich App 758, 773; 300 NW2d 399 (1980). Plaintiff's parents gave Bay Mills Point to plaintiff and her sister while plaintiff was married to defendant and did not include defendant's name on the deed, nor was defendant's name ever added. Defendant contends that the court did not properly consider the length of the parties' marriage and the fact that when part of the Bay Mills Point property was sold in 1990, plaintiff deposited her half of the sale proceeds into the joint marital checking account and a portion of those funds was used to pay for the children's college tuition, to pay off the balance of the marital home mortgage, and to buy a computer. However, while it is a consideration, the length of the marriage does not control whether a gift to one party is part of the marital estate, *Lee v Lee*, 191 Mich App 73, 78; 477 NW2d 429 (1991), and plaintiff's decision to spend the proceeds of the sale of part of Bay Mills Point on the family, rather than on herself, does not necessarily show her intention to share ownership of the remaining property with defendant. Further, the court's findings on the record indicate that in making its decision, it considered testimony and case law addressing factors such as the length of the marriage and how the parties treated the asset, as well as defendant's contributions to the upkeep of the property. We find no error in the court's conclusion that Bay Mills Point was plaintiff's separate property.

Next, defendant argues that even if Bay Mills Point is plaintiff's separate property, the trial court erred in failing to open that property for redistribution on the basis that defendant contributed to the improvement of the property. Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party. *Reeves, supra* at 494. However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met. MCL 552.23; MSA 25.103 and MCL 552.401; MSA 25.136; *Reeves, supra*. Defendant contends that the Bay Mills Point property was subject to redistribution under MCL 552.401; MSA 25.136, which provides for distribution of separate property "if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property."

In this case, however, the parties reached a negotiated settlement of the marital estate. Property settlement provisions in a divorce judgment are typically final and cannot be modified by the court. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). Absent fraud, duress, or mutual mistake, the court must uphold divorce property settlements reached through negotiation and agreement of the parties. *Id.* This rule applies whether the settlement is in writing or orally placed on the record, even though not yet formally entered as part of the judgment of divorce. *Kline v Kline*, 92 Mich App 62, 71-72; 284 NW2d 488 (1979). The parties in this case put the terms of their negotiated settlement on the record and both parties acknowledged on the record that they were satisfied with the terms of the settlement. Accordingly, the negotiated property settlement was not subject to modification by the trial court.

Defendant's last argument on appeal is that the trial court erred in finding that the securities inherited by plaintiff from her mother were plaintiff's separate property. The trial court determined that the securities should be treated as separate property because defendant's name was included on the securities for only approximately one month before plaintiff separated from defendant and because the securities were passive investments that were never commingled, except for the short time that defendant's name was on them. The court's findings are supported

by the record and we do not believe the court erred in concluding that the securities were the separate property of plaintiff.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins