

STATE OF MICHIGAN
COURT OF APPEALS

HONG-MEI SARA XIAO,

Plaintiff-Appellant,

v

ARTHUR GREENE,

Defendant-Appellee.

UNPUBLISHED

July 20, 2001

No. 221885

Washtenaw Circuit Court

LC No. 98-01299-DO

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff-wife appeals as of right from the June 23, 1999 judgment of divorce, challenging provisions relating to property division and attorney fees. We affirm.

The parties are both professional musicians who were married on April 18, 1987, in Iowa City, Iowa. According to the record, the parties met while pursuing degrees at a university in New York. In 1990, the parties moved to Michigan so that defendant could take a job as a music professor at the University of Michigan in Ann Arbor. Plaintiff is a talented violist who has toured in Japan, Europe, and played in the Minneapolis orchestra.¹ Defendant, meanwhile, is a pianist who has toured with plaintiff. Plaintiff filed for divorce in December 1998. Following a one-day trial, the trial court entered the June 23, 1999 judgment of divorce.

On appeal, plaintiff contends that the trial court's division of the marital property was inequitable. We review the trial court's findings of fact with respect to property distribution for clear error, and then determine whether the ultimate dispositional ruling was fair and equitable under the circumstances. *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). We will affirm a trial court's property distribution unless we are left with a definite and firm conviction that the division was inequitable. *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992).

¹ According to the record, plaintiff won the prestigious Geneva International Music Competition in the fall of 1987 for her playing of the viola.

The goal of the court when apportioning a marital estate is to reach an equitable division in light of all the circumstances. Each spouse need not receive a mathematically equal share, but significant departures from congruence must be explained clearly by the court. When dividing the estate, the court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance. [*Byington, supra* at 114-115 (citations omitted).]

Plaintiff's first challenge to the division of the marital estate involves defendant's retirement plan. According to plaintiff, the trial court erred by not awarding plaintiff half of defendant's pension plan with the University of Michigan, which was valued at \$47,145.00 at the time of trial. At trial, plaintiff, whose retirement plan was valued at \$6,911.09, argued that she should receive fifty-five percent of the total value of the two retirement plans because of defendant's admitted infidelity during the marriage.

We recognize that under Michigan law, pension benefits may properly be considered a part of the marital estate for the purposes of property division. MCL 552.18(1); *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992); *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995). However, simply because a pension is considered a marital asset does not require the division of that asset between the parties. See *Bone v Bone*, 148 Mich App 834, 839; 385 NW2d 706 (1986). A review of the record reveals that the trial court properly considered both defendant and plaintiff's pension funds as marital assets and took them into account when dividing the marital estate. *Id.* However, in *Boonstra, supra*, this Court recognized:

Pension benefits are assets to be considered part of the marital estate subject to distribution *at the discretion of the circuit court*. To hold otherwise would be to restrict the ability of the trial court to reach one of the primary objectives of any divorce proceeding: to arrive at a property settlement that is fair and equitable in light of *all* the circumstances. [*Boonstra, supra* at 563 (emphasis supplied; citation omitted).]

Evidence at trial revealed that plaintiff is a talented violist who has performed in concerts all over the world. During her trial testimony, plaintiff indicated that she was paid anywhere from \$1000 to \$2000 a concert. Plaintiff also testified that by teaching students privately, she earned \$60 an hour. During her tenure with the Minneapolis symphony orchestra, plaintiff earned \$74,000 annually. Plaintiff also testified that she had secured a full-time teaching position at the University of Arizona which was to begin in September 1999, and was expected to provide a comfortable salary.²

During her trial testimony, plaintiff portrayed herself as having given up her professional aspirations to further her husband's career. Plaintiff also stated that she was unable to support herself during the pendency of the divorce, and that she relied on defendant's income to survive.

² During trial plaintiff indicated she was expected to earn in the mid \$40,000 range.

In contrast, defendant testified that plaintiff was very talented, and could obtain teaching positions, or a well-paying position in a symphony if she so chose. Indeed, a review of plaintiff's trial testimony indicates that she had not been actively pursuing employment opportunities in the period leading to the divorce. In our view, the trial court's decision to not grant plaintiff half of defendant's retirement plan reflects its recognition that plaintiff, as a talented musician, was well-stationed in life, with the potential to make a comfortable living.

When dividing the marital estate, the trial court also noted that defendant had admitted to infidelity during the marriage. However, the trial court also found that plaintiff's behavior during the marriage contributed to its breakdown. Specifically, the trial court concluded that plaintiff's "fractious" conduct during the marriage "resulted in physical and emotional injury to defendant."³ The court's thus determined that plaintiff was partially at fault for the breakdown of the marriage. The trial court's conclusions in this regard were based on defendant's trial testimony. We afford special deference to a trial court's findings in a divorce case when they are based on a witness' credibility. *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999).

The judgment of divorce provided that each party share equally in the sale of the marital home.⁴ Further, the divorce judgment awarded plaintiff the two violas and a bow that were valued at \$31,500. The judgment also provided that plaintiff was to share equally in the proceeds of (1) the sale of a piano valued at \$15,600 and (2) the sale of two of the parties' vehicles. Defendant was awarded the parties' Mercury Sable vehicle.⁵ After the trial court awarded each party family paintings and their personal effects,⁶ the parties were ordered to divide the remaining personal property by selecting their items of choice on an alternating basis. On this record, where it is clear the trial court attempted to balance the division of property by allowing defendant to retain the full value of his retirement plan, and by awarding plaintiff the two violas and the bow, we are not left with a definite and firm conviction that the court's division of the marital property was inequitable.

³ In her brief on appeal, plaintiff argues that the trial court's comments indicate that it was biased against her. Because plaintiff did not move for the trial court's disqualification pursuant to MCR 2.003, this claim is not properly preserved for our review. *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401 (1997). In any event, after a thorough review of the record, we conclude that plaintiff has failed to demonstrate "actual bias" on the part of the trial court. See *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996) (emphasis in original); MCR 2.003(B)(1). Because there is no indication in the record that the trial court was personally biased against defendant, plaintiff has not overcome the "heavy presumption of judicial impartiality." *Cain, supra* at 495, 497 (citation and footnote omitted).

⁴ A review of the record does not specify the value of the marital home at the time of trial.

⁵ The Mercury Sable was valued at \$11,100 at the time of trial, and the parties still owed \$8,677 toward its purchase.

⁶ Plaintiff retained the \$5,000 watch she won in the Geneva music competition.

Plaintiff also complains that the trial court erred by failing to award plaintiff \$11,000 that she contributed to finish the basement of the marital home.⁷ We disagree.

A trial court's initial consideration when dividing property is to discern whether property is part of the marital estate, or whether it is separate. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Marital property is "property that came 'to either party *by reason of the marriage . . .*' " *Id.* at 493, quoting MCL 552.19 [Emphasis and ellipses in original]. As this Court observed in *Reeves*, *supra*, a spouse's separate property is subject to distribution between the parties when " 'the other spouse contributed to the acquisition, improvement, or accumulation of the property.' " *Id.* at 494-495, quoting MCL 552.401; see also *Dart v Dart*, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999). Specifically, the *Reeves* Court opined:

When one [spouse] significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of contribution. [*Id.* at 495; see also *Lee v Lee*, 191 Mich App 73, 79; 477 NW2d 429 (1991).]

Denying plaintiff's request that the \$11,000 be awarded separately to her, the trial court reasoned that plaintiff "overlook[ed] . . . the amounts of money defendant has placed in the home over the years based on his employment." Specifically, defendant testified during trial that he had contributed to the value of the marital home by making monthly mortgage payments. In our view, the trial court properly recognized that the \$11,000 was subject to distribution because defendant actively contributed to its accumulation, namely the building of equity in the marital home. MCL 552.401; *Reeves*, *supra*; *Lee*, *supra* at 79. As this Court observed in *Hanaway v Hanaway*, 208 Mich App 278, 294; 527 NW2d 792 (1995), "[t]he asset at issue did not increase simply by earning interest. Rather, it appreciated because of defendant's efforts" [Citation omitted.] Thus, we are not left with a definite and firm conviction that the trial court erred in distributing the \$11,000 between the parties.

Plaintiff also asserts that the trial court erred in holding that the two violas and a bow were part of the marital estate.⁸ During trial, plaintiff testified that she purchased one of the

⁷ It is unclear whether the trial court accepted plaintiff's assertion that the \$11,000 was premarital income. During trial, plaintiff testified that she withdrew the money from her personal checking account in 1995 and 1997 and transferred it to the parties' joint checking account. Documents admitted as evidence at trial corroborated plaintiff's claim. During trial, defendant could not recall whether plaintiff had the money before the parties married. However, presented with the relevant documentation, defendant did not dispute plaintiff's claim.

⁸ Plaintiff also asserts that the trial court's award of the instruments to plaintiff is unenforceable and void because the trial court included this award in its written opinion accompanying the judgment of divorce, but not the written judgment itself. We disagree. We recognize the well-settled rule that a court speaks through its judgments and not its oral statements or written opinions alone. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). However, in the present case, the trial court's failure to reference the award of the instruments in the judgment appears to be the product of inadvertence. Because the trial court's judgment was based on its findings in the concomitant written opinion, we find plaintiff's assertion to be unpersuasive in the instant case.

violas before the marriage, and the other was given to her as a gift before the marriage. On the other hand, defendant maintained that the instruments were purchased once the parties were married. Because the trial court's conclusion regarding whether the instruments were separate or marital property hinged on a credibility determination, we will not disturb its finding on appeal. *Welling, supra* at 709. Likewise, we reject plaintiff's assertion that the trial court clearly erred in the valuation of the instruments. We review a trial court's valuation of assets for clear error, and will reverse the trial court's finding only if we are left with a definite and firm conviction that the trial court made a mistake in its valuation. *Id.*

During trial, defendant estimated the value of the two violas and the bow to be between \$31,000 and \$33,000.⁹ Conversely, plaintiff testified that one of the violas was insured for between \$8,000 and \$10,000, and that the second viola was purchased for \$10,000. Plaintiff further indicated that she had insured the bow for between \$8,000 and \$10,000. Our review of the record leads us to conclude that the trial court found defendant's valuation of the instruments to be more credible. Because we afford "special deference" to a trial court's findings when they are premised on the credibility of the witnesses, we decline to disturb the trial court's valuation on appeal. *Welling, supra* at 709.

Additionally, the trial court did not err by accepting defendant's valuation of the instruments even though he was not qualified as an expert. In *Lee, supra*, a panel of this Court recognized that a trial court may accept the parties' valuation of an asset in the absence of expert testimony. *Lee, supra* at 76. Similarly, in the instant case, the parties are learned musicians familiar with the cost and value of the instruments they play. Because the parties were familiar with the instruments and expressed their opinions regarding their value, the trial court properly relied on their opinions when valuing the assets. See also *Sullivan v Sullivan*, 175 Mich App 508, 511; 438 NW2d 309 (1989) (where the parties did not proffer expert testimony on the value of an asset, the trial court properly considered the parties' opinions when valuing the asset).¹⁰

Plaintiff also challenges the trial court's determination that the parties were jointly liable for defendant's credit card debt incurred before the divorce.¹¹ According to plaintiff, she should not be required to contribute to defendant's credit card debt because some of it was incurred by defendant's employment obligations and by defendant entertaining his girlfriend. After a thorough review of the record, we are convinced that the trial court's division of the credit card debt was equitable.

⁹ Plaintiff argues that the trial court improperly relied on hearsay evidence in valuing the instruments. However, because defendant's testimony regarding the value of one of the violas was based on his opinion of the value of the instrument, plaintiff's assertion is without merit.

¹⁰ On appeal, plaintiff points to a letter from an instrument appraiser that was appended to her motion for a new trial in support of her argument that the trial court's valuation was clearly erroneous. Because this letter was not before the trial court when it made its factual finding, we decline to consider it when assessing the court's determination. *Krohn v Sedgwick James of Michigan, Inc.*, 244 Mich App 289, 293; 624 NW2d 212 (2001).

¹¹ The judgment of divorce provided that the parties' credit card debt be paid out of the proceeds arising from the sale of the marital home.

During trial, defendant testified that after the parties separated, he incurred significant credit card debt because he was supporting plaintiff. Specifically, defendant indicated that he paid the mortgage on the marital home, the accompanying condominium fees, as well as plaintiff's car payment and insurance. During this time, defendant was paying rent for a separate apartment,¹² and had to take out loans and use his credit cards to pay his expenses. According to defendant's trial testimony, he paid approximately \$26,240.00 for plaintiff's support in the time leading up to the divorce.¹³ Under the circumstances, where defendant went into significant debt while supporting plaintiff, we are satisfied that the trial court's division of the credit card debt was not inequitable.¹⁴

Finally, plaintiff contends that the trial court abused its discretion by failing to order defendant to pay her attorney fees. We disagree.

We review a trial court's decision regarding attorney fees for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). A party to a divorce action may be ordered to pay the other's reasonable attorney fees "if the record supports a finding that such financial assistance is necessary to enable the other party to defend or prosecute the action." *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

In the instant case, a review of the trial court's decision reveals that it declined to award plaintiff attorney fees based in part on its finding that plaintiff persisted in litigating this matter where "several allegations and requests made by plaintiff were simply not sustainable." The trial court also observed that plaintiff was not forthcoming while testifying about her income, and that her behavior at trial was "inconsolable and nearly uncontrollable." As this Court observed in *Hawkins, supra*, attorney fees are properly awarded when the party requesting their payment has "been forced to incur them as a result of the other party's unreasonable conduct in the course of

¹² According to the record, plaintiff requested that defendant move out of the marital home, and defendant agreed.

¹³ A review of the trial transcript indicates that documentation corroborating defendant's claim was introduced into evidence at trial. However, our thorough review of the lower court file did not yield the pertinent documentation. In any event, it is undisputed that defendant supported plaintiff during the parties' separation.

¹⁴ We also do not share plaintiff's view that the trial court should have divided the credit card debt on a pro rata basis. In support of her argument, plaintiff cites *McNamara v McNamara*, 178 Mich App 382, 391; 443 NW2d 511 (1989), mod 436 Mich 862 (1990). In *McNamara, supra*, the Court noted that the plaintiff-wife was in poor health and of advanced age and faced "[an] impoverished financial condition and . . . poor financial prospects." *Id.* at 394. The court went on to order the defendant to bear the majority of the parties' marital debt. In our view, *McNamara, supra* is factually distinguishable from the instant case. A review of the record reveals that plaintiff is well-stationed in life and has the potential to earn a comfortable living. At the time of trial plaintiff had accepted a well-paying position with the music department at the University of Arizona. Because the record evidence does not suggest that plaintiff is in an "impoverished financial condition" facing bleak financial prospects, we are satisfied that the trial court's division of the credit card debt was equitable under the circumstances. *Id.*

the litigation.” *Hawkins, supra* at 669. [Citation omitted.] Likewise, we are satisfied that the trial court did not abuse its discretion in refusing to award attorney fees where it found that plaintiff engaged in “unreasonable conduct during the course of the litigation.” *Id.*

Moreover, plaintiff has not demonstrated that she required the payment of her attorney fees to pursue the instant action. Although plaintiff testified that she was not employed during the pendency of the divorce, the record is clear that she had a high earning potential as a talented musician, and that she was not actively pursuing employment opportunities. Further, plaintiff had secured a full-time teaching position at the time of trial, and was awarded \$257 a week in spousal support until she started her employment. On this record, we do not believe the trial court abused its discretion by declining to award plaintiff attorney fees. See *Heike v Heike*, 198 Mich App 289, 294; 497 NW2d 220 (1993).¹⁵

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O’Connell
/s/ Robert J. Danhof

¹⁵ For the same reasons, we reject plaintiff’s assertion that she is entitled to appellate costs.