

STATE OF MICHIGAN
COURT OF APPEALS

VICTORIA J. NULTY,

Plaintiff-Appellant,

v

RICHARD G. NULTY,

Defendant-Appellee.

UNPUBLISHED
November 2, 2001

No. 223025
Washtenaw Circuit Court
LC No. 96-005424

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

In this divorce case, plaintiff appeals by right from a property distribution and spousal support schedule ordered by the trial court after a bench trial. We affirm in part, reverse in part, and remand.

In reviewing a divorce judgment, this Court reviews the trial court's findings of fact "for clear error and then determine[s] whether the ultimate dispositional ruling was fair and equitable in light of the facts" *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). We will reverse the disposition only if we are firmly convinced that it was inequitable. *Id.*

Plaintiff first argues that she was entitled to share in the appreciation in value of certain properties that defendant purchased before the marriage. We agree. Before the parties married, defendant purchased six properties that were used solely as rental properties. After the marriage, defendant maintained those rental premises, actively managing and improving them. Eventually, the rental properties became profitable enough that defendant was able to quit his full-time job as a truck driver to run the rental units and do occasional contracting jobs. Defendant obtained both a builder's license and a mechanical contractor's license during the course of the lengthy marriage, which lasted approximately nineteen years. During the marriage, plaintiff worked outside the home sporadically, provided services as a homemaker and, in the later years, cared for the parties' children. The premarital rental properties appreciated significantly during the time of the marriage.

The trial court refused to award plaintiff any share in the appreciation during the marriage of the premarital rental properties. It found that plaintiff had benefited from the income those

properties produced during the marriage and that it would therefore be inequitable for her to receive any part of the appreciation that accrued during the marriage.

Appreciation during a marriage of a separate asset is not automatically included in the marital estate. *Dart v Dart*, 460 Mich 573, 585, n 6; 597 NW2d 82 (1999). In *Dart*, the Court recognized that only “in certain situations, a spouse’s separate assets, or the appreciation in their value during the marriage, may be included in the marital estate.” *Id.* The *Dart* Court, however, cited *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997), for the proposition that the marital estate does indeed include the appreciation in value of the husband’s separate assets if he actively managed them during the marriage. *Dart, supra* at 585, n 6.

In *Reeves*, the defendant purchased two rental properties before the parties married, making the down payments on his own. *Reeves, supra* at 492. The parties then had a short marriage of approximately four years, during which the plaintiff worked sporadically and also performed the duties of a homemaker. *Id.* at 492-493. This Court found that the plaintiff was entitled to a share in the appreciation in value of the rental properties that accrued during the marriage. *Id.* at 496. This Court ruled that the “increase in value . . . that occurred between the beginning and end of the marriage . . . was part of the marital estate.” *Id.* While awarding the plaintiff a share in the appreciation of the rental properties, which were actively managed by the defendant during the marriage, this Court refused to award the plaintiff a share in the appreciation of an asset that passively appreciated during the marriage. *Id.* at 497. Thus, this Court distinguished between the value of appreciation of separate assets based on whether the appreciation was the result of active management or passive involvement with the asset.

In *Hanaway v Hanaway*, 208 Mich App 278, 292-294; 527 NW2d 792 (1995), this Court also took the position that appreciation of an asset that occurs because of the husband’s investment of time and effort, facilitated by the wife’s commitment to run the household and care for the children, is part of the marital estate. This Court further noted that it is inequitable to deprive the plaintiff wife of any share in appreciation based on the rationale that she benefited from the fruits of the money received over the years. *Id.* at 293-294.

In this case, the trial court specifically deprived plaintiff of any share in the appreciation of the rental properties that were purchased before the marriage because she reaped the benefits of the income generated by those properties while the parties were married. This decision was contrary to the prevailing law. See *id.* Plaintiff was entitled to a share in the appreciation of the premarital rental properties that occurred during the marriage because of defendant’s active management of them and her activities as a homemaker.¹ See *Reeves, supra* at 496-497, and *Hanaway, supra* at 292-294. Accordingly, we reverse the property division portion of the judgment and remand for the trial court to determine an equitable division of this appreciation, using the above cases for guidance.

¹ Defendant contends that an antenuptial agreement entered into by the parties barred plaintiff’s claim to the appreciation of the rental properties. However, defendant did not raise this argument in his statement of questions presented, and review is therefore inappropriate. See *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998). In any event, we do not agree that the trial court abused its discretion in refusing to enforce the antenuptial agreement.

We disagree, however, with plaintiff's suggestion that she is entitled to share in any equity that defendant had built in the premarital rentals before the parties married. As noted in *Reeves, supra* at 496, "it was error for the court to consider as part of the marital estate the increase in value . . . that occurred before the parties married." As in *Reeves*, the premarital rental properties in the instant case were purchased before the marriage without any contribution or effort on behalf of plaintiff. Accordingly, on remand, the trial court should not consider as part of the marital estate the down payments, equity payments, or appreciation of the premarital rental properties that accrued before the parties married.

Plaintiff next argues that the trial court erred in retroactively modifying an interim spousal support award. We disagree. A trial court may modify its interim support orders, *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993), and it may do so retroactively. See MCR 3.207(C). The temporary order in this case specifically put plaintiff on notice that the trial court could modify the amount of spousal support retroactively. Moreover, three months after the temporary order went into effect, the Friend of the Court issued a report that recommended a lesser amount of spousal support. Thus, plaintiff was on notice that the amount she was receiving might have been excessive.

At trial, the court modified the spousal support retroactively. We find that the retroactive modification was fair, especially in light of the notice plaintiff had that her support amount might be altered. Moreover, we note that plaintiff cites no facts or law in support of her assertion that the retroactive application of the support order was "profoundly unfair." Accordingly, she has essentially forfeited the issue for appellate review. See *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 151-152; 577 NW2d 200 (1998), and *Mann v Mann*, 190 Mich App 526, 536-537; 476 NW2d 439 (1991). Finally, we disagree with plaintiff's suggestion that the retroactive modification of the spousal support order was improper because defendant used marital accounts to pay for the interim support. Indeed, while it is true that defendant had exclusive use of the parties' rental income during the pendency of the divorce, he alone did not enjoy the income. He used it to pay bills and to maintain the value of the rentals, which benefited plaintiff. Under the circumstances, we are not firmly convinced that the trial court erred in making the spousal support modification retroactive. See *Mitchell, supra* at 396 (setting forth applicable standard of review).

Finally, plaintiff argues that the chief circuit judge improperly disqualified the original trial judge from the case. Under the circumstances, we disagree. We review a chief judge's decision to disqualify a trial judge for an abuse of discretion. *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997).

The specific grounds for the motion for disqualification are not known by this Court and apparently were not known by the chief judge either; indeed, the motion was phrased vaguely and stated that "the [c]ourt cannot act in an unbiased manner."² However, when the original trial

² While defendant did cite a specific problem at the disqualification hearing – that the original trial judge had spoken ex parte to the Friend of the Court – the chief judge's grant of the motion to disqualify did not rest on this allegation. We note that at the hearing, defendant's counsel stated that he was "still precluded from disclosing information to this Court" because of the

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judge refused to recuse himself, he asserted his rights and privileges under MCR 9.200 *et seq.*, which set forth rules for Judicial Tenure Commission proceedings. It therefore appears that the motion to disqualify was related to a matter before the Judicial Tenure Commission. MCR 9.222(A) indicates that “[b]efore a complaint is filed, a member of the commission or its staff may not disclose the existence or contents of the investigation”

In granting defendant’s motion for disqualification, the chief judge stated:

We grant, as I indicated, grant the motion. The reason I am doing so is because of the fact that there has been, in [the original judge’s] order, which the Court takes judicial notice of . . . an assertion of rights and privileges under MCR 9.200 which in fact does preclude the Court from a hearing on those issues which may be pertaining to whatever it is that’s at issue or in dispute under MCR 9.200. I don’t believe that the Judge, on the one hand can say, I’m not biased and have nothing that would prohibit me from making rulings in an unbiased manner and at the same time assert rights under a court rule which in fact preclude[s] anyone from exploring the veracity of that statement.

We cannot say that the chief judge *abused his discretion* in making this ruling, despite the apparent lateness in defendant’s filing of the motion to disqualify and defendant’s failure to attach an affidavit to the motion. As noted in *Mixon v. Dixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999), “[a]n abuse of discretion occurs when the result is so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.” The chief judge evidently determined that because of the possibility of judicial partiality and the inability to fully explore the issue, disqualification was the best solution. We cannot say that this determination evidenced “a perversity of will, a defiance of judgment, or the exercise of passion or bias.” *Id.*³

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Patrick M. Meter

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Judicial Tenure Commission court rules, but he mentioned the Friend of the Court allegation “by way of example but not limitation.”

³ We further note that plaintiff’s requested remedy for this appellate issue is to reassign this case to the original trial judge. In other words, she does not contend that this issue warrants a new trial but merely requests that the original trial judge handle the proceedings on remand. In our view, the second trial judge, who actually presided over the trial, would be in a much better position to assess the relevant issues on remand.