

STATE OF MICHIGAN
COURT OF APPEALS

KIM ANN PANETTA,

Plaintiff-Appellee,

v

RICHARD EDWARD PANETTA,

Defendant-Appellant.

UNPUBLISHED

October 21, 2004

No. 247939

Roscommon Circuit Court

LC No. 02-723024-DM

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by right the trial court's division of property in a divorce judgment. We affirm.

Defendant first argues that the trial court made several factual errors in its opinion regarding property division. This Court reviews a trial court's findings of fact for clear error. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). A finding of fact is clearly erroneous if after reviewing the entire record, we are left with a firm and definite conviction that a mistake has been made. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). If this Court upholds the trial court's findings of fact, we then review the dispositional ruling to determine if it "was fair and equitable in light of those facts." *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). We must affirm the trial court's decision unless "left with the firm conviction that the division was inequitable." *Id.*

Defendant first claims the trial court erred when it found that the parties made improvements to the downstairs portion of the barn. Defendant argues that he made the majority of the improvements, not plaintiff. However, testimony indicated that plaintiff did paint the drywall in the barn. Additionally, later in its opinion the court noted that defendant had performed much of the labor. We find no clear error by the trial court.

Defendant also argues that the trial court erred when it stated plaintiff lived in the downstairs portion of the barn when testimony indicated plaintiff lived in the upper portion of the barn. But, reading the entire sentence, one gleans that the court was suggesting plaintiff used to live in the barn, not specifically the downstairs portion. Regardless, it is not material where in the barn plaintiff resided before the marriage.

Defendant also argues that the court erred when it referenced the size of the addition to the home where the parties lived with plaintiff's father. The testimony supported the trial court's statement, and the trial court recognized that improvements were made to plaintiff's father's home. We find no clear error by the trial court in light of the evidence presented at trial.

Defendant further argues that the court erred when it referred to time frames when plaintiff's father was diagnosed with Parkinson's disease and when plaintiff began to care for him. Again, however, a review of the evidence supports the trial court's findings, and it was not clear error for the court to suggest plaintiff began to care for her father at the time she and defendant moved back to plaintiff's father's home. Further, defendant fails to argue how any of these alleged errors were material or affected the court's division of property.

Defendant next argues that the trial court erred when it determined that the mortgage plaintiff's father drafted in favor of the parties was a gift that failed. We disagree. The trial court did not err when it determined that the mortgage was a gift and not compensation for work the parties performed. Plaintiff testified at trial that her father wanted to protect her equity in her father's home from her brother. Her father did not want plaintiff to have to sell the home in order to pay her brother \$30,000 for his equity in the home. Plaintiff did guess the mortgage was to compensate her and defendant for their work, but she also testified that her father's main concern was that she not have to sell the home to pay her brother's share of the equity in the home. Additionally, plaintiff testified that she never gave her father \$90,000 as consideration for the mortgage. Because there was evidence to support the trial court's finding that the mortgage was a gift, this finding was not clearly erroneous.

We need not decide whether the trial court was correct in finding that the mortgage was a conditional gift because the court found that the gift failed when the trust did not have \$90,000 to pay off the mortgage. This finding was not a clear error. Plaintiff's father drafted the trust so as to pay plaintiff and defendant a lump sum of \$90,000 on the sale of plaintiff's father's home or in the event of plaintiff's father's death. When plaintiff's father died, the trust did not have \$90,000. The only assets were the home and property. Because of this, the trial court concluded the gift had failed or was adeemed. See *In re Thornton*, 192 Mich App 709, 712; 481 NW2d 828 (1992). Because testimony indicated that there was no money in the trust and that plaintiff's father drafted the trust to protect her from having to sell the house, the trial court did not clearly err by concluding that the mortgage was a failed gift.

Defendant argues that the gift did not fail because the trust has the house and property as an asset. However, the trial court determined that selling the home would not help the parties to collect upon the mortgage, as there existed a superior mortgage that one of the parties would have to pay. As the trial court noted, there simply was not \$90,000 or the potential of \$90,000 available to the parties. Additionally, the reason plaintiff's father drafted the mortgage was to ensure that plaintiff would not have to sell the home. In light of these facts, we cannot say the trial court erred or that the property settlement was unfair or inequitable. *Sands, supra* at 34.

Next, defendant argues the trial court erred when it determined that the real property was a gift to plaintiff and her separate property. Defendant argues that because he contributed to the improvement of the property, he is entitled to part of the increase in its value. We disagree.

In dividing a marital estate, a court must first determine what is marital property and what is separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). “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.” *Id.* at 494. There are two exceptions to this rule: (1) where the marital estate is insufficient to support one party, and (2), where the other party “‘contributed to the acquisition, improvement, or accumulation of the property.’” *Id.* at 494-495, quoting MCL 552.401. Therefore, in certain situations a party’s separate property, or the appreciation in value of that property may be included in the marital estate. *Dart v Dart*, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999). If a party receives an inheritance during the marriage but keeps it separate from marital property, that inheritance is deemed separate property and not subject to division. *Id.* at 584-585.

Plaintiff’s father’s property is her separate property because her father left title to her and in her name only. Although, defendant argues that he is entitled to the increase in value because of his contribution to the improvement of that property, defendant performed all of the work on the property while the property still belonged to plaintiff’s father. It was not yet plaintiff’s property. In *Polate v Polate*, 331 Mich 652, 654; 50 NW2d 190 (1951), our Supreme Court held that a circuit court “properly refused to include the value of plaintiff’s prospective interest in the farm or the extent of appellant’s contributions while it was owned by plaintiff’s mother in decreeing a property settlement between the parties.” Because, in this case, the improvements were made to plaintiff’s father’s property, the court properly held that defendant did not contribute to its acquisition, improvement, or accumulation.

Because the trial court’s finding that plaintiff’s father’s property was separate property was not a clear error, we next consider whether the settlement was fair and equitable in light of these facts. *Sparks, supra* at 152. When relevant, the trial court is to make specific findings regarding: (1) the duration of the marriage, (2) contributions to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities, (8) past relations and conduct, and (9) equity. *Id.* at 159-160.

In dividing the marital estate, the trial court found that the marriage was an eleven-year marriage; the parties contributed equally to the marital estate, but the parties did not contribute to the acquisition of plaintiff’s father’s property; plaintiff was in good health and forty-one years old, while defendant was fifty-one years old and recovering from a stroke; both parties were destitute; plaintiff had a limited earning ability of \$600 to \$800 dollars a month, and defendant was totally disabled, had no earning ability, and was not receiving any social security disability benefits; the court noted that defendant was charged with a crime where plaintiff was the victim but did not view either party as being at fault for the breakdown of the marriage. After noting the above, the court found that an equitable division of property would allow plaintiff to keep her father’s home, to award defendant no equity from it, and to have plaintiff be solely responsible for all of the marital debt as defendant was disabled and earning no income.

In reviewing the *Sparks* factors and the evidence presented at trial, we find the trial court’s division of property to be fair and equitable. The court noted that the parties did not accumulate much of a marital estate. Although plaintiff received the home and property and defendant did not receive any equity, plaintiff was also solely responsible for the marital debts that total over \$30,000. The trial court noted that even though defendant equally contributed to

the marital debt, it would have been inequitable for the court to order him to be liable for half, as he was disabled and not working. Additionally, plaintiff was raising the parties' children without any support from defendant. In viewing the entire record, the trial court's division of property was fair and equitable considering plaintiff's separate property and defendant's health and earning abilities.

Defendant's final argument is that the trial court erred when it attributed a benefit of \$20,000 in rent free living to defendant and not to plaintiff when they both lived in plaintiff's father's home rent free. We disagree that the trial court erred.

When the court noted that defendant received a benefit of over \$20,000 for living rent-free at plaintiff's father's property, it was in the context of refuting defendant's position that plaintiff would be receiving a windfall if she received the home and defendant received no cash value. The court also noted that plaintiff would be paying the monthly mortgage payment, plaintiff owed her brother \$30,000, and she was raising the parties two children. The court also found that plaintiff would be paying all of the marital debts even though both parties contributed to the debts. There was also evidence presented at trial that while plaintiff lived in her father's home, she cared for him while he was suffering from Parkinson's disease. Based on evidence presented at trial, it was not clearly erroneous for the court to attribute the amount of rent-free living to defendant and not plaintiff.

As discussed, the overall property settlement was fair and equitable in light of the *Sparks* factors and the evidence presented at trial.

We affirm.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Jane E. Markey