

STATE OF MICHIGAN
COURT OF APPEALS

SHARON LEE BLACK,

Plaintiff-Appellee,

v

BILLY GLOE BLACK,

Defendant-Appellant.

UNPUBLISHED

December 20, 2005

No. 257650

Manistee Circuit Court

LC No. 02-010964-DO

Before: Smolenski, P.J., Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right, challenging the property division of the judgment of divorce entered by the trial court. We affirm in part, reverse in part, and remand for a redetermination of the property division.

I. FACTS

The parties were married on August 29, 1989. This was a second marriage for both parties. The parties separated on September 1, 2002 and plaintiff filed for divorce on November 4, 2002. At the time of trial, plaintiff was 58 years old and defendant was 61 years old. There were no children born of this marriage.

Before the marriage, plaintiff owned a home, a car, and had approximately \$20,000 in a savings account. She worked as a personal assistant at an insurance company, taught a few adult education classes in stained glass, and sold her stained glass at craft shows. Before the marriage, defendant was employed as a school counselor and had been so employed for around 20 years. Defendant owned several rental properties as joint tenants with his mother. Defendant also owned a home in Corunna and a cabin in Manistee as joint tenants with his mother. The parties entered into an antenuptial agreement before the marriage, which provided that the party's separate property would stay separate. However, the agreement also had a provision allowing the parties to gift property to each other and to transfer property into the parties' joint estate.

Plaintiff testified that after the parties were married defendant wanted her to quit working. Plaintiff testified that she first stopped teaching classes and a few years into the marriage, she also quit her job at the insurance company because defendant made it too difficult for her to work. Defendant testified that he did not force plaintiff to quit working and in fact

encouraged plaintiff to find some type of work so she would have something to do during the day. Defendant continued to work as a counselor throughout the marriage and retired shortly before the divorce was filed. After defendant retired, he received a pension of \$2,130 a month.

About a year into the marriage, plaintiff sold her pre-marital home. With some of the proceeds, she purchased a rental cabin in Manistee, which was titled in both parties' names. The parties also attempted to purchase the cabin in Manistee from defendant's mother during the marriage. The parties entered into a land contract with defendant's mother and plaintiff provided \$5,000 as part of the down payment for the cabin. Plaintiff testified that she believed defendant was making the monthly installment payments on the cabin. Defendant testified that plaintiff ended the land contract after making only two or three payments and his mother returned the \$5,000 to plaintiff. The parties continued to make improvements to the cabin, even after the time defendant claimed that the parties had ended the land contract with his mother. Also during the marriage, defendant's mother died, leaving defendant as the sole owner of a rental property on Goodhue Street, a rental property on Clyde Street, the home in Corunna, and the cabin in Manistee. Defendant subsequently conveyed his interest in the rental properties and his home in Corunna to himself and plaintiff as joint tenants. The home in Corunna was sold during the marriage and the proceeds were placed in a certificate of deposit (CD) account and savings account in both parties' names.

The trial court determined that the antenuptial agreement had been voided by the parties. The court further determined that the marital estate consisted of:

the cabin in Manistee
the rental in Manistee
defendant's pension
the Clyde and Goodhue rental properties
a Villager Van
a 1998 Jeep
a 1999 Jeep
and "marital personalty including cash accounts."

The court found that defendant contributed more to the acquisition of the marital estate but that he was also more at fault for the breakdown of the marriage and found that the parties should share the marital estate as equally as possible. The court then divided the marital estate as follows:

Plaintiff received:

the Manistee rental

Defendant received:

the CD and savings accounts

the Manistee cabin

the Goodhue and Clyde rental
properties

the 1999 Jeep

the 1998 Jeep

\$6,375.43 as one half the marital bills she paid

the Villager Van

one half defendant's pension

one half defendant's pension

plaintiff's personal property

defendant's personal property

The court also ordered that defendant provide insurance coverage for plaintiff under the provision of his medical insurance policy or a separate policy with similar provisions. The court did not award any spousal support or attorney fees.

II. ANTENUPTIAL AGREEMENT

Defendant first argues that the trial court erred in its determination that the antenuptial agreement was void. We agree.

A. Standard of Review

The interpretation of a contract is a question of law that this Court reviews de novo. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636; 687 NW2d 300 (2004). If a contract is unambiguous, it must be enforced according to its terms. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005).

B. Analysis

Antenuptial or prenuptial agreements that govern the distribution of property in the event of a divorce are valid in Michigan subject to certain limitations. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991). A party who is challenging the validity of the antenuptial agreement bears the burden of proof and persuasion. *Id.* Antenuptial agreements “must be fair, equitable, and reasonable in view of the surrounding facts and circumstances.” *In re Benker Estate*, 416 Mich 681, 689; 331 NW2d 193 (1982). Antenuptial agreements are subject to the general rules regarding contract interpretation. *Reed, supra* at 144.

“Antenuptial agreements, like other written contracts, are matters of agreement by the parties, and the function of the court is to determine what the agreement is and enforce it. Clear and unambiguous language may be [sic] not rewritten under the guise of interpretation; rather, contract terms must be strictly enforced as written, and unambiguous terms must be construed according to their plain and ordinary meaning.” [*Id.* (citation omitted)].

The trial court found that antenuptial agreement to be void and stated “[t]he court has determined that the antenuptial agreement was voided by the creation of joint deeds and accounts as per the provisions of paragraphs 10 & 12 thereof.” Paragraph ten of the antenuptial agreement states:

The parties agree that if they acquire any property, real or personal, as joint tenants with rights of survivorship, or as tenants by the entireties, the property so acquired shall become part of the parties['] joint estate. The parties agree that either of them may transfer any property, real or personal, into the joint estate of the parties, and at the death of either party, this property shall pass in accordance with the law governing the form of ownership of the property.

Paragraph 12 of the agreement states:

This agreement shall not be construed to prevent either party from making gifts to the other. Any gifts made shall be and remain property and part of the separate estate of the recipient of the gift. Either party shall have the right to transfer or convey to the other party any property or interest which may be lawfully conveyed or transferred during his or her lifetime.

The provisions of the agreement allowed the parties to convey land to the joint estate and to gift property to the other party as part of that party's separate estate. The creation of joint deeds and accounts by the parties was done *pursuant* to the plain language of the antenuptial agreement. Therefore, the creation of joint deeds and accounts could not have voided the agreement. We conclude that the trial court erred in declaring the antenuptial agreement void for the reasons it expressed in its opinion.¹

II. PROPERTY DIVISION

Defendant next argues that the trial court erred in its determination of what constituted marital property and in its division of that property. We conclude that because the trial court found the antenuptial agreement to be void, it also erred in determining that defendant's pension was marital property. We also conclude that the trial court did not clearly err with regard to the remaining property it considered to be part of the marital estate. However, the trial court did not consider all of the relevant *Sparks* factors. Therefore, a remand for reconsideration of the property distribution is necessary.

A. Standard of Review

In reviewing a property settlement in a divorce case, a reviewing court must first review a trial court's findings of fact for clear error. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493

¹ Plaintiff argues on appeal that the trial court's decision to void the agreement should be upheld because of a change in circumstances or, in the alternative, even if the agreement is upheld, the trial court's error in voiding it was harmless, because the agreement does not apply to divorce, it only applied to estate planning upon the death of one of the parties. Neither issue was argued at the trial court and we therefore decline to address these arguments. See *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003) (holding that issues first raised on appeal need not be addressed by this Court).

(1993). A finding of fact is clearly erroneous if the reviewing court, when viewing the entire record, is 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 the trial court's findings of fact are not clearly erroneous, this Court reviews the dispositional ruling to determine whether it "was fair and equitable in light of those facts." *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). The reviewing court should affirm the trial court's decision unless it is "left with the firm conviction that the division was inequitable." *Id.*

B. Analysis

In dividing a marital estate, a court must first make a determination of what is marital property and what is each party's separate property. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). The trial court is "to include all property that came 'to either party by reason of the marriage as part of the marital estate.'" *Pickering v Pickering*, 268 Mich App 1, ___; ___ NW2d ___ (2005), slip op at 6, quoting MCL 552.19. "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, "[w]hen the parties have commingled their separate property or used it for joint purposes, an appellate court will consider the parties' intent in regard to including the assets in the marital estates." *Pickering, supra* slip op at 6, citing *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951).

The trial court did make a determination of what constituted marital property. Specifically, the court found that the marital assets consisted of the following: the cabin in Manistee, the rental home, defendant's pension, the Clyde rental, the Goodhue rental, the 1986 van, the 1998 Jeep, the 1999 Jeep, and marital personalty including cash accounts. However, the court made this division under the erroneous assumption that the antenuptial agreement was invalid and not applicable to the property division.

We conclude that the trial court did not clearly err in including the cabin in Manistee, the Manistee rental home, the Clyde rental, the Goodhue rental, and the CD and savings account as part of the marital estate.² With the exception of the Manistee cabin, the property that the court included in the marital estate was all titled in both parties' names. The CD and savings account were formed with proceeds from the sale of defendant's premarital home, which was also titled in both parties' names at the time of the sale. The CD and savings accounts were also in both parties' names. When parties commingle or use their separate property for joint purposes, the Court is to look to the parties' intent to determine whether the property is to be considered part of the marital estate. *Pickering, supra* slip op at 6. Paragraph ten of the antenuptial agreement is evidence of the parties' intent to treat separate property that is then acquired by the parties as joint tenants as marital property and part of the marital estate. Pursuant to paragraph ten of the antenuptial agreement, and because the property was deeded in both parties names, it is part of the parties' joint estate. See also *Polate, supra* at 654-655. Therefore, the trial court did not

² The parties do not disagree with the trial court's determination that the vehicles were marital property.

clearly err in including the property that was in both parties' names as part of the marital estate. Likewise, the trial court did not err in determining that the CD and savings accounts that were formed from the proceeds of the home that was titled in both parties' names were part of the marital estate.

The trial court also did not clearly err in including the Manistee cabin as part of the marital estate. Defendant owned the Manistee cabin before the marriage as joint tenants with his mother. However, during the marriage, plaintiff and defendant entered into a land contract with defendant's mother to purchase the property and plaintiff paid \$5,000 of her separate money as a down payment. Additionally, the parties made significant improvements to the cabin during the marriage. The cabin ultimately was titled in defendant's separate name and defendant claimed the land contract was ended by plaintiff and his mother returned the \$5,000 down payment to plaintiff. However, based on plaintiff's testimony that the parties were purchasing the cabin, we conclude that the trial court did not clearly err in determining that the Manistee cabin was a marital asset. *Sands, supra* at 34. The antenuptial agreement would not apply to this asset because the parties attempted to purchase the cabin as joint tenants during the marriage. There was testimony from plaintiff that the parties were purchasing the cabin and a land contract in both parties' names was admitted into evidence.³ There was evidence to support the trial court's determination that the cabin was part of the marital estate and this finding was not clearly erroneous.

However, we conclude that the trial court did clearly err in determining that defendant's pension was part of the marital estate. Paragraph five of the antenuptial agreement states:

The parties agree that any income received by either of the parties, whether derived from employment, property owned by the parties as part of their separate estates, proceeds from the sale or disposition of property in the separate estates of the parties, or otherwise, shall be and remain in the separate estates of the parties. Each of the parties shall be responsible for all taxes on their respective incomes or properties.

Normally, the portion of a pension that is earned during the marriage is considered marital property. MCL 552.18(1); *VanderVeen v VanderVeen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998). However, based on the clear language of the antenuptial agreement, defendant's pension is properly considered income derived from employment and his separate property. Therefore, pursuant to the antenuptial agreement, the pension is defendant's separate property and the trial court erred in including it as marital property, subject to division.

Additionally, the trial court erred in not considering the relevant *Sparks* factors when dividing up the marital estate. A court's division of property should be equitable in light of all of the circumstances involved in the case. *McNamara v Horner*, 249 Mich App 177, 188; 642

³ Although defendant's testimony conflicted with plaintiff's testimony about the circumstances surrounding the land contract, deference is given to the trial court's determination of credibility. *Draggou v Draggou*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

NW2d 385 (2002). A division of property does not have to be equal to be equitable, but is should be “roughly congruent.” *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). To determine an equitable division of the property, a court is to make specific finding regarding the following factors: (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. *Sparks, supra* at 159-160. The determination of what specific factors are relevant will depend on the circumstances of the case. *McNamara, supra* at 185. “Nonetheless, where any of these factors are relevant to the value of property or the needs of the parties, the trial court must make specific findings of fact regarding those factors.” *Id.* at 186.

The trial court briefly discussed two of the *Sparks* factors; that defendant contributed more to the marital estate and that defendant was more at fault for the break down in the marriage. The court also mentioned the duration of the marriage in its initial discussion, but not in the context of the property award. The court made no findings of fact in regards to the age of the parties, the health of the parties, the life status of the parties, the necessities and circumstances of the parties, the earning abilities of the parties, and any other general principles of equity used in making the property division. See *Sparks, supra* at 159-160. The failure to address the majority of the *Sparks* factors makes it necessary to remand this case to the trial court for further factual findings regarding the relevant *Sparks* factors. *McNamara, supra* at 186-187.⁴

IV. HEARSAY STATEMENTS

Defendant argues that he is entitled to a new trial because the trial court erred in admitting certain hearsay statements. We disagree.

A. Standard of Review

This Court reviews the trial court’s admission of evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). A court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). “However, any error in the admission or exclusion of evidence will not warrant appellate relief ‘unless refusal to take this action appears . . . inconsistent with substantial justice’ or affects ‘a substantial right of the [opposing] party.’” *Id.* (citations omitted).

B. Analysis

Defendant alleges that the trial court erred in admitting statements plaintiff made to friends, a police report, and the deposition of a witness who also testified at trial. Defendant objected to the admission of the statements and to the police report. However, at trial defendant

⁴ Defendant also argues that the trial court erred in awarding plaintiff health insurance as defendant’s expense. The trial court will have to reconsider this award in light of the remainder of the property division and the relevant *Sparks* factors.

did not object to the admission of the deposition transcript. Defendant did not object until the motion for entry of the judgment of divorce. To preserve an issue for appeal, a party must timely object at trial on the same ground it asserts on appeal. *Clapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Defendant did not timely object to the admission of the deposition transcript and therefore, that issue is not preserved for review by this Court. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Additionally, the trial court did not abuse its discretion in admitting the police report. The police report was admissible under MRE 803(8) as a public record or report. Further, plaintiff's statements in the police report could arguably have been admitted under MRE 803(2) as an excited utterance.

As to the admission of witnesses' recollection of plaintiff's statements, we conclude that any error in their admission was harmless. Although it appears that the trial court erred in admitting the statements under MRE 801(d)(2), this error did not deprive defendant of substantial right. The evidence was cumulative, as plaintiff herself testified to all of the statements the witnesses recalled. Defendant points to a comment the trial court made as evidence of prejudice. However, the comment was made during plaintiff's testimony and appears to be unrelated to the hearsay statements. As such, defendant has not shown how the error affected his substantial rights so as to warrant a new trial. *Craig, supra* at 76.

Defendant additionally requests that this case be remanded to a different judge for reconsideration. Defendant does not support this request with facts or case law nor does defendant allege any bias or other reason to remand this case to a different judge. Therefore, the issue is abandoned. See *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (a party's failure to address the merits of the claim of error constitutes abandonment of the issue).

V. CONCLUSION

We conclude that defendant is not entitled to a new trial. However, the trial court erred in declaring the antenuptial agreement to be void. The trial court also erred in including defendant's pension as part of the marital estate, although the trial court's remaining determination of the marital estate was not clearly erroneous. However, the trial court failed to consider all the relevant *Sparks* factors when dividing the marital estate and reconsideration of the property division is necessary.

Affirmed in part, reversed in part, and remanded for reconsideration of the property division in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello