

STATE OF MICHIGAN
COURT OF APPEALS

GAYLE SELLES,

Plaintiff-Appellee,

v

TERRY SELLES,

Defendant-Appellant.

UNPUBLISHED

March 22, 2007

No. 266218

Ottawa Circuit Court

LC No. 03-047291-DO

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant appeals as of right the property division contained in a judgment of divorce. Defendant specifically argues that the trial court erroneously treated his premarital business as a marital asset, failed to treat his inheritance as a separate asset, and failed to award him a portion of plaintiff’s pension. We affirm; however, we also remand to afford the trial court the opportunity, at its discretion, to reconsider the issues raised herein.

Plaintiff filed for divorce in 2003, after the parties had been married for eleven years. Over the course of their marriage, both parties worked and each contributed separate funds to a joint bank account. It appears from the record that plaintiff contributed \$57,000 to the account at the time the parties were married, and she later contributed a \$138,172.01 inheritance. Defendant contributed \$40,000 in cash and \$119,000 from the sale of two real estate properties at the time of the marriage, and he later contributed a \$10,000 inheritance. The parties used the funds in their joint account to purchase several pieces of real estate. Additionally, before their marriage, defendant acquired property on Division Street in Grand Rapids, Michigan (“Division Street property”). During their marriage, defendant used his earnings to repay a debt on that property. Plaintiff receives a pension from prior full-time employment; defendant intends to continue a law practice indefinitely but also receives a pension from previous employment.

The trial court concluded that neither party was clearly at fault and that fault would not affect the property division. That conclusion is not disputed on appeal. The trial court also concluded that the real estate that the parties jointly purchased with their separate assets became part of the marital estate, although the trial court attempted to credit each of them for their individual contributions. The trial court determined that, because defendant used marital assets to repay a debt on the Division Street property, \$15,000 of the property’s total value should be included in the marital estate. The trial court ultimately granted plaintiff a net award of \$493,000 and defendant a net award of \$493,500.

Defendant first argues that the trial court erred by including any portion of the Division Street property's value in the marital estate. We disagree, but we note that the trial court apparently miscalculated its value.

We review findings of fact made in relation to the division of marital property for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Stoudemire v Stoudemire*, 248 Mich App 325, 336-337; 639 NW2d 274 (2001). The trial court's dispositional ruling is discretionary and will be affirmed unless we are left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005). Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). However, a party's separate property can be invaded if the other party contributed to the acquisition, improvement, or accumulation of the property. MCL 552.401; *Reeves v Reeves*, 226 Mich App 490, 494-495; 575 NW2d 1 (1997). Generally, assets earned by a spouse during the marriage are included in the marital estate, and the appreciation of a premarital asset during the marriage is subject to division unless the appreciation was wholly passive. *McNamara, supra* at 183-184.

Defendant admits that he repaid a \$12,000 debt on the Division Street property during the parties' marriage. Therefore, we conclude that the property must have appreciated in value to the parties by at least \$12,000 during the marriage. Furthermore, because defendant repaid the debt with assets he earned during the marriage, which would have been used for joint purposes otherwise, the property's resulting \$12,000 increase in value was properly included in the marital estate. *Id.* Plaintiff testified that she paid the mortgage on a different real property parcel to permit defendant to use his earnings to repay the Division Street property debt. However, the record evidence shows *only* that defendant repaid \$12,000 on the property. We find no support for the conclusion that the property's value increased by \$15,000, as the trial court found. It appears that the trial court erred in this calculation. Nevertheless, the trial court exerted obvious effort to divide the property equitably, notwithstanding the fact that most of the estate was composed of real property valued at more than \$1,300,000 total, which defendant requested not be sold. We are not convinced that this \$3,000 difference renders the ultimate disposition inequitable.

Defendant next argues that the trial court erred by failing to treat his \$10,000 inheritance as separate property. Generally, property received by a married party as an inheritance, but kept separate from marital property, is considered to be separate property. *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). A trial court has discretion, however, to include property acquired by inheritance in the marital estate if the property was commingled with marital property, if it was used for joint purposes, or if the marital estate would otherwise be insufficient to support either party. *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976); *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992).

The trial court determined that, once the parties used their separate assets, including assets acquired by inheritance, to purchase real property, the property became part of the marital estate. We agree. However, to ensure an equitable division of the marital estate, the trial court's division of the property credited the parties for their contributions of separate assets. We find no error in this approach generally, but it appears that the trial court gave plaintiff credit for contributing her inheritance, but it failed to give defendant credit for contributing his inheritance.

It is not clear from the record whether the trial court did so intentionally or inadvertently. Had defendant's inheritance been accounted for, his overall contribution to the marital estate would have totaled \$169,000, rather than \$159,000. We again are unable to conclude that this necessarily rendered the ultimate division inequitable. However, when viewed together with the miscalculation regarding the Division Street property, we believe the trial court should have the opportunity to reconsider its division, should it determine that doing so is warranted.

Finally, defendant argues that the trial court erred by failing to grant him a portion of plaintiff's pension. We disagree.

Generally, any right to vested pension benefits accrued by a party during the marriage must be considered part of the marital estate subject to division upon divorce. MCL 552.18(1); *Pickering*, *supra* at 7-8. Pension benefits should be allocated based on the ratio of the years that the parties were married while the employed spouse earned the pension to the years in which the employed spouse worked to accrue the pension. *Id.* at 8. The party seeking to include a pension in the marital estate bears the burden of proving a reasonably ascertainable value. *Beaty v Beaty*, 167 Mich App 553, 557; 423 NW2d 262 (1988). If the burden is not met, the pension should not be included in the marital estate. *Id.* Plaintiff testified that she retired in 1999 after 25 years of service and, thereafter, received a pension of \$1,200 per month. Defendant argued that he should receive 50 percent of the portion of plaintiff's pension which accrued during their marriage, which the trial court denied because defendant failed to provide evidence regarding the value of plaintiff's pension and presented conflicting evidence regarding her years of service. We agree. Therefore, because defendant failed to meet his burden of valuation, plaintiff's pension was properly excluded from the marital estate.

We affirm the trial court's property division. However, we nevertheless remand to the trial court so that it may, in its discretion, reconsider the property division in light of the apparent miscalculations related to the Division Street property and defendant's inheritance, presuming they are in fact miscalculations. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Alton T. Davis