

STATE OF MICHIGAN
COURT OF APPEALS

ANNA MARIE TYMES,

Plaintiff-Appellee,

UNPUBLISHED
October 30, 2007

v

RONALD BRUCE TYMES, JR.,

Defendant-Appellant.

No. 270598
Kent Circuit Court
LC No. 04-011087-DM

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce, challenging the trial court's division of marital property and its decision to award spousal support to plaintiff. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Basic Facts and Procedural History

At the time of the parties' marriage in 1987, defendant was employed full-time at General Motors Corporation (GM). Although plaintiff was then also employed full-time as a nurse's aid, she later left that job in order to care for the couple's children. The parties purchased a home in 1994, after which plaintiff began working part-time performing secretarial functions at a church. In November 2004, plaintiff filed a complaint for divorce. During that year plaintiff earned approximately \$7,000, and defendant earned approximately \$133,000. Defendant retired from GM in October 2005 and became an ordained evangelist. At the time of trial in January 2006, defendant was receiving \$2,859 per month from his pension, but was not receiving remuneration as a minister. Plaintiff was unemployed and had no prospects of employment.

Before trial, the parties reached stipulations regarding their personal property and agreed that they would share joint legal and physical custody of their three children. They also agreed that defendant would receive the marital home as his separate property and would remain responsible for the mortgage payments on the home. At the close of trial, the trial court awarded each party one-half of the \$10,000 in equity it found in the marital home. In addition to awarding plaintiff one-half of the value of defendant's personal savings plan (PSP) account, the trial court also ordered that plaintiff was entitled to receive one-half of defendant's monthly pension benefits. The trial court further ordered defendant to pay plaintiff \$450 per month in spousal support for a period of three years.

II. Analysis

A. Marital Home

Defendant first argues that the trial court erred in finding that there was \$10,000 equity in the marital home and that the court's decision to award \$5,000 of the equity to plaintiff was inequitable. We disagree.

In *Draggoo v Draggoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997), this Court set forth the following standards of review that apply in divorce cases:

In a divorce case, this Court must first review the trial court's findings of fact . . . under the clearly erroneous standard. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses. If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. [Citations omitted.]

"The goal of a court when apportioning a marital estate is to equitably divide it in light of all the circumstances." *Reed v Reed*, 265 Mich App 131, 152; 693 NW2d 825 (2005). "As a prelude to this property division, a trial court must first make specific findings regarding the value of the property being awarded in the judgment." *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). The trial court may base the valuation on expert testimony, lay testimony, the parties' testimony, or may appoint its own independent expert to provide the court with a more objective valuation. *Id.* at 627 n 4.

In this case, trial testimony revealed that the parties refinanced the marital home in 2002. At that time, an appraiser valued the home at \$110,000, which defendant claimed at trial was not an accurate valuation. Specifically, defendant testified that the appraiser inflated the value of the home to help the parties obtain a larger mortgage from the bank. In or around October 2005, plaintiff's attorney arranged for appraiser Kevin Garcia to conduct an appraisal of the marital home. Plaintiff testified that Garcia appraised the marital home "in the eighties." Defendant testified that he was present when the appraisal was conducted and that Garcia appraised the home's value at approximately \$84,000. The record also reveals, however, that in October 2005 defendant filed a petition for bankruptcy in which he declared the value of the marital home to be \$103,800, subject to a \$93,858 mortgage. Defendant testified at trial that he did not have a copy of Garcia's appraisal when he prepared his bankruptcy petition and, thus, was required to estimate the value of the home using its state equalized value (SEV). According to defendant, the SEV was based upon the 2002 appraisal and, thus, was not an accurate reflection of the true market value of the home.

On the record before us, the evidence supported the trial court's finding that there was \$10,000 equity in the marital home. Based upon the figures provided by defendant in his bankruptcy petition, which he signed under penalty of perjury, the equity in the home was approximately \$9,942. We recognize that defendant testified that the 2002 appraisal, upon which

the declaration in his bankruptcy petition was based, was not an accurate representation of the value of the home, and that the condition of the home had deteriorated since the 2002 appraisal was conducted. However, it is not a reviewing court's function to resolve conflicts in the evidence or pass on the credibility of witnesses. See *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). Rather, we must give special deference to the trial court's findings. MCR 2.613(C); *Draggo*, *supra* at 429. Affording such deference here, we find no clear error in the trial court's conclusion regarding the equity in the parties' marital home. Furthermore, defendant failed to establish that the trial court's decision to award \$5,000 of the equity to plaintiff was inequitable. The trial court's decision to award one-half of the equity in the home to plaintiff was consistent with its goal of fashioning a "roughly congruent" property distribution in this case. See *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

B. Adjournment of Trial

Defendant next argues that the trial court erred in denying his motion for an adjournment on the morning of trial to allow him more time to procure Garcia as a witness at trial. We review a trial court's decision on a motion for an adjournment for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). "A motion for adjournment must be based on good cause, and a court, in its discretion, may grant an adjournment to promote the cause of justice." *Id.* (citation omitted). An adjournment may be granted on the ground of unavailability of a witness only if the motion is made as soon as possible after ascertaining the facts and the court finds that diligent efforts were made to produce the witness. MCR 2.503(C); *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

The trial court properly denied defendant's motion to adjourn the trial based upon the unavailability of Garcia to testify at trial. The record suggests that defendant failed to exercise diligence in obtaining the presence of the witness at trial and that he failed to move for an adjournment as soon as possible after ascertaining the facts, as required by MCR 2.503(C). Defendant argues that he could not subpoena Garcia until two days before trial, when he retained counsel and learned Garcia's name. However, defendant admitted at trial that he was present at the marital home when Garcia conducted his appraisal in or around October 2005. Furthermore, defendant was represented by counsel when Garcia performed the appraisal.¹ Nothing in the record indicates that defendant or his counsel attempted, or were unable, to subpoena Garcia in a timely fashion.

Defendant also argues that the trial court erred in denying his motion for an adjournment because he did not know that plaintiff was going to claim a portion of the equity in the marital

¹ We recognize that defendant's original attorney withdrew from representation on November 4, 2005, and that defendant did not retain a new attorney until January 9, 2006, just two days before the bench trial in this case. Nevertheless, the fact that defendant did not have an attorney of record between these dates did not constitute good cause to grant the motion for an adjournment. During that time defendant elected to proceed in this action without an attorney and was held "to the same standard in the presentation of his case as would be required of a member of the bar." *Baird v Baird*, 368 Mich 536, 539; 118 NW2d 427 (1962).

home at trial, and Garcia's testimony was necessary to establish that there was in fact no equity in the home. Although in her pretrial statement plaintiff relinquished any claim that she had to the marital home and agreed to transfer the title to the home to defendant, she did not waive her claim to a portion of the equity in the marital home. Reasonably, defendant should have anticipated that, even though plaintiff agreed to forego any claim to the house itself, the value of the home and the amount of equity in the home, if any, were going to be at issue in the divorce trial. Nothing precluded defendant from subpoenaing Garcia or, in the alternative, filing his motion to adjourn when he received plaintiff's trial brief and learned that plaintiff was claiming that there was \$10,000 in equity in the marital home. If defendant wanted to present Garcia's testimony to establish that there was no equity in the home, it was his responsibility to timely secure Garcia's presence at trial. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Because defendant did not act to adjourn the trial "as soon as possible after ascertaining the facts," and because he failed to make a diligent effort to subpoena Garcia in a timely manner, the trial court did not abuse its discretion in denying defendant's motion to adjourn the trial. MCR 2.503; *Tisbury*, *supra* at 20.

C. Pension and PSP Award

Defendant next argues that the trial court erred in finding that the entirety of his pension and PSP account were marital property subject to distribution upon divorce. We agree.

It is well-settled that only marital assets are subject to property division between the parties. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). "Thus, the trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The marital estate is composed of only those assets that come to "either party by reason of the marriage." 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. "This distinction between marital and separate estates has long been recognized in this state." *Id.*

The undisputed evidence in this case establishes that defendant was employed at GM for 12 years before the marriage, during which time his pension and PSP account were established. The portions of the pension and PSP account that accrued before the parties' marriage were thus defendant's separate property. *Id.* The trial court found, however, that defendant waived any claim that a portion of the pension or the PSP account was his separate property because he asserted in his answers to plaintiff's interrogatories that he did not have any separate property. Under the circumstances of this case, we are firmly convinced that invasion of those portions of the pension and PSP account rightfully titled as defendant's separate assets is, on this basis, inequitable. *Dragoo*, *supra*. Indeed, there is nothing in the record before us to suggest that defendant or his attorney, who withdrew from the case long before trial, knowingly provided a false or misleading answer to the interrogatory. MCR 2.114(E); see also *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 597; 592 NW2d 707 (1999). To the contrary, the evidence

supports that defendant did not himself recognize the legal effect of his answer and was not appropriately counseled in this regard by his prior attorney. Further, while we recognize that a spouse's separate assets may in certain situations be included in the marital estate, see *Reeves, supra* 494-495,² the trial court did not rely on these exceptions as a basis for including the entirety of defendant's pension and PSP within the marital estate for purposes of distribution. Rather, the court merely concluded that defendant waived any claim that a portion of these assets were his separate property in his answer to plaintiff's interrogatories. Given the factual underpinnings for the trial court's conclusion in this regard, and considering the long and well-recognized distinction between marital and separate estates, we find the trial court's invasion of defendant's separate property without substantive consideration of the equities in doing so to be inequitable. Accordingly, we reverse the trial court's dispositional ruling in this regard and remand this matter for such consideration.³

D. Time Valuation of PSP Account

Defendant next argues that the trial court erred in valuing the PSP account as of June 13, 2005, the date closest to the actual trial date, rather than November 10, 2004, when plaintiff filed the complaint for divorce. He also argues that the trial court erred in failing to subtract the outstanding loan balance from the PSP account before distributing the funds in the account.

The evidence in this case establishes that on November 10, 2004, the vested balance in defendant's PSP account was approximately \$78,400, with an outstanding loan balance of nearly \$28,200. On June 13, 2005, the vested balance of the PSP account had increased to more than \$100,700, while the outstanding loan balance decreased to \$18,300. In fashioning the property distribution in this case, the trial court valued the PSP account as of June 13, 2005, and awarded plaintiff one-half of the vested balance in the PSP account as of that date, plus an additional \$5,000, which represented plaintiff's share of the equity in the marital home. The trial court concluded that "[a]ny loan that the defendant has taken out on his GM personal savings plan of course is his responsibility, 'cause you're the one who got the money."

"It is well settled that decisions regarding the time of valuation of property in a divorce action are matters within the discretion of the trial court." *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). The trial court in this case did not abuse its discretion in determining the time for valuing the PSP account. "For purposes of dividing property, marital

² As recognized in *Reeves, supra*, two statutorily created exceptions apply to permit invasion of a spouse's separate estate in a divorce. First, invasion is permitted if, after division of the marital assets, the marital estate is insufficient for suitable support of a spouse. *Id.* at 494, citing MCL 552.23. Second, invasion is permitted "when the other spouse 'contributed to the acquisition, improvement, or accumulation of the property.'" *Id.* at 494-495, quoting MCL 552.401.

³ Our decision that this matter must be remanded for this purpose necessarily affects the appropriateness of the trial court's award of spousal support. Accordingly, we decline to address defendant's challenges to this award on appeal. Rather, we vacate the trial court's award of spousal support and direct that the matter be reconsidered in conjunction with the trial court's substantive assessment of the equities, if any, of invading defendant's separate property.

assets are typically valued at the time of trial or at the time judgment is entered, though the court may, in its discretion, use a different date.” *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997) (citations omitted). Defendant failed to establish that November 10, 2004 was a more appropriate date on which to value the account. Defendant’s position, that plaintiff would have received less money from the account if the trial court would have valued it as of November 10, 2004, ignores the fact that the approximately \$22,300 that accrued in the PSP account between November 2004 and June 2005 was a marital asset that was subject to distribution. An asset that is earned by a spouse before the entry of a judgment of divorce is marital property and is properly considered part of the marital estate. *Id.* at 110.

Nonetheless, we agree with defendant that the trial court erred in finding that the loans that were drawn against defendant’s PSP account were not marital debt. Indeed, it is generally presumed that all debt accumulated during the marriage is marital debt. *Lesko v Lesko*, 184 Mich App 395, 401; 457 NW2d 695 (1990), overruled on other grounds by *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992). The undisputed evidence in this case established that the parties acquired the loans during their marriage and that the proceeds from the loans were deposited into the parties’ joint bank account and were used to pay marital debts and other expenses. Therefore, we reverse the portion of the judgment of divorce concerning the PSP account and direct that any judgment of divorce entered on remand reflect that plaintiff is entitled to one-half of the balance in the PSP account as of June 13, 2005, less one-half of the outstanding loan balance on that date.

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

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray