STATE OF MICHIGAN

COURT OF APPEALS

THERESA NELSON WELLS,

Plaintiff-Appellant,

v

THOMAS ALVAN WELLS,

Defendant-Appellee.

UNPUBLISHED
November 20, 2007

No. 271465
Ottawa Circuit Court
LC No. 05-051821-DM

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this dispute involving the division of the parties' marital estate, plaintiff appeals as of right the trial court's May 3, 2006 judgment. Plaintiff claims that the trial court erred by failing to include defendant's partnership interest and the premarital value of his stock in the marital estate, by miscalculating the value of the stock, and by granting plaintiff only 45 percent of the marital estate. We affirm.

The parties were married in 1987 and plaintiff filed for divorce in 2005. Defendant and members of his extended family own and operate a 220-acre farm and orchard. The family farm is comprised of three primary parcels of land, including the "Schmidt farm," the "home farm," and the "Riddering farm." In 1986, defendant's parents, Alvan and Barbara Wells, formed Riverbend Farms, Inc., to operate the family farm. Thereafter, Alvan and Barbara gifted their Riverbend Farms stock to defendant and his brothers. The brothers also formed a general partnership, Wells Farms. Currently, Wells Farms owns all of the land comprising the family farm. Riverbend Farms leases the land from the partnership. The trial court found that plaintiff engaged in an extramarital affair before she filed for divorce and that the affair was the primary reason for the breakdown of the parties' marriage. Accordingly, the trial court awarded 55 percent of the marital estate to defendant and 45 percent to plaintiff. It excluded defendant's interest in Wells Farms, along with the premarital value of defendant's Riverbend Farms stock, from the marital estate.

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). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the firm conviction that a mistake has been made. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). 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).

Plaintiff first argues on appeal that the trial court erred in treating defendant's interest in Wells Farms as his separate property. Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded. *McNamara*, *supra* at 183. "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). Assets earned by a spouse during the marriage are generally included in the marital estate, and the appreciation of a premarital asset during the marriage may also be subject to division unless the appreciation was wholly passive. *McNamara*, *supra* at 183-184.

The trial court clearly erred in finding that defendant's interest in Wells Farms was a *premarital* asset. It is undisputed that defendant and his brothers formed Wells Farms during the parties' marriage. Nonetheless, we agree with the trial court that defendant's partnership interest should be treated as a separate asset, an inheritance. In determining that the land held by Wells Farms was a "pre-inheritance transfer" to defendant and his brothers, the trial court properly considered the intent of the donor. See *Darwish v Darwish*, 100 Mich App 758, 773-774; 300 NW2d 399 (1980). The Wells family farm started in 1858. During the parties' marriage, defendant's parents gifted all of the land comprising the current family farm, with the exception of the Schmidt farm, to defendant and his brothers. The land was then conveyed to Wells Farms. Defendant and Scott both testified that they hope the next generation of Wells can continue to operate the family farm and that they believe their parents gifted the land to them for that purpose. The land now held by Wells Farms has been in defendant's family for several generations and most of the land was gifted to defendant and his brothers to enable the family farm to continue. Based on this evidence the trial court did not err in treating defendant's interest in Wells Farms as an inheritance. See *Id*.

Additionally, we find that the trial court properly excluded defendant's partnership interest from the marital estate. Property received by a married party as an inheritance, but kept separate from marital property, is generally considered to be separate property. *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). The decision to include an inheritance in the marital estate is discretionary and dependent upon the circumstances of the case. *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992). The trial court noted several factors militating against defendant's inheritance being included in the marital estate, including the presence of non-party co-owners, see *Reed v Reed*, 265 Mich App 131, 157-158; 693 NW2d 825 (2005), development restrictions on the land, and plaintiff's fault in causing the breakdown of the marriage. The trial court further noted this Court's decision in *Simmons v Simmons*, 58 Mich App 480; 228 NW2d 432 (1975), which cautions against making an award that would inevitably result in the sale of a family farm. Considering the circumstances, the trial court did not abuse its discretion in excluding defendant's partnership interest from the marital estate. See *Demman*, *supra* at 112.

Plaintiff argues that, even if defendant's partnership interest is his separate property, she is entitled to part of his interest. There are two statutorily-created exceptions to the doctrine of noninvasion of separate estates. MCL 552.23(1) permits the trial court to invade separate property when "'the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . .'" *Reeves*, *supra* at 494. The second exception,

MCL 552.401, permits the trial court to invade separate property when the other spouse "'contributed to the acquisition, improvement, or accumulation of the property.'" *Id.* at 494-495.

Neither statutory exception is applicable in this case. Plaintiff presented no evidence that the division of marital assets was insufficient for her suitable support and maintenance as required by MCL 552.23(1). In fact, the trial court indicated that it granted plaintiff alimony, in part, as an effort to offset its decision not to invade defendant's partnership interest. Plaintiff has also failed to demonstrate that she contributed to the growth of Wells Farms over the course of the parties' marriage as required by MCL 552.401. Plaintiff has not presented any evidence regarding the partnership's appreciation in value. Moreover, we agree with the trial court that, although plaintiff contributed to the growth of the "family business," Riverbend Farms was the beneficiary of her efforts, not Wells Farms. Any increase in the value of defendant's partnership interest consists of the passive appreciation in the land that should not be included in the marital estate. See *McNamara*, *supra* at 183-184. Accordingly, we affirm the trial court's decision not to invade defendant's partnership interest.

Plaintiff next argues on appeal that the trial court erred in excluding the premarital value of defendant's Riverbend Farms stock from the marital estate. We disagree. Defendant currently owns 16,000 shares of Riverbend Farms stock. He received 14,750 shares before the parties' marriage and 1,250 shares during the marriage. The trial court found that, because plaintiff contributed to the value of Riverbend Farms through her employment on the farm and as a homemaker, she was entitled to an equitable share of the appreciation in defendant's stock, including his premarital stock. Accordingly, the trial court included $43,992.20 of stock in the marital estate, representing the current value of defendant's stock ($94,880) less the premarital value of the stock ($50,887.80). See *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995). Because plaintiff has failed to demonstrate that the division of marital assets was insufficient for her suitable support and maintenance and because the trial court included the appreciation in defendant's stock in the marital estate, we cannot conclude that further invasion into defendant's premarital stock is warranted in this case. See *Reeves*, *supra* at 494-495.

Plaintiff further argues that the trial court erred in its valuation of the Riverbend Farms stock. Again, we disagree. In determining the property rights of the parties to a judgment of divorce, the trial court must make specific findings as to the value of the property being awarded in the judgment. *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). "A trial court has great latitude in determining the value of stock in closely held corporations, and where a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). In this case, only one witness testified about the value of Riverbend Farms and the trial court adopted the witness's assessment. Because it arrived at a value within the range established by the evidence, we find that the trial court's valuation of defendant's stock was not clearly erroneous. *Id.*

Plaintiff finally argues on appeal that the trial court abused its discretion by awarding her less than 50 percent of the marital estate. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara*, *supra* at 188. The division need not be mathematically equal, but the trial court must clearly explain any significant departure from congruence. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's

station in life, earning ability, age, health, and needs, fault or past misconduct, and any other equitable circumstance. *Sparks*, *supra* at 158-160. The trial court must make specific findings regarding the factors it determines to be relevant. *Id.* at 159.

Plaintiff argues that the trial court erred in finding that she engaged in an extramarital affair before she filed for divorce and in considering this erroneous conclusion in dividing the marital estate. We disagree. Plaintiff filed for divorce in March 2005. Shortly thereafter, plaintiff informed defendant's sister that she planned to remarry within the year. In April 2005, defendant learned from plaintiff's journals that she was involved in an extramarital affair with a pastor at the family's church. Defendant testified that, when he confronted plaintiff about the affair, she admitted having "feelings" for the pastor since the summer of 2004 and, on cross-examination, plaintiff testified that the pastor became her "soulmate" in the winter of 2004. Plaintiff further testified that she and the pastor purchased a joint cellular telephone plan more than one week before she filed for divorce and that the pastor resigned from the church, in part, because of their relationship. In light of this evidence, the trial court's finding that plaintiff engaged in an extramarital affair before she filed for divorce cannot be deemed clear error. See *McNamara, supra* at 182-183. Furthermore, the trial court properly considered evidence of plaintiff's affair in distributing the marital estate. "The relative value to be given the fault element in a particular case . . . [is] left to the trial court's discretion . . . . The trial court is in the best position to determine the extent to which each party's activities contributed to the breakdown of the marriage." *Hanaway*, *supra* at 297.

Plaintiff further argues that the trial court erred in finding that she resides in a two-income household. Plaintiff does not dispute that she currently resides with her boyfriend, the former pastor. Rather, plaintiff asserts that it was improper for the trial court to base its distribution of the marital estate "on the fact that she presently resides with another adult person who works." Again, we disagree. Plaintiff admitted that her boyfriend provides her with some financial support, that they share their living expenses, and that they co-signed the lease to the apartment where they cohabitate. Plaintiff's boyfriend is clearly responsible for paying at least a portion of her living expenses. Based on this evidence, we find that the trial court properly considered plaintiff's residence in a two-income household in distributing the marital estate. See *Sparks*, *supra* at 158-160.

The trial court properly considered all of the factors relevant to the distribution of marital assets, including plaintiff's current financial situation and her extramarital affair, and reached an equitable division of the marital estate.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter