STATE OF MICHIGAN

COURT OF APPEALS

BARBARA ANN PFENNINGER,

Plaintiff-Appellee,

v

GREGORY JOHN PFENNINGER,

Defendant-Appellant.

UNPUBLISHED
December 11, 2007

No. 272711
Bay Circuit Court
LC No. 05-007016-DM

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Defendant appeals by right the divorce judgment entered August 21, 2006. We affirm the judgment.

Defendant and plaintiff married in 1980 and divorced in 1989 after having two children. The trial court awarded physical custody of the children to plaintiff and ordered defendant to pay child support. After the divorce, defendant contracted to have a house built on a lot he had purchased on Salzburg Road (the Salzburg house). He moved into the house in mid-1989. In 1990, plaintiff and the children moved in with him. After they moved in, the court relieved defendant of the child support order. The parties remarried in 1996. In 2005, they separated and plaintiff again filed for divorce.

Defendant argues that the trial court erred by including the appreciated value of the Salzburg house in the property division relative to appreciation that accrued between 1990 and 1996. During the six years the parties lived together before remarrying, the house nearly doubled in value. The house continued to appreciate after the parties remarried. The trial court included the full appreciated value of the house in the property distribution, after setting off the amounts defendant paid for the lot and the construction. Defendant maintains that the trial court erred by including all of the appreciation in the property division, arguing that the house was his separate asset from 1990 through 1996.

With respect to the distribution of property in a divorce action, this Court reviews the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts." *Id*. at 151-152. The parties do not dispute the court's factual findings regarding the value of the Salzburg house. Regarding the trial court's dispositive ruling on the house, we note that this Court has previously refused to

classify the full appreciation of a residence as a marital asset when the parties lived together in the residence prior to their marriage. *Reeves v Reeves*, 226 Mich App 490, 496; 575 NW2d 1 (1997). *Reeves* stated that a court must distinguish marital and separate assets. *Id.* at 494. Based on *Reeves*, the house was defendant's separate asset until the parties remarried. However, *Reeves* also recognized that a spouse's separate estate can be invaded by the other spouse if either MCL 552.401 or 552.23 is satisfied. *Id.* With regard to MCL 552.401, the *Reeves* panel stated:

> The other statutorily granted method for invading a separate estate is available only when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." MCL 552.401 . . . . When one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation. [*Id.* at 494-495.][1]

The record indicates that plaintiff made both monetary and intangible contributions to the improvement of the Salzburg house from 1990 forward. Plaintiff's intangible contributions to the Salzburg house included household chores, helping with the original landscaping, and painting. She testified that once she moved in, she and defendant did most of the work on the house together. This Court has held that a party's intangible contributions will support inclusion of the other party's separate assets in the property division. *Hanaway v Hanaway*, 208 Mich App 278, 293-294; 527 NW2d 792 (1995).

In addition to plaintiff's intangible contributions, plaintiff made direct and indirect monetary contributions to the improvement and maintenance of the house. Plaintiff paid the bulk of the child-rearing costs, provided most of the groceries and household items, and paid for the family van, relieving defendant of his responsibility for these costs. Plaintiff thus conferred a financial benefit to defendant, which, by reducing defendant's liabilities, indirectly contributed to defendant's ability to expend monies on the Salzburg house. Further, plaintiff made direct monetary contributions to the Salzburg house, using assets from the sale of her previous home, which she had received in the prior divorce. We find that the trial court correctly concluded that the proceeds from the sale of plaintiff's home were commingled with the assets that defendant used to pay for improvements to the Salzburg house. Given plaintiff's monetary and intangible contributions toward the Salzburg home, the trial court correctly included the full appreciated value of the house, i.e., the increase in the home's value from 1990 forward, in the property distribution.[2]

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[1] While the trial court referenced "defacto" marriages and Michigan does not recognize common-law marriages, *Reeves*, *supra* at 493 n 1, the trial court essentially applied concepts and cited facts that fit under MCL 552.401.

[2] Defendant complains that if premarital home appreciation was subject to division, so should the premarital appreciation of plaintiff's pension. Defendant was awarded fifty percent of one of plaintiff's pensions on the amount that was earned between 1996 and 2005. Defendant retained his full pension. We reject defendant's arguments. First, defendant has not appealed the pension

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Next, defendant challenges the inclusion of his dirt bike and his four-wheeler in the property division, claiming that he purchased those items with traceable premarital assets. We reject this claim. The traceable assets to which defendant refers came from the sale of a 1994 motorcycle, which was purchased while the parties were living together in the Salzburg house. As noted above, plaintiff conferred a financial benefit upon defendant during that time period. We agree with the trial court that plaintiff's contributions to the household warrant inclusion of the dirt bike and the four-wheeler in the property distribution.

Defendant also argues that the trial court erred by reserving the issue of spousal support to plaintiff in the event this Court reversed the property settlement. Given that we affirm the property settlement, the issue of reserved spousal support to plaintiff is moot. We note, however, that the trial court had authority to reserve the issue under MCR 3.211(B)(4). Regarding defendant's related contention that the trial court erred by failing to reserve the issue of his own possible spousal support, we note that defendant did not request spousal support in his pleadings, nor did he present an argument to the trial court concerning an award of spousal support from plaintiff to defendant. In his trial brief, he addressed the spousal support issue with regard to whether *plaintiff* was entitled to spousal support, not whether he was entitled to support. Not having requested such support, defendant cannot now claim error on the part of the court in failing to order reservation of the issue. See *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1999) (observing that error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence).[3]

Defendant next argues that the trial court abused its discretion in denying his motion to stay enforcement and in ordering defendant to pay costs, attorney fees, and interest if defendant did not make a lump-sum cash payment to plaintiff within 90 days, which payment was part of the judgment and represented plaintiff's portion of the equity in the home. This Court rejected defendant's arguments in our denial of defendant's motion to stay, and we decline to reconsider those arguments here. To the extent that this issue remains pertinent at this late date, we find that the trial court acted well within its discretion.

Finally, defendant argues that the trial court abused its discretion in awarding attorney fees to plaintiff for the prosecution of the underlying divorce action. Attorney fees in divorce actions are governed by MCR 3.206(C), which requires a party seeking attorney fees to demonstrate that he or she is unable to bear the expense of the action and that the other party is able to pay. MCR 3.206(C)(2)(a). As this Court explained in *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007): "'A party to a divorce action may be ordered to pay the other party's reasonable attorney fees if the record supports a finding that such financial

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provisions in the judgment of divorce, and it does not appear that he raised the argument below. Second, there is no evidence regarding defendant contributing to the improvement or accumulation of the pension. Defendant also makes a statute of frauds argument that simply is irrelevant and lacks any merit.

[3] We note that MCL 552.28 gives either party to a divorce judgment the right to request a modification of the spousal support provisions in the judgment, which right is always applicable "to any alimony arrangement adjudicated by the trial court when the parties are unable to reach their own agreement." *Staple v Staple*, 241 Mich App 562, 569; 616 NW2d 219 (2000).

assistance is necessary to enable the other party to defend or prosecute the action.'" *Id.*, quoting *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

Here, the trial court found that defendant's income exceeded plaintiff's income, which is supported by the record, and plaintiff testified that she had to borrow money from her mother and that she had to take a second job because of the divorce costs. We find no abuse of discretion.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto