

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE WALLACE COOK,

Plaintiff/Counter-Defendant-
Appellant,

v

KAREN COOK,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

December 11, 2007

No. 273837

Bay Circuit Court

LC No. 03-003447-DO

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

PER CURIAM.

In this divorce action, plaintiff appeals as of right from the parties' judgment of divorce. We affirm in part and remand in part.

Plaintiff first alleges that the trial court erred by awarding defendant a portion of the trust that he asserts was a separate asset, not a part of the marital estate. We disagree. Plaintiff is the beneficiary of a trust that was created during the marriage by his parents. The trial court found that both parties in this action had intended the trust monies to be part of the marriage, and indeed their lives were planned around it, with their efforts being expended with an eye toward it being shared. Specifically, the trial court found that the parties had spent their 401(k)s on marital expenses in reliance on their shared belief that the trust funds would be used to support them during their retirement. The court stated that there would not be enough assets, for purposes of division and to fairly compensate defendant, without consideration of the trust.

We review a trial court's findings of fact related to property division for clear error and determine, in light of those facts, whether the ultimate ruling was fair and just. *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). Reversal is warranted only if this Court is "left with the firm conviction that the distribution was inequitable." *Id.*

In *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997), this Court, after noting that a court must distinguish marital and separate assets, stated:

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. However, a spouse's separate estate can be opened for

redistribution when one of two statutorily created exceptions is met. MCL 552.23 and 552.401. [Citation omitted.]

MCL 552.23(1) permits the invasion of separate estates if after the division of the marital assets “the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party[.]” See also *Reeves, supra* at 494. Invasion of a separate asset under the statute has been permitted when a division of the marital assets alone “would have been insufficient for suitable support in the manner in which the [parties] were accustomed.” *Id.*, citing *Charlton v Charlton*, 397 Mich 84; 243 NW2d 261 (1976).

Defendant in this case performed all of the childcare and household duties, in addition to being the primary wage earner. Moreover, because of plaintiff’s assurances to defendant that she would have access to the trust funds for her retirement, defendant spent a significant amount of her retirement funds on marital expenses. This resulted in a depletion of the marital assets that could be awarded to defendant, while the trust continued to appreciate in value. Under the judgment of divorce, and assuming that the sizeable trust was not considered, the only significant asset awarded to defendant was the marital home. Were the trust not included in the property division, the marital assets would not have been sufficient for the suitable support and maintenance of defendant. We conclude that, under MCL 552.23(1), the trial court did not err in including the trust in the property division.

Next, plaintiff claims that the trial court erred in its property distribution because it did not find defendant at fault. Although fault may be considered in determining an equitable property distribution, it may not be the sole factor. *Sparks v Sparks*, 440 Mich 141, 158; 485 NW2d 893 (1992). Plaintiff alleged at trial that defendant’s petition to have him placed in a mental health facility was irrational and based solely on her desire to acquire his assets. The trial court listened to both parties’ descriptions of the events leading up to and including defendant’s petition. It found that defendant’s actions were not illegal or immoral, but done in an effort to help plaintiff with what defendant believed to be behavioral issues. On the record, we find no clear error. Plaintiff refused to provide any medical records during discovery, asserting his medical privilege at his deposition, thereby removing the issue of whether defendant accurately assessed plaintiff’s condition from the trial. MCR 2.314(B)(2). Based on the evidence defendant provided regarding her perceptions and information she received from other parties, the trial court could properly find that defendant was acting in plaintiff’s best interests. We defer to the trial court’s assessment of credibility given its opportunity to personally view and hear the witnesses appearing before it. *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999). Accordingly, we cannot say that the trial court’s finding that there was no fault was clearly erroneous. Because the trial court properly found neither party to be at fault, we need not consider plaintiff’s claim that fault should have affected the property division.

Plaintiff’s third argument is that the trial court erred in denying him spousal support because it overestimated the income it imputed to him. The award of spousal support is within the trial court’s discretion. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). We review a trial court’s findings of fact related to spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). “A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made.” *Id.* at 654-655. If

there is no clear error, this Court determines whether the dispositional ruling was fair and equitable in light of the facts. *Id.*

The trial court found that based on the assets to be distributed, the earning history of both parties, their retirement funds, their similar ages, their good health, their contributions to the marriage, and their future needs, no spousal support would be appropriate. Plaintiff argues that he has health issues that would prevent future employment, but there is no evidence of any health issues in the record to support this assertion.

Plaintiff also argues that the trial court imputed too much income to him. The trial court found that nothing in the record indicated that plaintiff was unable to be employed and make the same amount as defendant. He had a previous work history of income greater than plaintiff's, and he was responsible for managing investments, caring for his parents, and managing the parties' rental property during the marriage. With his parents gone, his full-time job of caring for them was no longer required. He had time and skills to find other employment. The trial court could properly consider plaintiff's voluntary reduction of income and impute income to him when determining spousal support. *Moore, supra* at 655. Additionally, the trial court awarded him the income-producing rental property. Given that defendant is near the age of retirement and that the evidence shows that her retirement benefits will be similar to the income received by plaintiff, we hold that the trial court's finding was not clearly erroneous, nor was the denial of spousal support inequitable under the circumstances.

Plaintiff's last claim on appeal is that the substance of the judgment of divorce does not comport with the trial court's ruling on the record at trial. Plaintiff failed to timely object under MCR 2.602(B)(3) regarding the proposed judgment of divorce submitted pursuant to the seven-day rule. Therefore, the issue is not preserved for appeal. However, this Court may overlook preservation requirements to prevent manifest injustice or to decide an issue that is necessary to a proper determination of the case. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

The court awarded plaintiff two parcels of real property valued at \$233,600. Defendant received one parcel of real property valued at \$148,978, and was awarded, according to the judgment of divorce, \$84,622 in cash, "representing a portion of her net equity in" the property awarded to plaintiff. Therefore, the total value of the cash and property awarded to defendant in the judgment of divorce is \$233,600. Reviewing the transcript of the trial court's ruling in the divorce trial, we find no mention of the court awarding defendant \$84,622. Indeed, there is no mention of defendant receiving any cash as a setoff to the division of the real estate. The trial court merely spoke of dividing the three properties as stated above. That being said, the transcript appears to reflect that the court was intending an equal division. We note that by awarding defendant \$84,622 in cash, an equal division does not occur if only the real estate is considered. Rather, an award of \$42,311 to the defendant would result in an equal division if only the real estate is considered. We are uncertain whether the court intended to award a cash payment to defendant, and if so, we are uncertain whether the court intended to award defendant \$84,622. Accordingly, we remand the case to the trial court in order to allow the court to either let stand or alter the judgment such that it comports with the court's ruling as contemplated by the court.

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

/s/ Alton T. Davis

/s/ William B. Murphy

/s/ Deborah A. Servitto