

STATE OF MICHIGAN
COURT OF APPEALS

VICTOR JOHN WOLFERT,

Plaintiff-Appellee,

V

JENNIFER HOLLY WOLFERT,

Defendant-Appellant.

UNPUBLISHED
July 23, 2009

No. 281140
Ottawa Circuit Court
LC No. 05-53902-DM

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's final judgment of divorce. We affirm in part, reverse in part, and remand.

I

A

The parties married in 1982, when plaintiff was 25 years old and defendant was 27 years old. Defendant knew at the time the parties married that plaintiff had been divorced, and had gone through bankruptcy, but she did not know that he still had \$20,000 in debt, and that he had served time for a felony arson. When the parties married, defendant "sold her home and invested the \$17,000 proceeds, along with \$7,000 in savings, to buy a home, put a down payment on a tractor, and to help buy dairy cows."

The parties farmed owned and rented land. In addition, defendant had a day job at Haworth Corporation for 22 years, where she earned approximately \$35,000 annually. When the parties had dairy operations, defendant would milk the dairy cows every morning and then do household duties before leaving for work at Haworth, where she worked from 8:00 a.m. to 5:00 p.m. The dairy farm operations, however, ceased around 1997, when plaintiff injured his shoulder. On some days, she would do field work with the tractor. She testified that she took time off from her day job, one or two weeks each spring and fall, to assist with additional field work. In addition, when plaintiff suffered his rotator cuff injury, which led them to end the dairy operations, defendant did many of plaintiff's chores during the two years he went through surgery and recovery.

At the time of trial, plaintiff farmed the 24-acre farm, the adjoining 19-acre “muck farm,” and approximately 500 to over 600 acres of rented land. In 2000, the parties purchased the muck farm for \$47,500. The parties previously had dairy cows, but they ceased that operation.

Plaintiff was a full-time farmer, but that work was seasonal. He worked 16-hour days in the spring and fall. During the summer he did trucking work. Winter was the slow season, in which he worked on rebuilding his equipment, but less than full-time.

In October 2005, defendant revealed to plaintiff that she might have multiple sclerosis. She testified that his response was not supportive. Plaintiff filed for divorce in November 2005. Plaintiff also met the woman who, by the time of trial, had become his girlfriend in November 2005. The trial court concluded, however, that while this relationship contributed to plaintiff’s filing for divorce, it was not a cause of the breakdown of the marital relationship.

Defendant also left her job at Haworth in November 2005, because her illness made it too difficult for her to do the job. In December 2005, defendant’s parents loaned her \$7,000, she cashed-out a life-insurance policy worth under \$2,000, and she also left the farm around that time.

Defendant was subsequently re-hired by Haworth, but in November 2006, she was asked to resign as she was unable to work effectively with the medications she was needing to take. Defendant lost her health insurance when she left Haworth, and was unable to afford COBRA¹ coverage. Defendant admitted that she has traveled to Washington State to visit her significant other numerous times.

B

The parties requested and the trial court awarded an equal division of marital property. Defendant was awarded her retirement accounts, while each party was awarded the tangible personal property in their possession. The farming property, real and personal, together with farming debts, was awarded to plaintiff. The trial court further ordered plaintiff to pay defendant \$600 per month in spousal support, until she remarried or cohabitated with an unrelated adult male. The trial court specifically found, in conjunction with its award of spousal support to defendant, that defendant has the ability to work full-time, notwithstanding her medical condition.

II

Defendant first argues that the trial court erred in the determination and valuation of marital assets and debt when it included in the marital estate her vehicle gifted to her by her parents, as well as the money loaned to her by her parents and kept in a separate bank account. We reject this argument.

¹ Comprehensive Omnibus Budget Reconciliation Act.

A

Questions of law, such as statutory interpretation,² are reviewed de novo. *In re LE*, 278 Mich App 1, 17; 747 NW2d 883, 897 (2008). Determining what property is separate property, and what is marital property, is logically antecedent to the question of how marital property should be divided. See *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005).

In reviewing a circuit court's division of marital property, this Court reviews the circuit court's findings of fact for clear error. MCR 2.613(C); *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005). 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. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997), citing *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). But the reviewing court is not authorized to substitute its judgment for that of the circuit court. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007). Rather, this Court gives special deference to a circuit court's findings, when they are based on the credibility of witnesses who appeared before it. *Johnson, supra* at 11; *Draggoo, supra* at 429.

If the Court upholds the circuit court's factual findings, it must decide if the property division was fair and equitable. *Sparks, supra* at 151-152; *Baker v. Baker*, 268 Mich App 578, 582; 710 NW2d 555 (2005). A trial court's ruling in this regard is discretionary, and should normally be affirmed, unless the appellate court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); see also *Koy v Koy*, 274 Mich App 653, 660; 735 NW2d 665 (2007).

B

Marital property is property that accrued to the husband or wife “by reason of the marriage.” MCL 552.19 (emphasis added). Separate property, on the other hand, includes property acquired by one spouse or the other, through economic means *independently of the marriage*, such as inheritance. *Lee v Lee*, 191 Mich App 73, 78-79; 477 NW2d 429 (1991).

Generally, separate property is not divided between the divorcing spouses. Rather, each party takes his or her separate property as the parties part ways. But even if a party acquired separate property during the marriage, or brought preexisting separate property into the marriage, if it is *commingled* with marital property, or is *used for joint purposes*, the circuit court may

² Statutory interpretation would include MCL 552.19, which provides: “Upon . . . a divorce . . . the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party *by reason of the marriage* . . .” (Emphasis added.) This is the definition of marital property. Generally, separate assets are not subject to division between divorcing parties. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). In other words, by statute, Michigan is a separate property state, not a community property state. Married couples can maintain assets separately, if they wish.

divide it as part of the marital estate. *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951). Moreover, the “circuit court . . . may include in any decree of divorce . . . all or a portion of the property, either real or personal, owned by his or her spouse, . . . if it appears from the evidence in the case that the party *contributed to the acquisition, improvement, or accumulation of the property.*” MCL 552.401 (emphasis added). There is a presumption that earned property (received, for example, as compensation for services), acquired by one spouse during the marriage is marital property. *Byington v Byington*, 224 Mich App 103; 568 NW2d 141 (1997).

Once the circuit court determines what property is separate, and what property is marital (including commingled property, or property used for joint purposes), it then divides the marital estate equitably. *McNamara, supra* at 188.³

Defendant fails to show that she argued below that certain articles of property were separate, and not marital, property. Therefore, this argument is unpreserved. In civil cases, this Court may decline to consider unpreserved issues. *Coates v Bastian Bros*, 276 Mich App 498, 510; 741 NW2d 539 (2007), quoting *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) (“Issues raised for the first time on appeal are not ordinarily subject to review.”). We therefore decline to address this issue.

III

Defendant next asserts that the trial court erred in its determination and valuation of marital assets and liabilities, by not considering evidence revealing their accurate value, not using consistent dates of valuation, and missing some property in its analysis. We agree with respect to the trial court’s valuation of the wheat crop.

A

This Court reviews a circuit court’s findings of fact regarding valuation of marital-estate assets under the clearly erroneous standard. *Sparks, supra* at 151; *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). 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. *Beason, supra* at 805. If this Court accepts the circuit court’s findings of fact regarding valuation, it must then decide whether the division of marital-estate property was fair and equitable in light of the facts found. *Sparks, supra* at 152.

³ Courts consider several factors when making a division of marital property: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) the age of each party, (4) the health of the parties, (5) the life status of the parties, (6) the circumstances and necessities of the parties, (7) the earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. *Sparks, supra* at 159-160. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution, in light of all the circumstances. *McNamara, supra* at 188. The division need not be mathematically equal, but any significant departure from congruence must be clearly explained by the circuit court. *Id.* The circuit court’s disposition of marital property is intimately related to its findings of fact. *Id.*

B

The trial court did not clearly err in its valuation of the muck farm. The parties purchased it in 2000 for \$47,500. In April 2005, plaintiff submitted a loan application that indicated that the value of the muck farm was \$80,000. The trial court concluded that the parties merely guessed at the value in the loan application, guessed high to enhance their appearance of creditworthiness, and were not attempting to determine actual fair market value. The market value of the muck farm, according to the municipality, was \$54,000. The trial court used this value as its valuation.

Defendant now argues on appeal that the trial court erred in stating that the parties paid \$47,500 for the muck farm, and argues that, including the down payment of \$10,000, the parties paid \$57,500. Therefore, defendant argues, the trial court clearly erred in its valuation of the muck farm. We disagree. Even if the trial court was incorrect in believing that the original purchase price was \$47,500, instead of \$57,500, this is not the only factor in determining its updated value (for their purchase was several years before the trial court's valuation). Nor is it necessarily the most important factor in determining the updated value. Farm land values might have fallen in the interim. The trial court evidently found that the municipality's valuation of the property, was the most persuasive evidence of its value, at or shortly before the time of trial. We find no evidence that the trial court's judgment in that regard was clearly erroneous.

Next, defendant argues that the 2005 corn crop was undervalued. The trial court found the total value of corn sold, plus government payments,⁴ to be \$110,780. Defendant argues that the corn crop's value should have been set at \$129,340. We disagree.

Defendant's brief notes that, at trial, she merely "estimated" that the remaining bushels of corn not sold, would be valued at a certain amount. The trial court evidently believed plaintiff's testimony regarding the value of the corn at issue. This Court will not overturn the trial court's judgment regarding the relative credibility of the parties, given its superior ability to judge the credibility of live witnesses. MCR 2.613(C).

Next, defendant asks this Court to find that the trial court's valuation of LDP/government payments for the 2005 corn crop was erroneous. Defendant cites her own testimony that there were additional governmental payments, above and beyond the undisputed amount of \$27,260. Here again, defendant relies on trial exhibits not available to this Court. We find no error.

Defendant also asks this Court to find that the trial court erred in valuing the soybean crop. We reject defendant's argument. Plaintiff correctly notes that the trial court sustained a hearsay objection to the proposed exhibit on which this argument by defendant is based. Clearly, the trial court found plaintiff to be a more credible source of information regarding the value of the soybean crops than defendant. This finding is not clearly erroneous, since plaintiff had a closer relationship to the farming operation than defendant.

⁴ The parties agree that the LDP payment for the corn crop was \$27,260.

Defendant also argues that the trial court erred in its valuation of her 401(k) account. Defendant argues that her proposed numbers for this valuation were more accurate, because they reflected the value at or around the time of the complaint for divorce. We disagree.

Defendant cites no authority for the proposition that the trial court is required to value all assets as of the same date. As defendant notes, the trial court is, rather, required to divide the marital assets equitably. See *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987) (the goal of distributing marital assets in a divorce proceeding is to reach a “fair and equitable distribution in light of all the circumstances”); see also *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995) (this Court will not disturb a trial court’s property disposition rulings unless it is left with “the firm conviction that the distribution was inequitable”).

A trial court is afforded *broad discretion* in choosing the date on which to value a particular marital asset. See *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). Here, the trial court did not abuse its discretion in choosing to accept the valuation of defendant’s 401k contained in a letter from her employer’s plan coordinator, sent in response to subpoena, and rejecting the valuation contained in an email which purported to be sent from the plan coordinator to the defendant.

Next, defendant argues that the trial court erred in its valuation of plaintiff’s Byron Center Bank savings account. Here, the trial court chose a particular date for valuing this asset, as the amount of money in the account apparently fluctuated quite a bit. The trial court chose to value this account as of a date after the land rent was paid from funds in it, and plaintiff testified that the account was used to pay land rent. Defendant not demonstrated clear error in the valuation, nor an abuse of discretion in the choice of a particular time frame for the valuation.

Defendant next argues that the trial court erred in its valuation of farm equipment. Defendant argues that the trial court erroneously accepted the Fillmore appraisal. Defendant argues that the appraisal was for trade-in value, and that the appraiser admitted in his deposition that he would add 6% to get the fair market value.

The trial court did not clearly err in accepting the appraisal value without a 6% markup. Defendant does not attach the relevant deposition testimony of the appraiser. The trial court expressly rejected the idea that 6% should be added to reach the fair market value, and there is no apparent reason given by defendant why the fair market value would be higher if the equipment were sold for cash, than if it were traded-in. Accordingly, the trial court did not commit clear error.

Defendant next argues that the trial court erred in valuing marital debts. First, she argues that the trial court erred in valuing the Greenstone line of credit as of a date different from its valuation of other assets. Again, a trial court is afforded broad discretion in choosing the date on which to value a particular marital asset. See *Byington, supra* at 114 n 4. Because no authority cited by defendant indicates that the trial court was required to value all assets as of the same date, and because the failure to be consistent is the only error alleged by defendant, we hold that the trial court did not abuse its discretion.

Next, defendant argues that the trial court erred in considering the loan taken against the soybeans in November 2005 to be a marital debt, instead of the sole, separate debt of plaintiff. We disagree. As plaintiff persuasively argues, just as the crops themselves were held to be marital assets, and not separate property, so too the debt secured by those crops was property considered marital debt. It was not inequitable for the trial court to do so.

Defendant next argues that the Monsanto seed bill was not marital debt. We disagree. As with the soy bean debt, the seed debt was secured by the resulting crops which are an integral part of the farm operation, and thus, the marital estate. Accordingly, the seed debt is also marital debt. It is logical that if the trial court includes the crops of the parties' farm as a marital asset, it should include debts secured by those crops as marital debts.

Next, defendant argues that the trial court erred in including as a marital debt the money owed to plaintiff's father, to repay the loan of \$10,000 used as the down payment on the muck farm. This argument lacks merit. The proceeds of this loan were used to buy the muck farm, which was farmed by the parties as a joint asset. It is logical that a debt incurred to purchase a marital asset, is a marital debt.

Finally, defendant argues that there are marital assets missing from the trial court's assessment of marital assets. Regarding the grain tester, defendant fails to show that she raised this issue before the trial court. Therefore, it is unpreserved, and we decline to address it.

Regarding the wheat crop, defendant argues that it was erroneously excluded from the marital estate. Plaintiff argues that at the time of trial, the wheat crop was not yet harvested, and that the trial court's ruling was correct. We agree with defendant that the trial court clearly erred in failing to include the wheat crop in the marital estate.

Here, because both parties contributed to the farm operation, the wheat crop accrued to the farm operation "by reason of the marriage," MCL 552.19, and not independently of the marriage. Accordingly, the circuit court clearly erred in failing to include the wheat crop in the marital estate.

Finally, under this issue, defendant argues that the trial court erred in failing to include miscellaneous tools owned by plaintiff as marital property. This argument is rejected. First, there is no indication from defendant that she raised this issue below. Second, the evidence cited by defendant of the hand tools at issue is not provided to this Court by her.

Accordingly, the trial court clearly erred in failing to include the wheat crop in the marital assets, but in all other challenged respects, the trial court did not clearly err in the determination and valuation of several items of assets and debt, by not using a consistent date of valuation, and by excluding certain property and debts from the marital estate.

IV

Next, defendant argues that the trial court erred in assigning, to her, her entire defined benefit plan (her traditional pension, not her defined contribution plan, or 401(k)), when its present-day cash value was not credibly shown, and given that she was suffering from intense medical problems, putting in doubt her life expectancy, even to receive the future benefit of the

plan. Defendant also argues that the trial court erred in otherwise awarding her only two assets, with this one having no available receipts. We find no error.

A

We review the circuit court's findings of fact regarding valuation of marital-estate assets under the clearly erroneous standard, *Sparks, supra* at 151; *Beason, supra* at 805, and if we accept the circuit court's findings of fact regarding valuation, we must then decide whether the division of marital-estate property was fair and equitable in light of the facts found. *Sparks, supra* at 152.

B

In *Boyd v Boyd*, 116 Mich App 774, 782; 323 NW2d 553 (1982), this Court "discussed the distribution of potential pension benefits as if they must be reduced to present value and distributed immediately. In fact, this is only one possible means of distribution."

As plaintiff persuasively argues, defendant failed in the trial court to present any evidence of how her medical problems might limit her life expectancy. As the trial court noted, there was no expert medical testimony offered, so the trial court had no reliable prognosis for defendant's condition. Based on the evidence, the trial court could reasonably assume that defendant would live long enough to reap the benefits of her pension.

Further, defendant errs in asserting that the trial court failed to have support in the evidence for the present-day cash value of her pension. The trial court expressly cited an exhibit as the basis for its conclusion. Accordingly, the trial court's award of defendant's entire pension to her was not clearly erroneous.

V

Defendant's next issue is whether the trial court abused its discretion in failing to award attorney fees to her. We find no error.

A

In a divorce case, this Court reviews a trial court's decision on attorney fees for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231, 242 (2003), citing *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). The determination that a trial court abused its discretion involves far more than a difference in judicial opinion. *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 761-762; 685 NW2d 391 (2004). Rather, an abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *In re Estate of Kostin*, 278 Mich App 47, 51; 748 NW2d 583, 588 (2008). A trial court's findings of fact, on which it based its decision to award or to deny attorney fees, are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282; 738 NW2d 264 (2007).

B

A trial court may require either party “to pay any sums necessary to enable the adverse party to carry on or [to] defend the action, during its pendency.” MCL 552.13(1). MCR 3.206(C) also authorizes a trial court to award attorney fees to a party who demonstrates that she is unable to bear the expense of the action, and that the other party is able to pay for it.

“It has long been the general rule that a trial court possesses broad discretion relative to the grant of attorney fees in a divorce case.” *Demman v Demman*, 195 Mich App 109, 113; 489 NW2d 161, 164 (1992). An award of attorney’s fees is not appropriate where the party liable for the fees would have to invade assets he or she is relying on for support, in order to pay the fees. *Gates, supra* at 432-433.

The trial court did not abuse its discretion in failing to award defendant her attorney fees. Defendant failed to present evidence demonstrating that she was unable to defend the action without such an award, evidence that plaintiff had an ability to pay her attorney fees, or expert testimony regarding her work limitations.

VI

Defendant next argues that the trial court abused its discretion in its determination of the amount of alimony. We find no abuse of discretion.

A

The award of spousal support is within the trial court’s discretion. *Gates, supra* at 432. With regard to alimony, this Court reviews a trial court’s findings of fact for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). “The trial court’s decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable.” *Gates, supra* at 433.

B

The principal purpose of spousal support is to balance the incomes and needs of the parties, so that neither party is impoverished. *Moore, supra* at 654. If the trial court’s findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable, in light of the facts. *Id.* at 655.

Spousal support is to be based on what is just and reasonable under the circumstances. *Moore, supra* at 654. Factors that trial courts should consider include:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties’ ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties’ health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party’s fault in causing the divorce, (13) the effect of

cohabitation on a party's financial status, and (14) general principles of equity. [*Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336, 354 (2008) (citations omitted).]

The trial court's consideration of the issue of spousal support and the factors involved therein, does not contain any clearly erroneous findings of fact. On the contrary, the trial court's consideration of the many factors is careful and in-depth.

In particular, we review the trial court's conclusion that defendant can work. There was testimony on both sides of this issue, and the trial court weighed the competing testimony, including credibility, and made a finding that defendant could do some work. On the record before us, we cannot find clear error. As such, we find no inequity in the modest award of spousal support.

VII

Defendant failed to preserve her argument that certain items of property were separate, and not marital. The trial court did not err in the determination and valuation of certain marital assets and liabilities, with the exception that the trial court erred in failing to include the wheat crop in the marital estate. The trial court did not clearly err in assigning to defendant her entire pension, did not abuse its discretion in determining the date of valuation, and did not clearly err in its valuation of the pension. The trial court did not abuse its discretion in denying defendant her request for an award of attorney's fees. Finally, the trial court did not abuse its discretion in its determination of the amount of spousal support.

Affirmed in part, and reversed as to the trial court's failure to include the wheat crop in the marital estate. The case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder