

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE ELAINE GENTILE,

Plaintiff/Counter-Defendant-
Appellant,

v

JOHN GRAYBILL, Second Successor Personal
Representative of the Estate of SAMUEL
GENTILE, Deceased,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

October 15, 2009

No. 284639

Livingston Circuit Court

LC No. 07-003424-DO

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the entry of a judgment of divorce. We affirm.

Plaintiff, Joyce Gentile, first contends the trial court erred in its determination regarding distribution of defendant's pre-marital property and that the overall property distribution contained in the judgment of divorce is inequitable. Specifically, plaintiff argues that the trial court improperly concluded that the appreciation in value of pre-marital property owned by Samuel Gentile was not subject to distribution. In addition, plaintiff asserts that the trial court failed to recognize her contributions to the maintenance and/or improvement of the marital home and adjoining parcels of land, rendering the property division unfair. At the outset, we reject defendant's jurisdictional challenge regarding this issue.

"The division of marital properties is committed to the sound discretion of the trial court." *Spooner v Spooner*, 175 Mich App 169, 172; 437 NW2d 346 (1989). The trial court's factual findings are reviewed for clear error. *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). If the trial court's findings are not clearly erroneous, we then decide whether the "dispositional ruling was fair and equitable in light of those facts." *Id.* Factors to be considered in the equitable division of a marital estate include:

(1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties'

earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. [*Id.*]

“[T]he 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). “Generally, . . . each party takes away from the marriage that party's own separate estate with no invasion by the other party.” *Id.* at 494. Separate property is subject to distribution only when one of two statutorily created exceptions is met.¹ *Id.* In this instance, plaintiff asserts MCL 552.401, which permits the invasion of separate property if the other spouse “contributed to the acquisition, improvement, or accumulation of the property” is applicable. *Id.* at 494-495. However, a party’s contribution must be seen as having *significantly* assisted in the growth or appreciation of the asset before separate or pre-marital property can be invaded for distribution. *Reeves, supra* at 495 (emphasis added).

The home, adjoining five and ten-acre land parcels, and the nine parcels of land located in Washtenaw County were Samuel Gentile’s separate property before the parties married. A review of the lower court record, reveals the absence of any evidence that plaintiff significantly contributed to the appreciation in value of the home. *Korth v Korth*, 256 Mich App 286, 292; 662 NW2d 111 (2003); *Reeves, supra* at 495. The home was completely built and paid for before the parties married. Plaintiff’s only contribution was in the selection of carpeting for the home. There was no evidence that plaintiff invested any of her own money in the property other than her rather vague testimony that she made a cement purchase and “bought stuff” for the home, including all the groceries. Contrary to plaintiff’s assertions of contribution, the evidence revealed that the vast majority of all the living expenses related to the home were paid from the joint checking account and it was undisputed that only Samuel contributed monies to this account. Further, plaintiff’s testimony regarding her performance of household chores was extremely vague. Because the parameters set forth in MCL 552.401 are discretionary and the lower court record fails to support plaintiff’s contention regarding her contribution, we find that the trial court did not clearly err in determining that the home and its appreciation during the marriage was Samuel’s separate property and not subject to invasion. MCL 552.401; *Spooner, supra* at 172.

We also find that there is no support in the lower court record that plaintiff contributed in any significant manner to the appreciation in value of the five and ten-acre parcels that adjoined the home, or the nine parcels of land situated in Washtenaw County. At most, plaintiff performed the ministerial task of writing checks from the joint checking account to pay the property taxes for the adjoining parcels, but she did not contribute financially to the funds in that account. In addition, although the Washtenaw County property was surveyed, subdivided and partially developed during the marriage, the improvements were directly and solely attributable to the efforts of Samuel. There was no demonstration that plaintiff either directly participated or

¹ Plaintiff does not contend that the property distribution was insufficient for her support and maintenance. Consequently, the applicability of the second exception, MCL 552.23, is not at issue.

performed services during the marriage to facilitate the maintenance or development of these parcels. See *Reeves, supra* at 497. In fact, plaintiff worked full-time outside the home and there is no support for her contention that she routinely performed any housekeeping or other duties within the home, which enabled Samuel to focus his efforts on developing or improving these properties. Consequently, the trial court did not err in finding that this property was Samuel's separate property, which was not subject to invasion based on plaintiff's contribution to its appreciation in value. MCL 552.401; *Spooner, supra* at 172.

Plaintiff also contends that the overall distribution of assets was not fair and equitable. Before a determination pertaining to whether a distribution was equitable is made, the separate assets of the parties must be identified and omitted and only the value of the marital assets is to be considered. *Reeves, supra*. In this instance, the real property comprising the home, adjoining five and ten-acre parcels, and the nine parcels of land located in Washtenaw County, were Samuel's separate property and not subject to invasion or division. Notably, in the months preceding plaintiff's leaving the marital home she withdrew approximately \$103,200 from a joint account, to which she did not contribute or deposit any funds. At the time of the divorce trial, plaintiff was 63 years of age. She was expected to be capable of maintaining her current employment, earning \$13.63 an hour. It was anticipated that, on retirement, plaintiff would receive approximately \$13,200 a year in social security benefits. In contrast, Samuel was 78 years of age, retired and in seriously ill health and was expected to receive only \$7,000 a year in social security benefits. Plaintiff was awarded all of her 401k, worth \$33,000, as her separate property, along with her personal bank account in the amount of \$35,000. Plaintiff was permitted to retain any monies remaining in her possession that she had removed from the parties' joint accounts. In contrast, the trial court awarded Samuel only \$57,000. Hence, plaintiff's assertion that the property distribution was unfair and inequitable is without merit. *Berger, supra* at 717.

Finally, plaintiff argues that the trial court erred in entering the judgment of divorce after Samuel had died. The primary issue addressed in this divorce was the distribution of property. On December 14, 2007, the trial court elucidated, on the record, its determination regarding the award of assets and property to the parties and instructed plaintiff's counsel to submit a written judgment within seven days, pursuant to MCR 2.602(B)(3). However, plaintiff's counsel did not submit the proposed judgment until 20 days later, on January 3, 2008. Plaintiff's counsel had already signed the proposed judgment at the time of its submission to the trial court. Samuel passed away in the early morning hours of January 4, 2008. Samuel's counsel was unaware of his client's passing and approved the proposed judgment on January 4, 2008. The trial court also approved and entered the judgment later on that same day. Plaintiff subsequently filed a motion seeking to set aside the judgment asserting it was improperly entered *nunc pro tunc*.

We review the trial court's decision to enter an order *nunc pro tunc* for an abuse of discretion. *Vioglavich v Vioglavich*, 113 Mich App 376, 386-387; 317 NW2d 633 (1982). Generally, "[a] trial court is without jurisdiction to render a judgment of divorce after the death of one of the parties." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). However, exceptions to this rule exist based on whether the trial court read all the terms of the judgment into the record with indication of its immediate effect or if there is evidence of reliance by the parties on the terms of the divorce. *Id.* at 575 n 1, 577.

Based on the circumstances and equities in this case, we find that the trial court did not abuse its discretion when it entered the judgment of divorce *nunc pro tunc*. *Vioglavich, supra* at 386-387. The record demonstrates that plaintiff was aware that Samuel was seriously ill and hospitalized. Contrary to the trial court's directive that plaintiff's counsel was to submit the written judgment for approval in accordance with MCR 2.602(B)(3), plaintiff delayed its submission for 20 days. The trial court indicated that the delay in submitting the judgment was unexcused. Had plaintiff's counsel timely provided the judgment as ordered, within seven days of the ruling, the judgment could have been finalized and entered before Samuel's death. Given the knowledge that Samuel was seriously ill, it was impermissible for plaintiff to unreasonably delay in finalizing the judgment relying on the likelihood that Samuel would expire before the judgment was entered in order to obtain a more substantial award of assets based on the status of being a widow rather than a divorcee. See *Ensman v Ensman*, 86 Mich App 91, 97; 272 NW2d 176 (1978).

In this case, the trial court provided an oral ruling following four days of trial. The only task remaining was entry of a written judgment conforming to that ruling. Plaintiff's attorney drafted the proposed judgment and submitted, with his signature designating approval of the judgment, the day before Samuel's death. Further, the judgment submitted by counsel comported with the trial court's oral ruling and would have been entered regardless of plaintiff's alleged dissatisfaction and purported intent to appeal the trial court's decision. Contrary to plaintiff's assertion, the absence of her personal signature on the judgment is irrelevant. The approval of plaintiff's attorney was sufficient to bind plaintiff. *Ensman, supra* at 97; *Trupski v Kanar*, 366 Mich 603, 607; 115 NW2d 408 (1962). As such, we find that the trial court did not abuse its discretion when it entered the judgment of divorce *nunc pro tunc*. *Vioglavich, supra* at 386-387.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly