

STATE OF MICHIGAN
COURT OF APPEALS

NANNETTE MARIE SZUKALA,

Plaintiff-Appellee/Cross-Appellant,

v

ALAN DAVID SZUKALA,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

June 22, 2010

No. 289456

Muskegon Circuit Court

LC No. 07-034976-DO

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right, and plaintiff cross appeals by leave granted, from the trial court's judgment of divorce. We affirm.

I. STANDARDS OF REVIEW

On appeal, both parties raise several issues challenging the trial court's division of property. The following factors should be considered by a trial court, as relevant, when distributing the marital estate: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) ages of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). The trial court's division of property need not be equal, but it must be equitable and any significant departure from congruence must be clearly explained. *Id.* at 716-717.

On appeal, this Court must first review the trial court's findings of fact for clear error. 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 was made. The trial court's factual findings are accorded substantial deference. If the trial court's findings of fact are upheld, this Court must decide whether the trial court's dispositional ruling was fair and equitable in light of those facts. This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable. [*Id.* at 717-718 (citations omitted).]

In addition, we review for an abuse of discretion a trial court's decision whether to award attorney fees in a divorce action, but the trial court's findings underlying its decision are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). We also review for an abuse of discretion a trial court's determination of the proper time for valuation of an asset. *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008).

II. EDWARD JONES CREDIT CARD DEBT

Defendant argues that there was no basis for the trial court to find that the Edward Jones credit card debt was his separate, premarital debt. When dividing property, a trial court must first determine whether it is separate or marital. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Marital property can be divided, while separate property generally cannot. *Id.* at 494. All property that has come to either party by reason of the marriage is considered marital property. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997).

Conflicting testimony was presented regarding the source of the Edward Jones credit card debt. Although defendant claimed that the debt was marital debt, generated after the parties were married, plaintiff testified that the debt reflected defendant's premarital debt, which was rolled over to the new credit card. Defendant acknowledged having some premarital credit card debt, but stated that he did not know how much. The trial court found plaintiff's testimony regarding this issue to be more credible. In light of plaintiff's testimony, and giving deference to the trial court's credibility determination, *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007), we find no clear err in the trial court's assignment of the Edwards Jones credit card debt as defendant's separate, premarital debt.

III. LAWN MOWER

Defendant next argues the trial court erred in awarding plaintiff \$500 in exchange for defendant being awarded the couple's riding lawn mower. Defendant maintains the award cannot logically be justified given the evidence presented in regard to the value of the mower. It appears the mower was purchased on plaintiff's Home Depot credit card with \$1000 down and a minimum payment of \$50 due monthly. While the divorce was pending, defendant had possession of and used the mower and plaintiff made the monthly payments. Given this fact, as well as the overall mass of the property division, we decline to fly speck the trial court's award in regard to this particular matter. In short, given the overall property division, the manner by which the mower was purchased and paid for during these proceedings, and relatively minor amount in controversy, we cannot find clear error in the trial court's disposition of this chattel.

IV. PERSONAL PROPERTY AWARDS

Defendant challenges the trial court's decision to award plaintiff \$7,500 to allow her to acquire home furnishings that she disposed of before the marriage, and plaintiff challenges the trial court's refusal to award her certain personal property items in defendant's possession, or the equivalent value of those items.

The trial court recognized that the parties presented conflicting testimony regarding what items may have been taken from the marital home and who took the items. The court awarded

the parties the property in their possession, but also awarded plaintiff \$7,500 to be used to purchase replacement household items, which it believed was justified “in light of the fact that [plaintiff] was encouraged to discard household furnishings she had before the marriage.” Although defendant argues that the \$7,500 award was inappropriate because plaintiff voluntarily disposed of her property before their marriage, we find no clear error in the trial court’s determination that defendant encouraged plaintiff to dispose of her premarital furnishings. Further, the trial court implicitly found that plaintiff did not take sufficient property from the marital home to furnish a new home. Plaintiff argues on cross appeal that the trial court erred by failing to award her half the marital personal property, or its equivalent value, that defendant admittedly retained. According to plaintiff’s estimations, the items admittedly retained by defendant had an estimated value of \$5,524, not including the lawn mower and its corresponding debt.

Considering the circumstances involving plaintiff’s premarital disposition of her home furnishings, and the value of the disputed property that remained in defendant’s possession, we conclude that the trial court’s decision to allow defendant to retain the property in his possession, while granting plaintiff a credit of \$7,500 to allow her to acquire her own home furnishings, was equitable. Accordingly, we uphold those decisions.

V. 2007 INCOME TAXES

Defendant argues that the trial court’s decision to require the parties to file a joint tax return for 2007 is inequitable because plaintiff did not live in or contribute to the marital household for the entire year and, therefore, she should not receive the benefits of the household tax deductions. We disagree.

In 2007, the parties were married for the entire year. During the six months that plaintiff lived in the house, her contributions were essentially the same before and after filing for divorce. Even after plaintiff moved out of the marital home, she still paid marital bills that were in her name. Further, the trial court observed that plaintiff did not receive full tax benefits in 2006, because defendant filed his tax return separately. Under the circumstances, the trial court’s decision to require the parties to file a joint tax return for 2007 was equitable.

VI. VALUATION OF MARITAL HOME

Defendant argues that because of the declining housing market, the trial court should have valued the parties’ marital home at a time closer to when the judgment was entered rather than accept the parties’ stipulation regarding value, which was made on the first day of trial in October 2007. We disagree. For the purposes of dividing property, marital assets are typically valued at the time of trial or the time judgment is entered, although the court may, in its discretion, use a different date. *Byington*, 224 Mich App at 114 n 4.

In this case, on the first day of trial, the parties stipulated to the value of the marital home. Plaintiff was entitled to rely on that stipulation. Defendant did not attempt to set aside the stipulation or otherwise put plaintiff on notice that he intended to offer conflicting evidence of value. Further, defendant’s valuation evidence was based on an appraisal, the accuracy of which plaintiff disputed and which the trial court refused to admit into evidence. Under the circumstances, the trial court did not abuse its discretion in accepting the parties’ stipulation to

determine the value of the home. The trial court's decision to divide the home's negative equity equally also was equitable.

VII. ATTORNEY FEES

"In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)," but they are not recoverable as of right. *Reed*, 265 Mich App at 164. They may be awarded only when a party needs financial assistance to prosecute or defend the lawsuit. *Id.* The trial court found that plaintiff was in need of financial assistance based on her limited income and because she was not awarded any income-producing marital property. Further, there was also evidence that during the proceedings plaintiff cashed in CDs to pay for household expenses. These were funds that otherwise could have been used to prosecute the lawsuit. Because the attorney's bill appears fair and appropriate, the trial court was not required to conduct a separate hearing over the reasonableness of the attorney's \$4,000 bill. The trial court did not abuse its discretion in awarding plaintiff attorney fees.

VIII. MARITAL HOME EQUITY

In dividing the marital home, the trial court determined the parties' respective contributions of premarital funds to the purchase of the home. The court stated that defendant purchased the lot on which the home was built for \$44,415. The evidence does indicate that defendant purchased the lot with a loan for \$40,000, without mentioning costs to originate the loan. Regardless, when defendant's premarital home sold, he used the proceeds to pay off the remaining loan balance. Thus, regardless of the price of the lot, defendant took out a loan that was repaid, and the amount of surplus was not disputed. Accordingly, any mistake in regard to the lot price by the trial court was harmless.

IX. HONDA ELEMENT

The trial court found that plaintiff's Honda Element was purchased with \$10,000 of marital funds. Plaintiff argues on cross appeal that she purchased this vehicle using \$17,445 of her separate funds, consisting of \$2,900 from the sale of her premarital vehicle, \$4,545 from a gift from her father, and \$10,000 from her parents as an early inheritance. Property acquired by gift or inheritance is generally considered a separate asset, but may be considered marital property where it is commingled with marital property, or otherwise contributed to the marital household. *Pickering v Pickering*, 268 Mich App 1, 13-14; 706 NW2d 835 (2005).

Plaintiff admitted that the \$2,900 profit from the sale of her premarital vehicle was deposited into the parties' joint checking account and used for marital expenses. Thus, the trial court did not err in finding that this money was marital property that was not part of the Honda down payment. Conflicting testimony was presented regarding the \$4,545 check from plaintiff's father, whether the money was intended as a separate gift, and whether the money was used as part of the down payment on the Honda. Plaintiff admitted that the money was deposited in the parties' joint bank account, and defendant denied that it was intended as a gift. Given the conflicting testimony that was presented, and giving deference to the trial court's credibility determinations, we cannot conclude that the trial court clearly erred in finding that the \$4,545 was marital property and was not part of the Honda down payment.

Lastly, conflicting testimony was presented with regard to whether the 2005 Christmas check from plaintiff's parents for \$10,000 was written in the names of both parties, or only plaintiff. Further, it is undisputed that the check was deposited into the parties' joint bank account, and that the Honda was not purchased until several months later, in April 2006. Thus, the evidence did not clearly establish the \$10,000 gift as the source of the Honda down payment. Given this record, the trial court did not clearly err in finding that the \$10,000 down payment on the Honda was made with marital funds.

X. WASHINGTON MUTUAL CREDIT CARD DEBT

Plaintiff argues on cross appeal that the Washington Mutual ("WaMu") credit card debt should have been assigned to defendant because the majority of the debt was attributable to expenses to assist defendant's son. At trial, plaintiff testified that the WaMu credit card debt consisted of \$1,356 in marital debt and \$3,623 in debt attributable to defendant's son.¹ By characterizing only part of the debt as marital debt, plaintiff essentially contends that the remaining debt is defendant's separate debt. However, both parties testified that they gave marital funds to their children at various times during their marriage and plaintiff represented that the money was owed "to us." Moreover, all of the WaMu debt was accumulated during the parties' marriage. By assigning the debt to plaintiff, the trial court implicitly found that all of the WaMu debt was marital debt. That finding is not clearly erroneous. Further, the debt assignment was not inequitable considering the assignment of other debt to defendant.

XI. CERTIFICATES OF DEPOSIT

Plaintiff also argues on cross appeal that the trial court erred in treating certificates of deposit ("CDs") that were in the names of plaintiff and her daughter, and the funds that plaintiff received from cashing in those CDs, as marital property. Plaintiff argues that the CDs were neither marital property nor her separate property, but rather belonged to her daughter, and that the funds she received from cashing in the CDs to pay for household expenses were in essence a loan from her daughter.

Testimony was presented that the funds in the CDs were comprised of monies plaintiff received as child support payments for her daughter or monetary gifts intended for her daughter. Regardless of their source, the money became marital property when plaintiff took possession of the funds, commingled it with the parties' joint checking account funds, and used it to pay for household expenses. *Pickering*, 268 Mich App at 13-14. Therefore, the trial court did not clearly err in finding that the cashed-in CD funds were marital property.

¹ Plaintiff calculated the \$3,623 amount by subtracting the outstanding loan amounts her children allegedly owed the parties from the total amount of the outstanding loans defendant's son allegedly owed the parties, and then dividing the number in half. Thus, the amount did not represent the actual portion of the WaMu debt used to assist defendant's son, which plaintiff represented was \$4,304.

Defendant also argues that his demand for reimbursement of the value of the cashed-in CDs should not have been considered a “wash” with plaintiff’s request for reimbursement for household bills that she purportedly paid. To the extent that defendant seeks a decision more favorable than that granted by the trial court with respect to this issue, rather than merely advancing an alternative basis for affirming the trial court’s decision on this matter, his request is not properly before this Court because he failed to raise it in his direct appeal and an appellee may not seek a more favorable decision without filing a cross appeal. See *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 221; 625 NW2d 93 (2000). Thus, defendant is not entitled to affirmative relief with respect to this issue.

Affirmed. Neither party may tax costs.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher