STATE OF MICHIGAN

COURT OF APPEALS

FRED W. MCKISSACK, Plaintiff-Appellee,	UNPUBLISHED March 15, 2016
v	No. 325099 Muskegon Circuit Court
JULIE R. MCKISSACK, Defendant-Appellant.	LC No. 12-252539-DM

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendant, Julie R. McKissack, appeals as of right the judgment of divorce that dissolved her marriage to plaintiff, Fred W. McKissack. We reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff and defendant were married in November 1984.[1] When the parties were married, plaintiff worked as a journeyman painter and performed other side jobs. He was well-paid and able to accumulate a "great deal of savings." Around 1986, defendant began, and later completed, business school in order obtain better, permanent employment. Then, in 1992, plaintiff became permanently disabled after experiencing a work-related injury.

At the time of trial, plaintiff was 70 years old. He suffered from a variety of medical problems in addition to his permanent disability and received approximately $20,000 per year in Social Security disability, pension payments, and other government assistance. He also received $191.73 per month in pension payments from his previous employment as a journeyman painter. Defendant was 53 years old and employed, earning an annual gross income of approximately $34,000.

[1] The marriage produced two children. Both children are over the age of 18. Thus, neither custody nor child support were at issue in this case.

Prior to the divorce, the parties owned three parcels of real property: (1) the marital home, or "the Warner property"; (2) a residential property, or "the McMillan property," which was sold via land contract before trial; and (3) a commercial property, or "the Whitehall property." Significant testimony was presented at trial regarding the Warner property and the way in which it was purchased. This is the property most relevant to our opinion in this case.

In 1975, plaintiff purchased via land contract a house trailer on 32 acres of land in Oceana County, Michigan, for $11,270.94 ("the Crystal Valley property"). Plaintiff then sold the house trailer and used the proceeds to begin construction of a house on the property in 1976. Plaintiff made the final land contract payment in 1980. Although the parties lived in the Crystal Valley home for a period of time before their marriage, they never lived there after they were married.

In 1980, plaintiff took out a mortgage against the Crystal Valley property. In 1986, after the marriage, defendant's name was added to the mortgage through a mortgage modification agreement. However, plaintiff testified that defendant's name was not added to the mortgage note or the deed to the property. Plaintiff paid off the mortgage on the Crystal Valley property in 1988 using funds he had received from an inheritance. He ultimately sold the Crystal Valley property via a land contract. He accepted the land contract payments in cash and kept them in the marital home, never depositing those funds into a bank account, marital or otherwise. All of these land contract payments were kept separate from all marital accounts and expenses because plaintiff intended for the proceeds from the Crystal Valley property to be kept as a separate, stand-alone financial entity. These payments continued until 2000.[2]

In 2000, the land contract on the Crystal Valley property was paid off for $92,113 through a check that was made out to both plaintiff and defendant. Plaintiff deposited the check, as well as $7,000 in cash from recent land contract payments, into a money market account at Old Kent Bank. The account bore both parties' names. However, plaintiff testified that the account was kept separate from the family's banking. Plaintiff testified that he eventually moved the funds into an account at Howmet Credit Union in the amount of $100,000. He then used the funds to purchase certificates of deposit ("CDs"), with five-year maturity dates, which yielded approximately $133,000. Both parties' names were listed on the CD accounts. Plaintiff testified that defendant never drew against these funds, never moved the funds, and never had anything to do with the funds in these accounts.

In 2005, the parties purchased the Warner property for $150,000. At trial, plaintiff explained that he paid for the home using the $133,000 from the CD accounts and funds borrowed from his brother. The Warner property was originally titled in the name of "Fruitland Ventures," a company created by plaintiff. In 2007, plaintiff added defendant's name to the

[2] At some point in the 1990s, the Crystal Valley home burned to the ground and was rebuilt with insurance proceeds. During the rebuilding process, plaintiff and defendant successfully sued the building contractor and were awarded approximately $22,000. Plaintiff testified that this money was used exclusively for the rebuilding effort and was neither deposited into any marital account nor used for family-related purposes.

deed. According to plaintiff, he made this change after defendant "threatened" him with divorce in order to force him to add her name to the property. Defendant moved out of the Warner property in 2010, but plaintiff continued to live there throughout the divorce proceedings. The Warner property was completely paid off at the time of trial.

Following the trial, the trial court made limited findings regarding which property was separate and which property was marital in stating its ruling on the record and entering the judgment of divorce. The trial court found that the $92,113 in proceeds from the sale of the Crystal Valley property, which had been applied to the down payment on the marital home, was plaintiff's separate property. The court also found that the parties' respective bank accounts were the separate property of each. However, the trial court made no further findings as to the marital/separate classification of any other assets.

The trial court awarded plaintiff the $92,113 from the sale of the Crystal Valley property, which was to be paid through future land contract payments received from the McMillan property until plaintiff recouped the full amount. Plaintiff also was awarded $6,805.94 contained in an escrow account, which was to be counted toward the $92,113. Once plaintiff recovered the full $92,113, the parties were to evenly divide the remaining land contract payments from the McMillan property. With regard to the marital home itself, which was valued at $150,000, the trial court held that the property was to be listed for sale as soon as possible, with the sale proceeds to be divided equally between the parties. The trial court also awarded plaintiff his pension in its entirety, but it did not specify whether it did so because the pension was plaintiff's separate property or because it found this distribution equitable. It also awarded plaintiff 50% of the funds in defendant's IRA as of March 31, 2010. Finally, the trial court ordered that "[e]ach party will retain the personal effects and belongings and household goods and furnishings in his or her possession as of the date of the entry of this Judgment of Divorce."[3]

Both parties moved for reconsideration of the judgment of divorce. The trial court denied both motions. Defendant now appeals as of right.

II. STANDARD OF REVIEW

"In a divorce action, this Court reviews for clear error a trial court's factual findings on the division of marital property and whether a particular asset qualifies as marital or separate property." *Hodge v Parks*, 303 Mich App 552, 554-555; 844 NW2d 189 (2014). A finding of fact is "clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made." *Id*. "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." *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); see also *Hodge*, 303 Mich App at 555. A trial court's dispositional ruling is discretionary and "should be affirmed unless the appellate court is

[3] Other than the McMillan property land contract payments and escrow account which, as discussed *supra*, were awarded to plaintiff in satisfaction of his separate property award, it appears that the only asset divided unequally was plaintiff's relatively minimal pension (approximately $190 per month), which he was awarded in its entirety.

left with the firm conviction that the division was inequitable." *Sparks*, 440 Mich at 152; see also *Hodge*, 303 Mich App at 555.

III. ANALYSIS

Defendant first argues that the trial court clearly erred in finding that the proceeds from the sale of the "Crystal Valley property" were plaintiff's separate property, as those funds were subsequently used to purchase the marital home. We agree.

> In any divorce action, a trial court must divide marital property between the parties and, in doing so, it must first determine what property is marital and what property is separate. Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage. Once a court has determined what property is marital, the whole of which constitutes the marital estate, only then may it apportion the marital estate between the parties in a manner that is equitable in light of all the circumstances. As a general principle, when the marital estate is divided each party takes away from the marriage that party's own separate estate with no invasion by the other party.
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> The categorization of property as marital or separate, however, is not always easily achieved. While income earned by one spouse during the duration of the marriage is generally presumed to be marital property, there are occasions when property earned or acquired during the marriage may be deemed separate property. For example, an inheritance received by one spouse during the marriage and kept separate from marital property is separate property. . . . Moreover, *separate assets may lose their character as separate property and transform into marital property if they are commingled with marital assets and treated by the parties as marital property*. The mere fact that property may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital. [*Cunningham v Cunningham*, 289 Mich App 195, 200-202; 795 NW2d 826 (2010) (quotation marks and citations omitted; emphasis added).]

See also MCL 552.19; MCL 552.401. "The actions and course of conduct taken by the parties are the clearest indicia of whether property is treated or considered as marital, rather than separate, property." *Cunningham*, 289 Mich App at 209.

Defendant does not dispute, and the record confirms, that the Crystal Valley property was initially plaintiff's separate property. Plaintiff purchased the property in 1975 and made the final land contract payment in 1980, thereby completing the transaction prior to the parties' marriage in 1984. See *id*. at 201. Additionally, plaintiff's actions and course of conduct in keeping the Crystal Valley property, and the income it derived, separate from marital assets further support his stated intention to keep the property separate. See *id*. at 209. He received all of the land contract payments related to the Crystal Valley property in cash, and he only used these payments to maintain the property and make mortgage payments on a second mortgage taken thereon. He testified that he never used the funds generated for a marital purpose or deposited them in any bank account, much less a marital or family account. Furthermore, plaintiff stated

that the second mortgage on the property was paid off in 1988 using a portion of an inheritance that he received. Inheritances, even those received by one spouse during a marriage, are generally deemed separate property. *Id*. at 201. Moreover, a review of the record reveals no indication that defendant contributed financially to the Crystal Valley property, whether for maintenance purposes or repaying the second mortgage secured by the property.

Once the property was sold for $92,113, plaintiff took further steps to keep the proceeds of the sale separate from the marital assets, depositing the proceeds into distinct accounts. He testified at trial that defendant neither accessed these accounts nor played any role in managing the funds, even though her name was on the accounts.

However, despite these efforts, plaintiff ultimately commingled the sale proceeds with marital assets when he used the proceeds, along with other funds, to purchase the *marital home* during the marriage. See *Cunningham*, 289 Mich App at 209. It is undisputed that all of the sale proceeds from the Crystal Valley property were used, in conjunction with funds received from plaintiff's brother, to purchase the Warner property in 2005. The parties lived together at this residence until defendant moved out in 2010 and divorce proceedings were initiated. "The sharing and maintenance of a marital home affords both spouses an interest . . . in its value . . . over the term of the marriage. Such an amount is clearly part of the marital estate." *Reeves v Reeves*, 226 Mich App 490, 495-496; 575 NW2d 1 (1997). Thus, because the subject $92,113 was invested in the marital home during the marriage, becoming part of the home's value, it was part of the marital estate and not plaintiff's separate property. *Id*.

We came to a similar conclusion in *Pickering v Pickering*, 268 Mich App 1, 12-13; 706 NW2d 835 (2005):

> Of the $22,000 of personal assets defendant claims he brought into the marriage, $19,876 is alleged to be equity in the parties' first home. Defendant funded the purchase of the property and the down payment on a home that the parties built together before the marriage. The parties moved into the home when it was completed one month before their marriage. The parties resided in the home for approximately fifteen years, paying the mortgage and making improvements with marital funds. The home was eventually sold, and the proceeds were reinvested in a new marital home that was jointly titled. Under the circumstances, we conclude that the trial court properly found that plaintiff's alleged contribution lost any characteristic of being separate property.

Our conclusion is further supported by our more-recent opinion in *Cunningham*, 289 Mich App 195. There, we reversed the trial court's finding that a $90,000 portion of the down payment on the marital home was the defendant-husband's separate property. *Id*. at 209. We agreed that the defendant received the $90,000 as a portion of a lump-sum workers' compensation award, and it was his separate property. *Id*. at 207. However, we held that those funds lost their status as separate property because the defendant used the subject $90,000, along with other funds, "to jointly purchase the marital home, which the parties continued to live in for the duration of their marriage . . . ." *Id*. at 208-209. In other words, despite the fact that the $90,000, when received, was "theoretically traceable as defendant's separate property, defendant's actions after receiving the funds established that he intended to contribute $90,000 of

those funds to the marital purpose of acquiring a new home." *Id*. at 208. Similarly, in this case, plaintiff's actions with regard the Crystal Valley property, and its sale proceeds, prior to the purchase of the marital home suggested that he intended to the keep that property separate from the marital estate. However, by purchasing the marital home—into which the parties moved during their marriage—with those funds, plaintiff exhibited an intent to contribute the entirety of those funds "to the marital purpose of acquiring a new home[,]" thus converting those funds into marital property. *Id*.

Accordingly, we are left with a definite and firm conviction that the trial court made a mistake in finding that the subject $92,113 was plaintiff's separate property and hold that the trial court clearly erred in so finding. See *Hodge*, 303 Mich App at 554-555.

Defendant's other arguments on appeal concern the trial court's distribution of the marital estate. Because the trial court erred in its calculation of the marital estate by excluding from the estate the proceeds from the sale of the Crystal Valley property, we must remand for further proceedings. Only after a trial court has *properly* determined which property is marital and which is separate may it apportion the marital estate "in a manner that is equitable in light of all the circumstances." *Cunningham*, 289 Mich App at 201; see also *Reeves*, 226 Mich App at 497 (after finding that a portion of a party's separate property was not properly removed from the martial estate, a remand is necessary "to allow the trial court to render an equitable property division that properly recognizes" the parties' separate and marital estates). Thus, in this case, remand is necessary to allow the trial court to equitably distribute the marital estate after it correctly classifies the parties' property, including the proceeds from the Crystal Valley property.

We note, however, that we have reviewed the rest of the trial court's distributions of the marital estate, and conclude that those distributions were not necessarily in error. Nonetheless, we caution the trial court that sufficient factual findings are necessary in order for us to meaningfully review its categorization of marital and separate property, as well as its equitable division of property, and review the reasoning behind those determinations. See *Woodington v Shokoohi*, 288 Mich App 352, 365-367; 792 NW2d 63 (2010).

On remand, the trial court shall specifically state which property, or a portion thereof, is part of the marital estate and "explain its general basis for determining an equitable division of property." *Id*. at 365; see also *id*. at 369. Although the trial court need not divide the marital estate into mathematically equal shares, it must explain "any significant departure from such equality" with reference to the factors delineated in *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008), or any other factors that it finds specifically applicable in this case, *id*. The trial court also should note whether it considered prejudgment property distributions between the parties in making its final distributions.

IV. CONCLUSION

The trial court erred in concluding that the proceeds from the sale of the "Crystal Valley property" were plaintiff's separate property. Thus, we remand this case so that the trial court may reapportion the marital estate with the understanding that the $92,113 arising from the sale of the Crystal Valley property is marital property. See *Cunningham*, 289 Mich App at 201; *Reeves*, 226 Mich App at 497.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark T. Boonstra
/s/ Michael J. Riordan