

STATE OF MICHIGAN
COURT OF APPEALS

REGINALD G. POWERS,

Plaintiff-Appellee,

v

CECYLIA Z. POWERS,

Defendant-Appellant.

UNPUBLISHED

June 5, 2012

No. 301868

Lapeer Circuit Court

Family Division

LC No. 10-042623-DO

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from the parties' judgment of divorce, arguing that much of what the trial court identified as plaintiff's separate property the court should have found to be marital property subject to division. Defendant also argues that the court abused its discretion in denying a motion for attorney fees. We affirm the court's rulings but remand for a separate award pertaining to certain fixtures in plaintiff's Florida condominium.

I. FACTS

The parties married in August 1994, and plaintiff was 65 and defendant 62 at the time of the divorce proceedings in 2010. It was a second marriage for each. Plaintiff lived his entire life on a 150-acre parcel that had long included a farmhouse, which plaintiff had bought from his parents. In the 1970s plaintiff built a second house on the land and lived there ever since, including during his marriage to defendant. During the course of the marriage, plaintiff rented the farmhouse and farmland to others, then sold the farmhouse by land contract. Plaintiff testified that he did not work the farmland himself during the marriage.

Plaintiff had many certificates of deposit and other financial accounts, and testified that he went to great lengths to keep them as his separate property and that defendant never contributed anything to the accounts. Defendant's testimony comported with plaintiff's in this regard.

Plaintiff testified that he cashed out several certificates of deposit and purchased a condominium in Florida with the proceeds, all expenses attendant to which he personally covered, but for defendant's having contributed a new refrigerator and a granite slab counter, which plaintiff invited her to reclaim as a consequence of the divorce. The testimony of both

parties indicated that defendant made significant contributions to the maintenance and improvement of the marital home, however.

The parties agreed that some of their respective assets were separate property, including plaintiff's pension from General Motors. Plaintiff agreed before trial to pay defendant spousal support until she began collecting Social Security benefits, which were understood to be commencing in February or March of 2011. Plaintiff also agreed before trial to pay defendant \$1,500 in attorney fees.

The trial court held that the marital home was marital property and awarded it to plaintiff, with the requirement that he pay half its equity value to defendant. However, the court concluded that the 150-acre parcel was plaintiff's separate farm property and awarded it and its proceeds to plaintiff. The court also awarded plaintiff, as his separate property, the condominium in Florida, plus all the various financial accounts held in plaintiff's name alone.

However, the court, recognizing that its judgment would leave defendant in a state of some financial inequality as compared to plaintiff, elected to invade plaintiff's separate property by way of ordering him to pay defendant \$15,000 "that she can hopefully invest in her annuity to provide herself with a better return on a monthly basis so that she can survive." The court denied defendant's motion for an additional \$5,000 in attorney fees.

II. SEPARATE PROPERTY

We review the trial court's factual findings in divorce proceedings for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "[F]actual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). "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. . . . [T]he dispositional ruling . . . should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks*, 440 Mich at 151-152.

When dividing a marital estate, the goal is to make an equitable division of the marital property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). "Assets earned by a spouse during the marriage are properly considered part of the marital estate." *Id.* at 110. This does not include "passive" appreciation in value during the course of the marriage of what was initially a separate asset, meaning appreciation that the owner did nothing to bring about but for letting time pass. See *Reeves v Reeves*, 226 Mich App 490, 497; 575 NW2d 1 (1997). However, a court may award one spouse some of the other's separate property if the spouse needs it for suitable support and maintenance, or if one spouse has significantly assisted the other in the acquisition or growth of that other's separate asset. *Id.* at 494-495.

When spouses agree to keep their respective acquisitions, before or during the marriage, as separate property, a court should give effect to that agreement. See *Reed v Reed*, 265 Mich

App 131, 147; 693 NW2d 825 (2005) (discussing this concept within the context of a prenuptial agreement).

In this case, plaintiff testified that he was determined since the failure of his first marriage to keep his investments and accounts as separate property, such that he and defendant “kept separate everything.” Defendant in turn testified that she never gave plaintiff money for investing in his many certificates of deposit, did not know where plaintiff obtained the money to invest in a municipal bond, and did not know what plaintiff did with the down payment resulting from the sale of the farmhouse. Further, defendant offered little protest when asked to confirm that she and plaintiff never shared a financial account but for a single brief instance that plaintiff attributed to a mistake. The trial court no doubt credited these indications in determining that plaintiff, with defendant’s understanding, maintained his various accounts as separate assets that were thus presumptively not subject to division. See *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) (“An appellate court recognizes the . . . judge’s unique opportunity to observe the witnesses, as well as the factfinder’s responsibility to determine the credibility and weight of trial testimony.”). We conclude that the trial court did not clearly err in so determining.¹

The trial court did recognize defendant’s substantial contributions to the maintenance and improvement of the marital home, and thus held that it was a commingled marital asset subject to division, but held that the rest of the home’s 150-acre farming estate, as well as the Florida condominium, were plaintiff’s separate property.

Concerning the farmland, defendant suggests that the court acted arbitrarily in treating only the house as a marital asset, as opposed to the farming acreage upon which it stood. We conclude that the trial court did not clearly err in recognizing major differences in character, usage, and defendant’s involvement in connection with the house and the farming estate. Plaintiff endeavored to keep the farmhouse, including proceeds from its rental and sale, as his separate property, and testified that he had done nothing himself to develop or work the farmland during the marriage. The trial court did not clearly err in declining to regard defendant’s financial and other contributions to the marital home as bringing the entire farming acreage and farmhouse proceeds within the marital estate.

Concerning the Florida condominium, the court acknowledged that defendant had contributed “minimal investment” in it, but held that “it was the intent of the parties that that would be [plaintiff’s] separate property.” Again, in light of the testimony suggesting that the parties always understood that they were inclined to hold their respective assets as separate property, the court did not clearly err in concluding that that intention carried over to the condominium. Indeed, defendant provided insufficient evidence of commingling with regard to

¹ Defendant argues that the appreciation or change in character of plaintiff’s assets should inure, in part, to her benefit. Defendant cites *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995). We find *Hanaway* distinguishable, however, in light of the evidence that the parties kept their assets separate. This was not a situation like in *Hanaway, id.* at 293-294, where the parties were essentially building joint financial assets based on mutual efforts.

the condominium. However, even though the condominium itself is not a marital asset, in light of plaintiff's admission that defendant bought a refrigerator and granite counter slab for the property, defendant must be awarded the value of these items, and we remand this case for the trial court to do so.

III. ATTORNEY FEES

This Court reviews for an abuse of discretion a trial court's decision regarding a motion for attorney fees. See *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). An abuse of discretion occurs when a trial court chooses a result falling outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"[A]ttorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). Fee shifting in divorce cases is authorized by MCL 552.13(1): "In every action brought . . . for a divorce . . . the court may require either party . . . to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency." See also MCR 3.206(C). Significantly, attorney fees in a divorce action are not recoverable as a matter of right, but may be awarded only where necessary to preserve the receiving party's ability to maintain or defend the action. *Stoudemire*, 248 Mich App at 344.

Again, plaintiff initially agreed to contribute \$1,500 toward defendant's attorney fees, but in the end defendant requested \$5,000. The court denied the motion, explaining, "I do not find that either party, in addition to what I've already done can afford to pay the other party's attorney fees anymore than you already have so I'm not awarding any additional attorney fees." We cannot conclude that this decision produced a result lying outside the range of principled outcomes.

Although plaintiff is emerging from the divorce in better financial condition than defendant, the court took that into account by invading some of plaintiff's separate property; it ordered him to pay defendant \$15,000 in hopes that defendant might use it to boost her annuity income. The trial court obligated plaintiff to provide additionally for defendant's support; it recognized her need for some additional assets, and we cannot conclude that the trial court abused its discretion in declining to order plaintiff to pay additional money as attorney fees. Defendant is able to cover her attorney fees.

Affirmed, but remanded for an award to defendant pertaining to fixtures in the Florida condominium. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Pat M. Donofrio