

FILED: May 15, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

PHILIP KAPTUR,
Petitioner-Respondent,

and

LOREEN KAPTUR,
Respondent-Appellant.

Washington County Circuit Court
C074277DRC

A143861

Keith R. Raines, Judge.

Argued and submitted on November 03, 2011.

George W. Kelly argued the cause and filed the briefs for appellant.

David C. Olsson argued the cause for respondent. With him on the brief was Giers Olsson PC.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

ORTEGA, P. J.

Property division vacated and remanded; otherwise affirmed.

1 ORTEGA, P. J.

2 Wife appeals a dissolution judgment, challenging the trial court's property
3 division. In particular, wife quarrels with two components of the trial court's property
4 division. First, wife contends that the equalizing payment included in the judgment was
5 too large based on the trial court's incorrect "finding that the parties had a \$33,600 debt
6 on their home." Wife also asserts that the "court erred in ordering a [Qualified Domestic
7 Relations Order (QDRO)] giving to husband \$21,500 from wife's retirement" accounts.
8 For the reasons set forth below, we vacate and remand the property division and
9 otherwise affirm the dissolution judgment.

10 The background facts are undisputed. The parties married in September
11 2002 and separated in January 2008. Although they have children from previous
12 relationships, the parties have no joint children. At the time of the marriage, wife owned
13 a home valued at approximately \$175,000 and subject to \$70,000 of debt. One issue in
14 the divorce was the division of the parties' property, including the home and several
15 retirement accounts, as well as debts consisting of credit card balances, a mortgage, and a
16 home equity line of credit.

17 At the end of the trial, the court awarded the house to wife and announced
18 that the equity in the house at the time of the marriage was premarital property to which
19 wife was entitled. However, the court determined that the appreciation in the house
20 during the marriage should be divided between the parties:

21 "[T]he fair market value of the house in 2002 was [\$]175,000, had \$70,000
22 of obligation wrapped up in it, leaving a fair--equity of \$105,000. The fair

1 market value today is \$260,000, with a \$33,600 obligation. So, really, the--
2 today's equity is [\$]226,400. We take from that the [\$]105,000 that Wife
3 had before the date of marriage, leaving a divisible portion of [\$]121,400.
4 So that means, Husband's going to start off with [\$]60,700 out of the
5 house."

6 The court also concluded that several credit card balances were joint obligations and that
7 wife had improperly taken and used certain funds while the parties were separated.

8 Based on all of those findings, the court concluded "that Husband's entitled to Judgment
9 against Wife in the amount of \$80,000." The dissolution judgment ultimately entered by
10 the trial court contained an equalizing award of that amount.

11 With respect to the retirement funds, the court determined that the marital
12 portion of the funds would be equalized through a QDRO. The court did not make a
13 finding regarding the value of the marital portion of the retirement funds. After the trial,
14 but before the entry of the dissolution judgment, the court held additional hearings in
15 which the parties addressed the division of the retirement funds. The parties presented
16 the court with differing amounts that they argued constituted the marital portion of the
17 retirement accounts to be divided. The court reiterated:

18 "I'm not looking at who made contributions, when, where, how, except
19 premarital. So if it's premarital, I'm going to pull that portion out. If there's
20 a growth of the premarital portion, there's growth of the premarital portion,
21 and that's going to be just lumped in with the rest of it because there's no
22 real way of ascertaining what's growth and diminishment, and that sort of
23 thing, without an--without having a--a headache.

24 " * * * * *

25 " * * * So, I'm just subtracting out those dollars and it should be the
26 simplest thing in the world to say, 'Well, on this date I have this much in the
27 account before I got married and then that part comes out to me.'"

1 At a later hearing regarding the form of judgment, the division of the retirement accounts
2 was discussed again. The court stated that it had determined "that husband's premarital
3 E*TRADE and * * * rollover IRA was \$23,000." Pursuant to that finding, "the first
4 [\$]23,000 came out of the E*TRADE and went to Husband; the rest was divided 50/50.
5 So 50/50, rather than a dollar amount." The court instructed husband's attorney to
6 prepare the judgment. The dissolution judgment submitted by husband's attorney and
7 entered by the trial court provided, as part of the property awarded to husband, that
8 husband would receive "[h]is retirement account and an equalization of [wife]'s
9 retirement account * * *. The equalizing amount shall be \$21,500. Said amount shall be
10 transferred pursuant to a QDRO, the cost of which shall be equally divided between the
11 parties."

12 As noted, in her first assignment of error, wife asserts that the trial court's
13 equalizing award of \$80,000 is too large. Specifically, according to wife, that equalizing
14 award "is predicated on the court having used \$33,600 as the amount of the parties'
15 mortgage"; however, wife contends that it was undisputed that the mortgage at the time
16 of trial was approximately twice that amount. Husband first responds that wife's
17 contention is not preserved and that, therefore, we should not address it on appeal.

18 Ordinarily, this court will not consider an issue on appeal unless it was first
19 presented to the trial court. ORAP 5.45(1). The preservation requirement is designed to
20 apprise the trial court of a party's position so that the court can consider it, to avoid
21 surprise and unfairness to the opposing party, and to foster full development of the

1 record. *Peeples v. Lampert*, 345 Or 209, 219-20, 191 P3d 637 (2008). The
2 "determination whether a particular issue was preserved for appeal is a 'practical one'; it
3 will depend on whether the policies behind the preservation requirement--judicial
4 efficiency, full development of the record, and procedural fairness to the parties and the
5 trial court--are met in an individual case." *Charles v. Palomo*, 347 Or 695, 700, 227 P3d
6 737 (2010) (quoting *State v. Parkins*, 346 Or 333, 340-41, 211 P3d 262 (2009)). We will
7 consider "an issue advanced by a party on [appeal] as long as that party raised the issue
8 below with enough particularity to assure that the trial court was able to 'identify its
9 alleged error' so as to 'consider and correct the error immediately, if correction is
10 warranted.'" *Id.* (quoting *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000)). Parties are
11 not, however, "required to repeat their objections after the trial court has ruled against
12 them." *Id.* at 701-02.

13 Here, in husband's view, wife failed to preserve the asserted error because
14 "during the seven months following the arising of the alleged error, Wife referred to the
15 alleged error--if at all--only in the most general terms[.]" Wife responds that her
16 submissions to the court set forth the correct dollar amount of debt on the house, and, in
17 addition, in his own submission, husband "agreed with those numbers." Under the
18 circumstances, she asserts that the alleged error was sufficiently preserved.

19 Wife presented evidence at trial that the debt on the parties' home was
20 approximately \$68,000. However, as noted, in its factual findings the trial court stated
21 that the debt on the house at the time of trial was \$33,600. After the court announced its

1 ruling, as husband notes, wife did not immediately assert that the trial court's finding
2 regarding the debt on the house was incorrect. However, after the trial and before the
3 judgment was entered, wife made submissions to the court that set forth the correct
4 amount of debt on the house at the time of trial.¹ In one submission, she noted that

5 "[t]he Court's determination was that the 2009 fair market value of the
6 house was \$260,000. After subtracting the 2009 loan debt in the amount of
7 \$67,027.32 from the \$260,000, fair market value, the 2009 equity in the
8 home was \$192,972.62."

9 Additionally, in another document, wife stated that the "current equity" in the house was
10 \$192,972.68. Wife also submitted calculation sheets and a bank statement, which the
11 court admitted into evidence, that set forth the 2009 loan debt on the house as being
12 between \$67,000 and \$68,000. As wife points out, in his own post-trial (but
13 prejudgment) submission to the trial court, husband also set forth the value of the house
14 at the time of trial as \$260,000 and the debt as \$68,000.

15 Although neither party specifically informed the court after trial that its
16 finding regarding the debt on the house was incorrect, their post-trial submissions set
17 forth the correct number. Wife did specifically assert to the trial court that its calculation
18 of the premarital equity in the house was incorrect. Moreover, as wife observes, with
19 respect to the amount of debt on the house at the time of trial, both parties appeared to be
20 in agreement regarding the correct amount, and the documents and calculations that they

¹ The parties submitted letters to the court, along with additional documents. The trial court admitted those submissions into evidence and they are part of the record on appeal.

1 submitted to the court set forth and relied on that amount.

2 Under the circumstances, we conclude that wife sufficiently preserved her
3 claim of error. She presented evidence regarding the debt on the house at the time of
4 trial. Furthermore, after the court made a finding at odds with that evidence, wife (and
5 husband), though not necessarily required to do so, submitted additional materials to the
6 court both stating and demonstrating the amount of debt on the house. In our view, the
7 policies underlying the preservation requirement were served in this case. The issue that
8 wife seeks to have us address on appeal was put before the trial court such that the court
9 should have been able to identify and correct the alleged error.

10 On the merits, wife contends that there is no evidence to support the trial
11 court's finding of \$33,600 in debt on the house at the time of trial and that the equalizing
12 award was based, in part, on that erroneous finding.² Husband counters that the trial

² As husband points out, wife does not request *de novo* review in this case. See ORS 19.415(3)(b) ("Upon an appeal in an equitable action or proceeding other than an appeal from a judgment in a proceeding for the termination of parental rights, the Court of Appeals, acting in its sole discretion, may try the cause anew upon the record or make one or more factual findings anew upon the record."); ORAP 5.40(8)(a) ("In those proceedings in which the Court of Appeals has discretion to try the cause anew on the record and the appellant seeks the have the court exercise that discretion, the appellant shall concisely state the reasons why the court should do so."). Given that wife does not seek *de novo* review and in light of the "presumption against the exercise of discretion" to conduct such a review, ORAP 5.40(8)(c), we review the factual findings at issue in this case to determine whether they are supported by any evidence. See *Morton and Morton*, 252 Or App 525, 527, 287 P3d 1227 (2012) ("[W]e are bound by the trial court's express and implicit factual findings if they are supported by any evidence in the record * * *").

Husband suggests that the court's oral remarks regarding the fair market value of and obligations on the house do not constitute factual findings. However, the court specifically characterized its discussion of the equity in the house as "findings of fact."

1 court did not base its judgment on any specific calculation and points to other
2 circumstances that he contends support the equalizing award. We agree with wife.

3 The court, as noted, specifically found that wife's equity in the house at the
4 time of the marriage was \$105,000. It found further that the fair market value at the time
5 of trial was "\$260,000, with a \$33,600 obligation." However, there is no evidence in the
6 record to support the latter figure. Rather, all the evidence (and both parties' submissions
7 after the trial) demonstrates that the debt on the house was about twice the amount found
8 by the trial court.

9 Given its incorrect understanding of the debt, the court concluded that the
10 equity in the house at the time of trial was \$226,400, and then subtracted from that
11 amount "the [\$]105,000 that Wife had before the date of marriage, leaving a divisible
12 portion of [\$]121,400. So that means, Husband's going to start off with [\$]60,700 out of
13 the house." That calculation formed the basis for a substantial portion of the \$80,000
14 equalizing award. Given that the trial court's finding underlying the equalizing award
15 regarding the debt on the house is not supported by evidence in the record, we conclude
16 that it is appropriate to remand the case for the trial court to determine a just and proper
17 division of property in view of the actual amount of equity in the house at the time of
18 trial. *Kunze and Kunze*, 337 Or 122, 135, 92 P3d 100 (2004) (under ORS 107.105(1)(f),
19 the court must determine a division of marital property that is "just and proper in all the

Thus, we reject husband's position on that point and treat the court's determinations as factual findings for purposes of our review.

1 circumstances").

2 As noted, in her second assignment of error, wife challenges the portion of
3 the property division in which the trial court awarded husband \$21,500 from wife's
4 retirement accounts. She notes that the trial court ruled that each party would receive his
5 or her own retirement funds and that the marital portion of the retirement accounts was to
6 be equalized between the parties. However, according to wife, the portion of the written
7 judgment that awards husband \$21,500 from wife's retirement account is entirely
8 inconsistent with that ruling. Furthermore, she asserts that the court made that order "by
9 signing a judgment two days after it was submitted by husband's attorney, (without
10 giving wife's attorney any opportunity to object), and without at any time previously
11 telling the parties that it was doing anything other than what it ordered from the bench * *
12 *."

13 Husband responds that wife failed to preserve the error. With respect to the
14 substance of wife's argument, husband does not appear to dispute that the portion of the
15 judgment relating to the QDRO is inconsistent with the trial court's stated intentions
16 regarding division of the retirement accounts. Instead, he asserts that the court could
17 have decided not to award wife any of his retirement accounts because, in his view, they
18 lost "virtually all of their pre-marital value during the marriage." Furthermore, according
19 to husband, "because Wife's * * * account, acquired during the marriage and funded by
20 joint funds, was the only account to grow, and was worth \$44,000 or \$55,000 * * * the
21 judgment correctly awarded Husband half of it." Because we have determined, as

1 discussed above, that the property division portion of the judgment must be vacated and
2 remanded, we need not address the parties' contentions regarding the retirement accounts.
3 The trial court, on remand, must determine a just and proper division of property under
4 all the circumstances and will be able to consider an appropriate division of the parties'
5 retirement accounts as part of that determination.

6 Property division vacated and remanded; otherwise affirmed.