

STATE OF MICHIGAN
COURT OF APPEALS

JANE ELLEN MCNAMARA,

Plaintiff-Appellee/Cross-Appellant,

v

ALBERT OCTAVE HORNER,

Defendant-Appellant/Cross-
Appellee.

FOR PUBLICATION

March 13, 2003

9:10 a.m.

No. 216018

Oakland Circuit Court

LC No. 96-532736-DO

AFTER REMAND

Updated Copy

May 9, 2003

Before: White, P.J., and Wilder and Zahra, JJ.

WILDER, J.

This case is before us after remand to the trial court for additional findings of fact and disposition of the marital assets. After review of the trial court's findings, we now affirm.

I

The trial court was directed on remand to: (1) determine whether defendant Albert O. Horner's retirement package was earned during the course of the marriage, and if so, determine whether division of the retirement package was equitable; (2) make further findings of fact regarding its determination that the marital assets of the parties should be divided fifty-five percent to defendant and forty-five percent to plaintiff Jane E. McNamara; and (3) determine, on the basis of the expanded record, the equitable disposition of the marital assets in this case.

II

In a divorce action, this Court's review of the trial court's factual findings is limited to clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Beason, supra* at 802; *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings of fact are upheld, we then must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152; *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999); *Draggoo, supra* at 429. A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Welling, supra* at 709-710; *Draggoo, supra* at 429-430. Further, assets earned by a spouse during the marriage, whether

they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate. *Vander Veen v Vander Veen*, 229 Mich App 108, 110; 580 NW2d 924 (1998); *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997).

III

The trial court made several findings of fact with regard to defendant's retirement package, which included a consulting agreement, a nondisclosure agreement, an agreement not to compete, and a release agreement. The trial court concluded that the consulting agreement, nondisclosure agreement, and agreement not to compete all related to future employment by defendant, and that although the agreements were signed during the latter part of the marriage, the compensation was defendant's separate asset and appropriately excluded from the marital estate.

The trial court's findings in this regard are not clearly erroneous, because although the agreement was signed during the marriage, defendant's compensation from the package was not earned during the course of the marriage. Because the compensation was not earned during the marriage, it is not a marital asset. See *Byington, supra* at 110. The trial court also did not clearly err in finding that the release agreement was part of the marital estate, because the net proceeds were accrued during the course of the marriage. *Id.* In addition to these findings, the trial court further determined that the parties' bonuses for years 1996 and 1997, and that portion of the NBD account that did not relate to income from the consulting agreement, were marital assets. We conclude that these findings are also not clearly erroneous.

In addition, the trial court found that the income from the release agreement, the portion of the NBD account not related to the consulting agreement, and the 1996 and 1997 bonuses of the parties were marital assets that should be divided equally by the parties. The trial court reaffirmed its finding that the remaining assets should be divided fifty-five percent to defendant and forty-five percent to plaintiff. In support of this conclusion, the trial court noted that premarital assets had been excluded from the property division, that defendant was responsible for a larger percentage of the increase of the parties' marital assets due to his income, and that plaintiff has significant, increased earning potential during the course of her career and an ability to thus maintain her standard of living, whereas defendant might have to draw on assets to continue to maintain his standard of living.

On the basis of the expanded record, we cannot find the trial court's asset distribution to be inequitable. Therefore, because such dispositional rulings are discretionary, *Sands, supra*, we do not disturb the trial court's determination in this case.

Affirmed.

Zahra, J., concurred.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra