

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA DOREE HERRINGTON,

Plaintiff- Appellee/Cross- Appellant,

v

LESTER HERRINGTON,

Defendant- Appellant/Cross- Appellee.

UNPUBLISHED

November 14, 1997

No. 197829

Marquette Circuit Court

LC No. 94-029839

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment granting the parties a divorce but reserving the issue of property distribution, and an addendum to the judgment of divorce, which distributed the property and was entered nunc pro tunc relating back to the entry of the divorce judgment. We affirm.

Defendant first contends that the trial court erred by entering a judgment of divorce without determining the property rights of the parties as required by MCR 3.211(B)(3), and that a new trial is warranted. A judgment of divorce must comply with the requirements of MCR 3.211(B)(3). *Yeo v Yeo*, 214 Mich App 598, 601; 543 NW2d 62 (1995). In pertinent part, MCR 3.211(B)(3) provides that a judgment of divorce must include a determination of the property rights of the parties. In this case, the trial court erred when it entered the judgment of divorce without resolving all issues required by MCR 3.211(B)(3). Moreover, the trial court did not cure the error by entering the addendum to the judgment of divorce nunc pro tunc because this cure was not an available remedy. The function of a order nunc pro tunc is to supply an omission in the record of action previously taken by the court but not properly recorded; an order nunc pro tunc may not be utilized to supply previously omitted action. *Sleboede v Sleboede*, 384 Mich 555, 558-559; 184 NW2d 923 (1971). Resolution of the property issues by the trial court was “previously omitted action.” It was not action that was previously taken but erroneously omitted. Therefore, it was improper for the trial judge to enter the addendum to the judgment of divorce nunc pro tunc in an effort to remedy the omission of the property issues from the judgment of divorce.

In *Yeo*, the judgment of divorce was vacated because, at the time of appeal, the trial court had not complied with the requirements of MCR 3.211(B)(3). Compliance with MCR 3.211(B)(3) ensures that divorce cases are not tried piecemeal, subjecting the parties to a multiplicity of orders that could be appealed. *Yeo, supra* at 601. However, the facts of *Yeo* can be distinguished from the case at bar. In this case, the trial court entered the judgment of divorce, held a two-day hearing in order to resolve the parties' property issues, and then entered an addendum to the judgment of divorce. Although the procedure was not in compliance with the court rule, all the elements required by MCR 3.211(B)(3) have been addressed. It would be redundant to order a new trial because the trial court has already gathered information about the parties' marriage and determined their respective shares of the marital assets. Furthermore, allowing the decision of the trial court to stand does not offend the policy rationale behind MCR 3.211(B)(3), which is to avoid multiple orders that can be appealed. Thus, the trial court's error was harmless.

Defendant also claims that the trial court erred by failing to make specific findings of fact or conclusions of law with regard to alimony. In his trial brief and post-trial statement, defendant uses the term "alimony" in the context of plaintiff's inheritance. Our interpretation of defendant's claim is more that defendant felt entitled to that particular asset than he is entitled to alimony in general. Defendant does not appear to ask for alimony outside the context of the inheritance. As a result, we question whether defendant properly raised the issue of alimony below and preserved it on appeal. In any event, based on our review of the record, reversal is not required.

Michigan provides a statutory basis for alimony. MCL 552.23; MSA 25.103. Whether to award alimony is within the trial court's discretion. *Demman v Demman*, 195 Mich App 109, 110; 489 NW2d 161 (1992). We have recognized several factors that are considered in determining whether alimony should be awarded. *Lee v Lee*, 191 Mich App 73; 477 NW2d 429 (1991). These factors include:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, and (11) general principles of equity. [*Id.* at 80.]

These "factors are to be considered wherever they are relevant to the circumstances of the particular case." *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992). In the case at bar, although the trial court did not specifically set forth each of the above factors in the context of an alimony analysis, it is apparent from the trial court's findings and conclusions that it was aware of the appropriate factors. We do not believe that the trial court's failure to specifically state its findings regarding each consideration requires reversal because our review of the record indicates that we would not have reached a different result. *Lee, supra* at 80.

Finally, defendant claims that the trial court erred when it failed to determine whether plaintiff's inheritance proceeds should be distributed for the suitable support and maintenance of defendant. We

disagree. Courts have discretion to treat inheritance proceeds as either marital or

separate property. *Demman, supra* at 112. In *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976), the Supreme Court recognized that “plaintiff’s inheritance could be awarded as part of the property to be divided with defendant either if [as provided by MCL 552.401; MSA 25.136] the husband had contributed to the ‘acquisition, improvement or accumulation of such property’ or if an award otherwise was insufficient to maintain either party.” In our opinion, because the trial court determined that alimony was not necessary, it implicitly held that the award was otherwise sufficient to maintain defendant. Therefore, it would not be improper to invade plaintiff’s inheritance.

On cross appeal, plaintiff claims that because the trial court attributed the breakdown of the marriage to defendant, it erred in not awarding her more than fifty percent of the marital assets. We disagree. The value to be given the fault element in a particular case is a matter to be left to the trial court’s discretion, subject to the requirement that the distribution not be inequitable. *Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995). Fault is but one factor among many to be considered. *Id.* We find no abuse of discretion and cannot conclude that the distribution was inequitable in this ground alone.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Richard A. Bandstra