

STATE OF MICHIGAN  
COURT OF APPEALS

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DORIS ANN DAVIS,

Plaintiff-Appellant/Cross-Appellee,

v

LAWRENCE M. DAVIS,

Defendant-Appellee/Cross-Appellant.

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UNPUBLISHED

November 9, 1999

No. 208755

Arenac Circuit Court

LC No. 96-005311 DO

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce, challenging the trial court's property distribution. Defendant cross-appeals, claiming that the trial court's valuation of one asset was based on the wrong valuation date. We affirm in part, reverse in part, and remand for further proceedings.

We review the trial court's findings of fact regarding which assets are included in the marital estate and regarding the valuation of those assets for clear error, and we will reverse only if we are left with the definite and firm conviction that a mistake has been made. *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the court's findings of fact are upheld, we then review its dispositional rulings regarding the division of the marital estate to determine whether they were fair and equitable in light of the facts, and we will reverse only if we are left with the firm conviction that the division was inequitable. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); *Draggoo, supra* at 429-430.

We conclude that the trial court's findings regarding three parcels of real estate were clearly erroneous. The trial court awarded property on Big Creek Road in Au Gres to defendant. This property was acquired by defendant before he was married to plaintiff. The parties improved the property by completing an unfinished house, and then used the property for rental income. The trial court did not include the value of the property itself in the marital estate because it was defendant's separate asset. Additionally, the court refused to include the value of the appreciation of the property during the course of the marriage. Rather, the trial court based its valuation on the value of the improvements in the marital estate. This was clear error. This Court has held that increases in the value of property resulting from appreciation over the course of a marriage are part of the marital estate if the

increase in value is not merely passive. *Reeves v Reeves*, 226 Mich App 490, 495-497; 575 NW2d 1 (1997). In this case, the parties made improvements to the property and then used it for rental income. Any appreciation during the marriage was not merely passive, but resulted from the efforts of both plaintiff and defendant in improving the property. Therefore, the appreciation of this property during the marriage should have been included in the marital estate. The trial court must determine the amount of appreciation and include that amount in the marital estate.

The trial court also awarded defendant property on Swenson Road in Au Gres. The court reduced the value of this property by ten percent to reflect the estimated cost of sale if the property were sold. This was clear error. If the parties to a divorce “have presented evidence that causes the court to conclude that it would not be speculating in doing so, it may consider the effects of taxation, stock brokerage and realtor fees, and other inchoate expenses in distributing the assets.” *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). Here, no evidence was presented to suggest that a sale was contemplated, and it was therefore improper for the court to reduce the value of this property by a cost-of-sale factor.

The court also awarded defendant property on Davis Road in Au Gres, on which the parties built a home. The court reduced the value of this property by a ten percent cost-of-sale factor. Again, this was clear error because no evidence was presented to suggest that a sale was contemplated. *Id.* Additionally, the court deducted the value of the land itself, including in the marital estate only the value of the house on the property. Defendant contends that this was not error because the property was a gift to him from his mother. However, the parties used the property as the location on which to build a home together. Both parties contributed to the construction of the home, and they planned to retire there together. In *Heike v Heike*, 198 Mich App 289, 293; 497 NW2d 220 (1993), this Court affirmed a trial court’s holding that money given to the parties by the plaintiff’s mother during the marriage as a gift was part of the marital estate, where the money was used as a down payment on the marital home. Similarly, in this case, the property was given to defendant during the marriage, and the parties used it as the location for their future marital home. Under these circumstances, it was clear error for the trial court to exclude the value of the land from the marital estate.

Plaintiff argues that the trial court’s distribution of the marital assets was inequitable. We need not address this issue because we conclude that the trial court’s factual findings regarding the value of three properties in the marital estate was erroneous. On remand, that will necessitate a new order of distribution. However, to provide guidance to the trial court, we briefly consider plaintiff’s arguments that the trial court’s distribution was inequitable.

Plaintiff contends that defendant’s separate assets should have been invaded to provide an equitable distribution. Generally, the separate assets of a spouse are not included in the property distribution, but those assets may be invaded when one of two statutory exceptions is met. *Reeves*, *supra* at 494. The first exception is that if the award to one spouse is “insufficient for the suitable support and maintenance” of that spouse, then the court may also award that spouse assets that are part of the separate estate of the other spouse. *Id.*, quoting MCL 552.23(1); MSA 25.103(1). This has been held to require the spouse seeking to invade separate assets to demonstrate additional need. *Reeves*, *supra*. Plaintiff has failed to make this showing, merely asserting that because plaintiff retired

from her job based on defendant's representations to her that he would soon retire and join her in the Davis Road home, the court should have invaded defendant's separate assets.

The second exception is that separate assets of a spouse may be invaded where the other spouse "contributed to the acquisition, improvement, or accumulation of the property." *Id.* at 494-495, quoting MCL 552.401; MSA 25.136. The trial court may include in the property distribution such assets "as appears to the court to be equitable under all the circumstances of the case . . . ." MCL 552.401; MSA 25.136. Here, plaintiff did contribute to the improvement of the Big Creek property, so that asset was available for invasion by the trial court, but the court was not required to invade it unless the court considered it to be required to make an equitable distribution.

Our Supreme Court has set forth the following factors to be considered in fashioning an equitable distribution of property upon divorce:

(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks, supra* at 159-160.]

This list is not exhaustive; rather, "[t]he determination of relevant factors will vary depending on the facts and circumstances of the case." *Id.* at 160. However, although not all these factors may be relevant to a particular case, and some factors not listed may be relevant, the Court stated that "where any of the factors delineated in this opinion are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors." *Id.* at 159.

The trial court did not explicitly consider the *Sparks* factors in its ruling, yet it did take some of them into account. Regarding the first factor, duration of marriage, the court noted that the parties were married for close to fifteen years. The court also considered the second factor, the contributions of the parties to the marital estate, by noting that defendant owned the Mobil Oil stock before the marriage and that plaintiff contributed the proceeds from the sale of her home to the purchase of the Tree Farm. The court also noted that fault was a factor, and rounded plaintiff's award of defendant's pension and deferred compensation account from twenty-eight percent to thirty percent, thus addressing the eighth factor, past relations and conduct of the parties. However, the remainder of the court's ruling consists of findings regarding the value of assets and which party was awarded each asset. The court did not make findings regarding whether and how the age, health, life status, necessities and circumstances, and earning abilities of the parties were relevant to its disposition of the marital estate. The court did attempt to make a disposition that was roughly equal. Also, in the judgment of divorce, the court noted, in denying alimony, that it was of the opinion that both parties were "well, able-bodied and capable of gainful employment." This addresses the factors relating to the health and earning abilities of the parties. Therefore, although the trial court did not delineate which factors it was considering, the court made sufficiently specific findings of fact relating to most of the *Sparks* factors.

In distributing the marital estate, the goal of the trial court must be “to reach an equitable division in light of all the circumstances.” *Byington, supra* at 114. The shares need not be mathematically equal, “but significant departures from congruence must be explained clearly by the court.” *Id.* at 114-115. Here, the court’s distribution was roughly congruent in value. The court even included a payment from defendant to plaintiff in an attempt to “equalize” the distribution. No significant departure from congruence exists that must be clearly explained.

Plaintiff argues that awarding the income-producing properties to defendant, i.e., the Tree Farm and Big Creek rental property, was inequitable because plaintiff was retired and had not found full-time employment. However, the court found that both parties were capable of gainful employment. In light of plaintiff’s testimony that, since her retirement, she had worked for two or three weeks with her previous employer, AirBorne Express, and defendant’s testimony that plaintiff was offered full-time employment and turned it down, we are not left with the firm conviction that the trial court’s finding that plaintiff was capable of gainful employment was mistaken. “This Court gives special deference to a trial court’s findings when they are based on the credibility of the witnesses.” *Draggoo, supra* at 429.

The distribution by the trial court in this case was not inequitable. However, as noted earlier, the trial court will need to reexamine the distribution in light of modified findings of fact regarding the value of certain marital assets.<sup>1</sup>

Plaintiff also challenges the court’s refusal to grant alimony. We review the trial court’s factual findings under the clearly erroneous standard, and we will reverse the trial court’s decision regarding alimony only when we are left with the firm conviction that the decision was inequitable. *Magee v Magee*, 218 Mich App 158, 161-162; 553 NW2d 363 (1996). The trial court has the discretion to award alimony as it considers just and reasonable. MCL 552.23; MSA 25.103; *Magree, supra* at 162. “The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party.” *Magee, supra*. Relevant factors that the court should consider include “the length of the marriage, the parties’ ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case.” *Id.* “The trial court should make specific findings of fact regarding those factors that are relevant to the particular case.” *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993).

Here, the trial court did not make specific findings of fact regarding the relevant factors. In the judgment of divorce, the court merely stated that “neither party shall be entitled to alimony, the Court being of the opinion that both parties are well, able-bodied and capable of gainful employment.” That both parties are able to work, without further findings of fact by the trial court, is not a sufficient basis for a denial of alimony. The court did not address the needs of the parties nor the incomes that the parties would receive from any employment they might be able to procure. Although a denial of alimony may indeed be proper after the trial court considers these factors, we conclude that the denial of alimony was inequitable where the court did not balance the incomes and needs of the parties and did not adequately address the relevant factors for determining whether to award alimony.

Next, plaintiff challenges the trial court’s refusal to grant attorney fees. “Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this

Court will not reverse the trial court's decision absent an abuse of discretion." *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). Here, the trial court did not consider whether an award of attorney fees was necessary for plaintiff to prosecute the action. Instead, the court refused to award attorney fees to either party because it concluded that both parties contributed to the protracted litigation of this divorce. This was not a proper reason to deny attorney fees, and constituted an abuse of discretion.

Plaintiff also challenges the trial court's method of valuing defendant's pension benefits and deferred compensation account. Plaintiff argues that the court should have included the value accrued before the marriage. Benefits based on years of employment that accrued before the marriage may be included in the marital estate if doing so is "just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case." *McMichael v McMichael*, 217 Mich App 723, 730-731; 552 NW2d 688 (1996), quoting *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992), quoting MCL 552.23(1); MSA 25.103(1). Plaintiff did not present evidence of a need for an invasion of the benefits that accrued before the marriage, and the trial court did not err by including only the benefits that accrued during the marriage. We also reject plaintiff's argument that the court erred by using the coverture method of valuing these benefits. This Court has approved the coverture method of calculating the value of pension benefits attributable to the marriage by looking to the fraction of years of marriage that the spouse employee was working over the total employment years of the party. *Vander Veen v Vander Veen*, 229 Mich App 108, 112-113; 580 NW2d 924 (1998).

Plaintiff also argues that defendant should be required to share in the payment of her debts incurred from gambling and attorney fees relating to an accusation that she shot a neighbor's dog. The record reflects that plaintiff agreed to be solely responsible for these debts; therefore, plaintiff has failed to preserve this issue for appeal. *Nalevayko, supra*.

On cross-appeal, defendant argues that the trial court erred by valuing plaintiff's IRA account as the average of the value at the time of the filing for divorce and the time of trial, where the court valued all other assets as of the time of trial. Although the determination regarding the valuation date of the marital estate is within the trial court's discretion, a plausible reason should exist for choosing a valuation date. *Thompson v Thompson*, 189 Mich App 197, 199; 472 NW2d 51 (1991). Although marital assets are typically valued at either the time of trial or the time the judgment of divorce is entered, a trial court may use a different date in its discretion. *Byington, supra* at 114 n 4. This Court has noted that after a trial court "determines that a particular asset is, in fact, a marital asset, it must then value the asset as of either the date of trial, the date of judgment, or a more appropriate date." *Id.* This language does not allow the averaging of an asset's values at different dates.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We retain jurisdiction. The trial court is instructed to enter its judgment within sixty-three days of this decision.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck

<sup>1</sup> With respect to plaintiff's arguments regarding the trial court's valuation and exclusion of the 4.56 acre parcel and the Mobil stock as marital assets, we conclude that no error occurred below.