

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM LAWRENCE KONOPKA,

Plaintiff-Appellee,

v

DENISE MARY WIRGAU,

Defendant-Appellant.

UNPUBLISHED

March 24, 2000

No. 214447

Monroe Circuit Court

Family Division

LC No. 95-022134-DM

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce and the distribution of plaintiff's pension, the division of the equity in the marital home, and the award of alimony. We affirm.

In an appeal of the distribution of property under a judgment of divorce, we first review the trial court's findings of fact, such as valuations of marital assets, for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A finding is clearly erroneous if, after a review of the entire record, we are left with the definite and firm conviction that a mistake has been made *Id.* at 429. We give special deference to a trial court's findings when based on the credibility of the witnesses. *Id.*

If the trial court's findings of fact are upheld, we then decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152; *Draggoo, supra* at 429. The dispositional ruling is discretionary and will be affirmed unless we are left with the firm conviction that the division was inequitable. *Sparks, supra* at 152; *Draggoo, supra* at 430.

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The division need not be mathematically equal, but any significant departure from congruence should be supported by a clear exposition of the court's rationale. *Id.* at 114-115. To reach an equitable division, the trial court should consider (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. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks, supra* at 158-160. The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight, but the trial court must make specific findings regarding the factors it determines to be relevant. *Id.* at 159, 163.

I

Defendant first argues that the trial court improperly established the period of time for valuation and distribution of plaintiff's pension, or, in the alternative, that plaintiff's separate assets should be invaded either because defendant has demonstrated additional need or because she has contributed to the improvement of plaintiff's property. We disagree.

Rights of one party to the other party's vested pension benefits in a divorce proceeding are governed by statute, which provides that any right to vested pension benefits accrued by a party during the marriage must be considered part of the marital estate subject to award upon divorce. MCL 552.18(1); MSA 25.98(1); *VanderVeen v VanderVeen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998). Further, pension benefits accrued before or after the marriage may be subject to property division. *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995); *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992).

Use of the date of the divorce judgment for asset valuation purposes is not mandatory. *Thompson v Thompson*, 189 Mich App 197, 199; 472 NW2d 51 (1991). The determination of the proper date for valuation of an asset is within the trial court's discretion. *Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 76; 471 NW2d 631 (1991).

The record in this case reflects that the court made factual findings regarding all relevant factors under *McDougal, supra*, and that it specifically addressed the issue of the valuation period, rejecting defendant's arguments. The court determined the appropriate period to be the date of marriage to the date plaintiff filed his complaint for divorce, plus a six-month reconciliation period. The court found that the parties cohabitated for several years while defendant collected welfare to support the couple's children, and defendant did not marry plaintiff until it was a matter of convenience, to receive health benefits after her welfare benefits ended, which was, in effect, welfare fraud on the part of both parties. Further, the marriage arguably ended as early as 1988 when defendant no longer shared the marital bedroom. Plaintiff filed for divorce in August 1995. Nevertheless, the court extended the period of marriage to early 1996 for valuation purposes, which benefited defendant. Clear manifestation of the intent to lead separate lives, such as filing a divorce complaint, is a proper consideration in apportioning a marital estate. *Byington, supra* at 112. We find no clear error in the trial court's findings. The trial court did not abuse its discretion in calculating the pension valuation period because its findings provided a plausible basis for the valuation dates selected. See *Thompson, supra* at 199.

Defendant's argument that plaintiff's separate property in his pension should be invaded is without merit. 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, 493-494; 575 NW2d 1 (1997). However, separate assets may be invaded at the discretion of the court under two statutorily created exceptions. MCL 552.23 and 552.401; MSA 25.103 and 25.136; *Reeves, supra* at 494. Invasion of the separate estates is permissible if, after division of the marital assets, the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party, i.e., a party demonstrates additional need. *Reeves, supra* at 494. "The other statutorily granted method for invading a separate estate is available only when the other spouse 'contributed to the acquisition, improvement, or accumulation of the property,'" i.e., "[w]hen one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Id.* at 494-495, quoting MCL 552.401; MSA 25.136.

Defendant points to her childrearing and household services, noting that these were provided under stark conditions, and suggests that because she received welfare benefits, plaintiff saved family support expenses that he would have had otherwise. Plaintiff contends that common law marriages are no longer recognized in Michigan, that services rendered during periods of cohabitation are presumed gratuitous, and that defendant has failed to rebut that presumption. See *Carnes v Sheldon*, 109 Mich App 204, 211-213; 311 NW2d 747 (1981); *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997).

The record reflects that the court considered defendant's distributions from the marital estate, and, in light of her choice not to seek employment, the court declined to find she had additional needs. While defendant testified concerning her disability, she offered no medical evidence to substantiate it or to explain why she was unable to obtain gainful employment. Thus, the court's findings in this regard are not clearly erroneous.

Defendant proffered no evidence to substantiate that she made *significant* contributions to the acquisition or growth of plaintiff's *pension*, such that she would come within the second exception under *Reeves, supra* at 494-495. Moreover, she failed to rebut the legal presumption that her services prior to the parties' marriage were gratuitous. To overcome this presumption, defendant must show that she expected compensation from plaintiff at the time she rendered the services and that plaintiff expected to pay for them. See *Featherston, supra* at 589. The court found that defendant's reasons for delaying her marriage to plaintiff were self-serving, and we find no indication of a mutual expectation of support in return for defendant's services.

The court did not abuse its discretion in concluding that defendant's circumstances did not meet the statutory bases for invading plaintiff's separate assets. The court's disposition of plaintiff's pension was not inequitable.

II

Defendant next argues that the trial court improperly limited her spousal support award to six months and that she is entitled to long term spousal support. We disagree.

An award of alimony is in the trial court's discretion. *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988). The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992). Alimony is to be based on what is just and reasonable under the circumstances of the case. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993). In awarding alimony, the court should consider the following factors: (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, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. *Ianitelli v Ianitelli*, 199 Mich App 641, 644; 502 NW2d 691 (1993); *Thames v Thames*, 191 Mich App 299, 307-308; 477 NW2d 496 (1991).

Defendant argues the trial court failed to adequately consider the length of the parties' relationship. However, under *Thames*, *supra* at 308, the court is to consider the length of the *marriage*, not the parties' relationship or prior periods of cohabitation. Moreover, as previously noted, the record supports the trial court's findings regarding the marriage's duration.

Defendant also argues that the court placed undue weight on her earning potential. However, the trial court made factual findings regarding all the factors under *Thames* and a fair reading of the court's decision does not substantiate defendant's claim that one factor was singled out and given greater weight than others. Moreover, testimony regarding defendant's ability to work due to injury to her hands was contradictory. While she claimed that injuries to her hands prevented her from working, she admitted performing craftwork, an activity involving intricate and extensive work with her hands. Further, defendant made no significant effort to find employment during the term of the divorce proceedings, which were lengthy, in part due to administrative delays in the court. Defendant received alimony during this time, in increasing amounts, and the court provided that the alimony would continue until the end of 1998.

Defendant also maintains that the court failed to adequately consider the parties' income disparity. However, the court acknowledged the income disparity between the parties and the various factors that would make it difficult for defendant to ever reach income parity with plaintiff, such as her health and minimal education. The court also found that defendant's failure to seek suitable employment and retraining, or in the alternative, disability benefits, was largely of her own choosing. These findings are not clearly erroneous. There was evidence that defendant could and would work at a job that paid well. The principal test under *Thames*, *supra* at 308, is the parties' *ability* to work. While defendant is correct that the transcript does not reflect that she declined employment, there is ample support for the court's finding that defendant has the *ability* to work. On the record as a whole, we are not left with a definite and firm conviction that any mistake has been made in regard to alimony, which we conclude was fair and equitable.

Finally, defendant argues that the trial court used an incorrect formula in valuing defendant's equity interest in the marital home or, alternatively, that plaintiff's separate property should be invaded because of her contributions to improving the home.¹ We disagree.

The record includes testimony and other evidence regarding the appraised value of the marital home, its purchase date and the payments made by plaintiff, as well as both parties' efforts to improve the home over the course of their relationship. The court's factual findings addressed all factors relevant to a property distribution and are supported by the record. We find no clear error in the court's findings of fact with regard to the distribution of the marital home's equity.

The trial court awarded defendant one-half of the increased value of the home from the time of the marriage to the time of the divorce, thereby returning to plaintiff premarital equity that arose solely from his down payment on the property and his payments thereafter. The actual marital relationship was of rather short duration. The division was equitable given that both parties contributed labor and assets during the length of the marriage.

The trial court's distribution of the marital home's equity was not an abuse of discretion. Contrary to defendant's claim, the court's decision provides no basis for the invasion of plaintiff's separate estate in the marital home.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry William Saad

¹ Defendant also asserts the court erred in failing to consider the entire acreage included in the marital property and the value of the home if improvements are completed. She requests that the case be remanded for an evidentiary hearing. However, the trial record indicates that defendant acknowledged the appraised value of the marital property as \$78,000. Defendant cites no authority for her position requesting a re-evaluation of the marital property, and thus, these matters are not properly before this Court. *Wiand v Wiand*, 178 Mich App 137, 150; 443 NW2d 464 (1989). Further, the trial court's order that hidden assets are to be awarded to the other party is sufficient to protect defendant's rights in the event she is able to prove plaintiff has additional undisclosed property.