

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM E. KASBEN,

Plaintiff/Counterdefendant-
Appellant,

v

BERYL W. HOFFMAN,

Defendant/Counterplaintiff-
Appellee,

and

EDWIN J. KASBEN,

Third-Party Defendant-Appellant.

UNPUBLISHED
November 30, 2001

No. 224551
Leelanau Circuit Court
Family Division
LC No. 96-003816-DO

Before: Griffin, P.J., Gage and Meter, JJ.

PER CURIAM.

Plaintiff William Kasben and third-party defendant Edwin Kasben (plaintiff's father) appeal as of right from the judgment of divorce awarding Fred Dery, the bankruptcy trustee, certain real estate for the benefit of defendant Beryl Hoffman. We reverse and remand for further proceedings.

Plaintiff and his father argue that plaintiff's father was improperly added as a party to this divorce action. We agree. Generally, the only proper parties to a divorce action are the husband and the wife. *Berg v Berg*, 336 Mich 284, 288; 57 NW2d 889 (1953). Although a court may add a third party to the action where that party has conspired with one spouse to deprive the other spouse of a property interest, *Donahue v Donahue*, 134 Mich App 696, 704; 352 NW2d 705 (1984), there was no evidence that plaintiff's father conspired with plaintiff to deprive defendant of any property. However, the addition of plaintiff's father to the action does not require reversal. Contrary to plaintiff's assertions, the trial court did not award property to defendant that was owned by plaintiff's father. The trial court simply awarded plaintiff's interest in the marital farm to defendant, subject to plaintiff's father's security interest as the land-contract vendor. Under the circumstances, plaintiff's father need not be joined on remand.

Plaintiff also argues his father owned the marital farm outright and that the land contract to plaintiff and defendant was invalid because they never satisfied the condition of paying the balance of the mortgage within ninety days. We agree with plaintiff that the trial court improperly concluded that it was precluded from deciding this issue by the preliminary finding of the bankruptcy court in defendant's bankruptcy action. Collateral estoppel, or issue preclusion, only applies where there has been a valid final judgment. *Dearborn Heights School Dist No. 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998). However, there was no evidence to indicate that the land contract from plaintiff's father to plaintiff and defendant was invalid. Although the trial court referred to the "condition" attached to the land contract, which was never satisfied by plaintiff or defendant, the land contract does not specify that payment of the remaining mortgage balance is a "condition." It was simply another obligation under the contract. Simply because plaintiff and defendant had failed to satisfy that obligation did not render the contract automatically invalid. *Sparling v Bert*, 1 Mich App 167, 170-171; 134 NW2d 840 (1965).

We also reject plaintiff's contention that he was denied a fair trial by the lack of discovery and the limitations in the presentation of the evidence. The trial court acted within its discretion in controlling the conduct of the litigation.

However, we reverse the judgment of divorce and remand for further proceedings because the trial court's property division was founded on legal error. First, the trial court failed to make any factual findings regarding which assets were marital assets and which were separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Although the trial court noted that such findings would be difficult in this factually complex case, it was incumbent upon the trial court to make those findings. Without knowing which assets were marital and which were separate, this Court cannot engage in any meaningful appellate review of the property division. On remand, the trial court must determine which assets are marital and which are separate.

Most troubling is the trial court's attempt to restore the parties to the financial condition they enjoyed at the time they met in 1989, three years before they were married. A restitution approach to a divorce action is disfavored in Michigan. *Bone v Bone*, 148 Mich App 834, 837-838; 385 NW2d 706 (1986). Rather, the court's approach should be to equitably divide the marital estate. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Moreover, the trial court essentially treated the parties as though they had married three years earlier than they did. It is error for a trial court to consider the parties' pre-marriage relationship as included in the length of the marriage. *Reeves, supra* at 493, n 1. To do so would be to recognize common-law marriage, which is against the public policy of this state. *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). On remand, the trial court must consider the appropriate factors to divide the parties' marital estate equitably. Separate assets may not be invaded unless one of the statutory exceptions is met. See *Reeves, supra* at 494-495.

In light of our decision, we need not address the trial court's award of attorney fees. However, to provide guidance on remand, we note that the trial court erred by awarding attorney fees to the bankruptcy trustee. The bankruptcy trustee was not required to participate in the divorce action; therefore, even if plaintiff's litigation conduct was unreasonable, it could not have caused the trustee to be forced to incur attorney fees. *Hawkins v Murphy*, 222 Mich App 664, 669-670; 565 NW2d 674 (1997).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Richard Allen Griffin

/s/ Patrick M. Meter

I concur in result only.

/s/ Hilda R. Gage