STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN ANN SCHMIDT,

Plaintiff-Appellee,

v

MARK JOSEPH SCHMIDT,

Defendant-Appellant.

UNPUBLISHED
March 15, 2002

No. 227391
Kent Circuit Court
LC No. 97-013108-DM

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of divorce. We affirm in part and reverse in part.

Defendant asserts that the trial court committed clear error when it valued the parties' motorboat and Jaguar automobile at $10,000 each. In *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992), our Supreme Court opined:

> The appellate court must first review the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. But because we recognize that the dispositional ruling is an exercise of discretion and that appellate courts are often reluctant to reverse such rulings, we hold that the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable.

A finding of fact is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000).

Plaintiff contended that the boat and car were worth $15,500 and $14,000, respectively. On the other hand, defendant contended that the boat and car were worth only $5,850 and $5,470, respectively. Thus, the trial court's selection of $10,000 for each was very close to the average of the parties' respective contentions. It should also be noted that the trial court valued plaintiff's van at $10,000, even though she testified that the van had 165,000 miles on it and that

she was unable to drive it because it needed so many repairs.[1] Viewing these three valuations together, as the trial court undoubtedly did, we are not left with a definite and firm conviction that the trial court mistakenly valued the boat and Jaguar. *Sparks, supra* at 151-152.

Defendant also contends that the trial court erred when it refused to consider a stock account partially owned by plaintiff as part of the marital estate. Generally, it is beyond the power of the trial court to adjudicate the rights of third parties in a divorce action. *Donahue v Donahue*, 134 Mich App 696, 704; 352 NW2d 705 (1984). However, in *Donahue*, we recognized that this rule is subject to exception where the third party has conspired with one spouse to defraud the other spouse out of his or her rightful interest in the marital estate. *Id.* at 704-705. Defendant contends that the trial court erred by not applying the *Donahue* exception to the facts of the instant matter.

However, unlike the facts in *Donahue*, there was no evidence that plaintiff's father had conspired to defraud defendant. Instead, plaintiff's father testified that he set up and controlled the stock account for the joint benefit of his four children, and that his children had no idea that the account even existed until defendant discovered it. Moreover, the instant matter is further distinguishable from *Donahue* because there was no evidence in this case that plaintiff benefited from the account. Given these factual differences, we do not believe that the trial court erred by refusing to consider the stock account part of the marital estate. Having reached this conclusion, we further reject defendant's assertion that the trial court's division of the stock accounts was unfair or inequitable.

Next, defendant contends that the trial court erred when it failed to value and divide all of the personal property of the parties, which resulted in plaintiff being awarded $38,000 worth of personal property that she purportedly concealed. Specifically, defendant contends that he presented evidence of $38,000 worth of personal property in plaintiff's possession but not accounted for by the trial court in its disposition of the marital estate. However, the documentary support for defendant's assertion was not admitted into evidence, and defendant does not contest this exclusionary ruling. Instead, the trial court was left with the competing testimony of defendant and plaintiff on this issue. Given the competing testimony, we are not left with a definite and firm conviction that a mistake was made. *Sparks, supra* at 151-152.

Defendant's next argument is that the trial court erred when it found that $50,000 of a $150,000 gift from plaintiff's father to plaintiff was not marital property. We agree. We note that there was evidence suggesting that the $150,000 was a gift made solely to plaintiff. However, plaintiff testified that the money was used to pay off the mortgage on the family home. Defendant, in turn, testified that the parties used the money to purchase commercial real estate.

We have defined the marital estate to include "any increase in net worth that may have occurred between the beginning and the end of the marriage." *Byington v Byington*, 224 Mich App 103, 113; 568 NW2d 141 (1997), quoting *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986). Regardless of which parties' contention is correct regarding the ultimate disposition

[1] Plaintiff testified that, at the beginning of the divorce process, she was informed by a dealer that her van was worth $10,000. She relied on a similar method of valuation—checking with the respective dealers—to determine the value of the boat and Jaguar.

of the money, it was used in a manner to increase the parties' net worth. As such, even if the money was a gift, it was poured into the marital estate. As a result, we believe that the trial court clearly erred by excluding $50,000 from the marital estate.[2]

Defendant also contends that the trial court erred when it failed to treat Infinite Potentials, the company acquired by plaintiff after filing for divorce, as a marital asset. Again, we agree. Plaintiff argued, and the trial court agreed, that because she had acquired the company after she filed for divorce it should not be treated as a marital asset. However, assets that are acquired by either spouse before entry of a judgment of divorce are properly considered part of the marital estate. *Byington, supra* at 109-111. Here, neither party disputes that plaintiff purchased the company before the judgment of divorce was entered; therefore, the trial court's conclusion that this property was plaintiff's separate property was clear error. However, because the trial court found that the company was "worthless, at best," we believe that any resulting error was harmless.

In summary, we conclude that the trial court clearly erred by excluding $50,000 of the $150,000 "gift" to plaintiff and Infinite Potentials from the marital estate. In light of these errors, we are left with a definite and firm conviction that the property distribution was inequitable. *Sparks, supra* at 151-152. Accordingly, we remand for redistribution of the marital estate consistent with this opinion.

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens

[2] On the other hand, we would note that plaintiff also testified that only $135,000 was used to pay off the parties' mortgage. Had the trial court accepted this testimony and excluded $15,000 from the marital estate, it is unlikely that we would have found clear error. We decline, however, to simply require the trial court to add $35,000 to the marital estate, and instead defer to the trial court the determination of whether to add $35,000 or $50,000 to the marital estate.