

STATE OF MICHIGAN
COURT OF APPEALS

ALAN W. HAXTON,

Plaintiff-Appellant,

v

PATRICIA S. HAXTON,

Defendant-Appellee.

UNPUBLISHED

November 18, 2003

No. 241191

Oakland Circuit Court

LC No. 01-652770-DO

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

JANSEN, J. (*concurring in part and dissenting in part*).

I concur with majority's opinion affirming the trial court's judgment of divorce in all respects except for the portion regarding the trial court's finding that the inheritance and its appreciation was a separate asset. In this regard, I respectfully dissent.

Plaintiff's first issue on appeal raises a question as to whether defendant's inheritance was a separate asset and as to whether he was entitled to at least a portion of the appreciation. When the trial court divides property in a divorce proceeding, its first consideration is the determination of marital and separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997), citing *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). The trial court determined that the inheritance was the separate property of defendant. In light of the fact that the inheritance account was placed jointly in the names of both plaintiff and defendant, both were allowed to withdraw funds, and the fact that plaintiff did remove funds, I would find that the asset and its appreciation lost its separate property status.

Separate property has been interpreted to include property acquired by one spouse through inheritance during the marriage. *Lee v Lee*, 191 Mich App 73, 78-79; 447 NW2d 429 (1991). In *Dart v Dart*, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999), our Supreme Court recognized that "in certain situations, a spouse's separate assets, or the appreciation in their value during the marriage, may be included in the marital estate." In the present case, I do not believe that the inheritance account "exists independently of . . . the marriage partnership." *Id.* at 585.

Plaintiff claims that the inheritance was in a joint account and that he paid the expenses and taxes on the earnings derived from the inheritance. Plaintiff also contends that the inheritance increased in value because he paid other matters. It is undisputed that the account was joint with both plaintiff's name and defendant's name on the account. It is also undisputed that both plaintiff and defendant withdrew money from the account. Defendant acknowledged

that money was removed from the “joint account” to pay “college tuition or taxes, large items.” Defendant testified that plaintiff’s name was taken off the account when he withdrew money to pay property taxes without discussing it with her. Defendant further testified the fact that she had just found plaintiff with another woman and being dishonest also contributed to her decision to remove his name from the account.

Courts have the discretion to include property acquired by inheritance in the marital estate where the separate property has been commingled with the marital property or used for joint purposes. See *Charlton v Charlton*, 397 Mich 84; 243 NW2d 261 (1976); *Polate v Polate*, 331 Mich 652; 50 NW2d 190 (1951); *Grotelueschen v Grotelueschen*, 113 Mich App 395; 318 NW2d 227 (1982); *Ross v Ross*, 24 Mich App 19; 179 NW2d 703 (1970). I would find, in the present case, that defendant turned the asset into a marital asset when she placed it under joint ownership. Defendant’s testimony supports that the asset was no longer a separate asset, as she was concerned with plaintiff’s withdrawals made without her permission. The fact that plaintiff could withdraw money without defendant’s permission evidences that the inheritance account lost its identity as a separate asset. Defendant’s attempt to remove plaintiff’s name from the asset after he withdrew money and was caught with another woman evidences defendant’s intent to change what had become a marital asset back into a separate asset. I would find that defendant’s inheritance and its appreciation lost its separate property status and, at the very least, equity would dictate that plaintiff receive a portion of the appreciation.¹ See, generally, *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). As such, I would reverse and remand to the trial court.

/s/ Kathleen Jansen

¹ This Court may modify judgments to alleviate inequities. *Hagen v Hagen*, 202 Mich App 254, 258; 508 NW2d 196 (1993).