

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES L. COOK,

Plaintiff-Appellant/Cross-Appellee,

v

JUDITH A. COOK,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED
December 9, 2003

No. 240469
Macomb Circuit Court
LC No. 95-000363-DO

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

PER CURIAM.

Plaintiff Charles Cook appeals as of right from a judgment of divorce. Defendant Judith Cook cross appeals. We affirm in part, reverse in part, and remand for further proceedings.

I. Basic Facts And Procedural History

The parties were married in 1965 and separated in March 1991. In 1987, Charles Cook became disabled due to heart disease. At approximately this same time, Judith Cook resumed her career as a speech pathologist. For the most part, the parties did not have any further financial dealings with each other after their separation in 1991.

The trial court determined that the marital assets should be valued as of the time of the parties' separation, in March 1991. It generally divided the assets equally, with the exception of the marital home. Because Judith Cook had contributed a substantial portion of her inheritance to the purchase of the marital home, the trial court awarded her a sixty percent share of this asset, and awarded Charles Cook a forty percent share. On appeal, both parties challenge several aspects of the trial court's property distribution.

II. The Trial Court's Findings Of Facts

A. Standard Of Review

A trial court's findings of fact in a divorce action are reviewed under the following standard:

In a divorce action, this Court's review of the trial court's factual findings is limited to clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Beason, supra* at 802; *Draggool v Draggool*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings of fact are upheld, we then must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152; *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999); *Draggool, supra* at 429. A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Welling, supra* at 709-710; *Draggool, supra* at 429-430.¹

B. The Testimony Of Judith Cook's Expert

Charles Cook argues that the trial court erroneously relied on the testimony of Judith Cook's expert in determining the value of his pensions. Charles Cook had vested rights in pensions from both the United States Navy and Ford Motor Company. The pensions were valued as of 1991, when the parties separated. Charles Cook's expert calculated the 1991 present values of the Naval pension at \$15,457, and the Ford pension at \$5,825. Judith Cook's expert valued these pensions at \$48,068, and \$18,088, respectively. The difference in the pension values was attributable to the experts' disagreement over Charles Cook's life expectancy. Because Charles Cook had been placed on disability by Ford in 1987, and had been awarded disability benefits by the Social Security Administration, his expert based his life expectancy on mortality tables prepared by the Pension Benefit Guaranty Corporation that took his disability into consideration. Accordingly, Charles Cook's expert determined that his life expectancy was 2.3 years beyond the age of sixty-five. In contrast, Judith Cook's expert used a mortality table that assumed that Charles Cook was a healthy individual, with an average life expectancy, and, accordingly, valued his pensions based on a life expectancy of age seventy-six. The trial court adopted the valuations as determined by Judith Cook's expert.

In light of the undisputed nature of Charles Cook's medical condition, we conclude that the trial court clearly erred in adopting the pension values calculated by Judith Cook's expert, which were based on Charles Cook having an average life expectancy for a healthy individual. It is undisputed that Charles suffers from severe heart disease. He has undergone three heart bypass procedures, one each in 1982, 1990, and 2000. According to his physician, each bypass procedure eventually fails, and it was not expected that he would be able to undergo another bypass procedure. The evidence showed that his bypass procedures lasted eight to ten years, that his last bypass surgery was in 2000, and that he was not expected to be able to undergo another

¹ *McNamara v Horner (After Remand)*, 255 Mich App 667, 669-670; 662 NW2d 436 (2003).

procedure. This evidence did not reasonably support a finding that his life expectancy would extend much beyond 2010, when he would be sixty-eight years old. The circumstances certainly did not justify assigning him an average life expectancy for a healthy individual. We therefore conclude that the trial court clearly erred in relying on the valuation testimony of Judith Cook's expert, and by failing to adopt the pension values as calculated by Charles Cook's expert; these pension values were based on Charles Cook's reduced life expectancy in light of his undisputed severe heart condition.² On remand, the trial court shall adopt the pension values as calculated by Charles Cook's expert. Because the change in the pension value affects the overall distribution of assets, we direct the trial court to redistribute the assets, other than the marital home, consistent with its distribution of fifty percent to plaintiff and fifty percent to defendant.

C. Life Insurance Policies

In her cross appeal, Judith Cook argues that the trial court erred by awarding two life insurance policies to Charles Cook. Both policies insured Charles Cook's life. It was undisputed that Judith Cook had been paying the premiums on the policies for many years and that coverage under at least one of the policies was available at the time of trial only because she had been paying the premiums for several years.

At trial, Charles Cook initially claimed that both policies had lapsed for nonpayment of the premiums in November 2001, whereupon he paid the premiums and was able to reinstate the policies. At that time, according to Charles Cook, he changed the beneficiaries under the policies, without Judith Cook's knowledge, from her estate to his. Later, however, Charles appeared to concede that he only paid a past-due premium on the Ford policy. In contrast, Judith Cook denied that the policies ever lapsed for nonpayment. She claimed that she had paid more than \$8,000 since 1985 or 1986, to maintain both policies. Judith Cook did not believe that Charles Cook could have unilaterally changed the beneficiaries, as he claimed.

The trial court awarded both disputed policies to Charles Cook, simply stating that he was the owner of the policies at the time of trial. Given Charles Cook's change of testimony regarding the U.S. Navy policy (also referred to as the "OSEGLI" or "OSGLI" policy), we conclude that the trial court clearly erred in finding that Charles Cook was the owner of that policy. He admitted to only paying an allegedly past-due premium on the Ford policy. His testimony did not establish that he had paid a past-due premium on the U.S. Navy policy. Accordingly, the trial court erred in awarding this policy to him. Rather, equity required that this policy be awarded to Judith Cook, who had been paying the premiums on the policy for several years. On remand, we direct the trial court to award the U.S. Navy policy to Judith Cook.

With regard to the Ford (also known as the "FOLIP" or "FOLIG") policy, the trial court failed to resolve disputed factual issues concerning that policy. Although Charles Cook claimed the policy had lapsed for nonpayment, Judith Cook denied this, claiming that she regularly paid the premiums. The trial court awarded this policy to Charles Cook, without resolving the factual

² See *Boyd v Boyd*, 116 Mich App 774, 779-780 n 2; 323 NW2d 553 (1982).

dispute concerning its ownership. On remand, we direct the trial court to revisit the evidence regarding the Ford policy and determine who is the rightful owner of the policy. If the trial court again finds that Charles Cook is the owner, it shall consider Judith Cook's entitlement to compensation for the premiums she paid on the policy for several years, given Charles Cook's concession that he would not have been entitled to coverage under that policy at the time of trial had Judith Cook not paid the premiums to keep the policy active.

D. Family Heirlooms

Because we are remanding this matter to the trial court, we also direct the trial court to reconsider Charles Cook's entitlement to certain family heirlooms within the marital home. The trial court implicitly awarded these items to Judith Cook because it awarded the parties the personal property in their respective possessions at the time the judgment was entered, and it denied Charles Cook's request to remove the items from the marital home. The items apparently had particular sentimental value to Charles Cook because they were acquired from his family. In her testimony, Judith Cook said that she was willing to turn the items over to Charles Cook, provided she received a credit for the items. The trial court simply awarded the items to Judith Cook, without further comment or explanation. Because Charles Cook's request for the items was not unreasonable, at a minimum he was entitled to an explanation from the trial court as to why Judith Cook's continued retention of the items was necessary to arrive at an equitable property distribution. Accordingly, the trial court shall reconsider this matter on remand and either award the items to Charles Cook or provide an explanation as to why it is equitable to allow Judith Cook to retain them. With regard to any items ultimately awarded to Charles Cook, the trial court, within its discretion, may readjust the division of other property as necessary to arrive at an overall equitable division of marital assets.

III. Remaining Claims

A. South Dakota Properties; Judith Cook's Inheritance

We conclude that the trial court did not clearly err in finding that the South Dakota properties and approximately \$17,000 in cash from Judith Cook's inheritance was her separate property. These assets were continuously kept separate from the marital estate. "Normally, property received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution."³ In contrast, Charles Cook commingled the money that he received from an inheritance with the marital funds. Thus, the property lost its status as separate property, and the trial court did not err in treating it as part of the marital estate.

³ *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999).

B. Value Of The Marital Home

Charles Cook contends that the trial court erroneously awarded defendant a greater percentage of the value of the marital home. As noted above, Judith Cook received a sixty percent share, while Charles Cook received only a forty percent share. The trial court found that Judith Cook was entitled to a greater portion because she had contributed a substantial portion of her inheritance to the purchase and improvement of the home. There was no dispute that the parties would not have been able to purchase the home without Judith Cook's contribution of her inheritance money. Under the circumstances, we conclude that the trial court did not err in its division of this asset.⁴

C. Charles Cook's Financial Support And Maintenance

Charles Cook also argues that the trial court should have invaded Judith Cook's separate assets in order to provide for his financial support and maintenance. A party's separate property, including an inheritance, may be "distributed as part of the marital estate only if the remaining property was insufficient for the suitable support and maintenance of" a party or if a party "had contributed to its acquisition, improvement, or accumulation."⁵

Here, Charles Cook's disability benefits, along with the pension benefits he would begin receiving in January 2002, were sufficient to meet his monthly expenses. The trial court also awarded him substantial other assets that could be used for his support. Although Judith Cook's income had increased substantially since 1991, much of her current income had been invested in her retirement. Unlike Charles Cook, Judith Cook did not have a substantial number of work years to prepare for her retirement. Therefore, the discrepancy between the parties' incomes at the time of trial was not as significant as Charles Cook claimed. He has failed to show that the trial court's division of the parties' assets was insufficient for his support and maintenance. Thus, we conclude that the circumstances did not require that the trial court invade Judith Cook's separate assets in order to reach an equitable property distribution and provide for Charles Cook's future support.

D. Judith Cook's Residence In The Marital Home

Charles Cook argues that he was entitled to additional compensation because Judith Cook had been allowed to live in the marital home since 1991. We note that the mortgage on the home was paid off before Charles Cook left the home in 1991. Judith Cook remained in the marital home since that time and solely assumed the cost of maintaining it. Charles Cook argues that he lost a substantial amount of investment income, however, because his money was tied up in the marital home while Judith Cook was allowed to live there, without having to make a mortgage

⁴ See *Byington v Byington*, 224 Mich App 103, 114-115; 568 NW2d 141 (1997); MCL 552.401.

⁵ *Lee v Lee*, 191 Mich App 73, 78-79; 477 NW2d 429 (1991); MCL 552.23, MCL 552.401. See also *Charlton v Charlton*, 397 Mich 84, 92-94; 243 NW2d 261 (1976).

payment. We find no error on these grounds. First, Charles Cook failed to offer any expert testimony to support his claim of lost interest income. Second, as the trial court found, it was Judith Cook's sizeable contribution from her inheritance that allowed the parties to acquire the marital home in the first instance. Third, Judith Cook was solely responsible for maintaining the home over the years. Any benefit she received from living in the home during that time was justified on account of her contributions to its acquisition and continued maintenance. We also note that Charles Cook had the exclusive use of marital funds since 1991, when he used \$55,000 from an account, which the trial court found was a marital asset, to purchase his condominium. On these facts, we conclude that the trial court did not clearly err in refusing to compensate plaintiff for alleged lost investment income.

E. Explanation Of The Division Of Assets

Charles Cook argues that the trial court did not sufficiently explain its division of the parties' assets. After reviewing the trial court's findings, it is apparent that the trial court attempted to divide the assets equally, with the exception of the marital home. Subject to the exceptions discussed previously, we are satisfied that the trial court's findings sufficiently explain its division of the parties' assets.

F. Valuation Of Assets

Charles Cook argues that the trial court erred in valuing assets as of March 1991. We review the trial court's decision for an abuse of discretion.⁶

Although marital assets are typically valued at the time of trial or when a judgment is entered, the trial court has the discretion to decide on a different valuation date based on what is equitable.⁷ In a previous appeal, this Court held that the trial court's choice of the March 1991, valuation date was not an abuse of discretion for determining the value of the marital home and Judith Cook's pension, because this was when the parties separated.⁸ Although the trial court was not required to adhere to this date for the remaining assets, in light of the fact that the parties separated on that date, we conclude that it was not an abuse of discretion for the trial court to do so.

G. Disability Benefits

In her cross appeal, Judith Cook argues that the trial court erred in refusing to award her a portion of Charles Cook's disability benefits. The trial court held that Charles Cook's disability benefits were a marital asset, but awarded them solely to him. We find no error. The trial court

⁶ *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993).

⁷ *Byington*, *supra* at 114 n 4.

⁸ *Cook v Cook*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2001 (Docket No. 217462).

essentially equated Charles Cook's disability benefits to Judith Cook's earnings. Because the amounts were generally equivalent, the trial court determined that Charles Cook was entitled to the full amount of his benefits and Judith Cook the full amount of her earnings.

We conclude that the trial court was not obligated to divide Charles Cook's disability benefits under MCL 552.18. That statute applies to benefits earned as a result of service credit. Charles Cook's disability benefits were not payable based upon the number of years served on a job. Therefore, we conclude MCL 552.18 is not applicable.

Second, we agree with the trial court that the benefits may be considered a marital asset. Although the appellate courts of this state have not squarely decided the issue, in *Evans v Evans*,⁹ this Court held that Social Security disability benefits are a marital asset. Here, Charles Cook received disability benefits from both his employer and the Social Security Administration. Accordingly, we conclude the trial court did not err in treating the benefits as a marital asset.

Nor, we conclude, did the trial court err in determining that the benefits should be awarded solely to Charles Cook. Judith Cook returned to work at about the same time that Charles Cook began to receive the benefits. Over the years, the amount of benefits Charles Cook received and the amount of Judith Cook's earnings were generally comparable. The trial court reasonably determined that each party would be allowed to retain their own source of support.

Moreover, we fail to see how the trial court's treatment of these assets harmed Judith Cook. Indeed, had the trial court awarded Judith Cook a portion of Charles Cook's future disability benefits, it likely would have been required to invade her separate assets to provide for his future support and maintenance in light of the fact that the disability benefits comprise Charles Cook's primary source of support.¹⁰ Accordingly, we find no error on this ground.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Jane E. Markey

⁹ *Evans v Evans*, 98 Mich App 328, 329-330; 296 NW2d 248 (1980).

¹⁰ See MCL 552.23(1).