

STATE OF MICHIGAN  
COURT OF APPEALS

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LINDA S. MAHER,

Plaintiff/Appellee-Cross-Appellant,

v

JAMES P. MAHER,

Defendant/Appellant-Cross-  
Appellee.

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UNPUBLISHED

April 20, 2010

No. 287309

Saginaw Circuit Court

LC No. 05-056101-DM

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

In this divorce action, defendant appeals by right from a judgment of divorce. Defendant specifically challenges the provision that he pay plaintiff's attorney fees in the amount of \$8,000, the trial court's valuation and property distribution concerning two automobiles, and the trial court's finding that the appreciation from a Smith Barney investment account funded by premarital funds from an employment discrimination settlement was marital property subject to division. Plaintiff cross-appeals the trial court's determination that the account principal constituted defendant's separate property. We affirm in part, reverse in part, and remand for modification of the judgment.

I. VALUATION OF INVESTMENT ACCOUNT

The parties first dispute the trial court's determinations concerning a Smith Barney investment account, which was initially funded with settlement proceeds from defendant's prior employment discrimination case that was filed before the parties' marriage, but that was settled during the marriage. The trial court found that, while the initial investment continued to remain defendant's separate property, the appreciation in the account during the parties' marriage was distributable as marital property. Defendant challenges the trial court's characterization of the appreciation, while plaintiff contends that the entire amount of the investment account should have been treated as marital property.

We review a trial court's findings of fact relative to property distribution for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made. *Draggou v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

When a trial court divides property in a divorce proceeding, it must first determine what property is marital and what property is separate. *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). Typically, separate property is an asset that one spouse obtained or earned prior to the marriage, whereas marital property consists of those assets earned or acquired during the marriage. MCL 552.19. Here, the trial court treated defendant's lawsuit-settlement funds, which were placed into a joint Smith Barney account, as defendant's separate property. The trial court found dispositive the fact that any injury addressed by the lawsuit accrued prior to the parties marriage and that only an insubstantial amount of marital funds were used to defend the lawsuit. We find no clear error with this determination.

A spouse's separate property is property that is earned or obtained prior to a marriage. Here, although plaintiff contends that defendant intended for these funds to be considered marital property, she did not demonstrate that the funds were intermingled with the parties' marital funds. The money was not put into the family checking account to pay general bills, but instead was segregated into a separate investment account and these funds remained segregated even after other marital property was placed into the account. This Court has held that whether property is titled as individual or joint is not dispositive of the classification of property as separate or marital. See *Korth v Korth*, 256 Mich App 286, 292; 662 NW2d 111 (2003); *Reeves*, 226 Mich App at 495-498. Additionally, the trial court did not find either of the statutory exceptions applied that would justify an invasion of the initial settlement funds. Indeed, it found that any marital funds expended on behalf of the lawsuit were *de minimis*, and made no finding with respect to need. This finding was not clearly erroneous, as nothing in the record reveals that plaintiff contributed to the receipt of these initial funds.

In arguing otherwise, plaintiff relies on *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995), asserting that under that decision she is entitled to invade defendant's separate property because plaintiff contributed to the acquisition, improvement, or accumulation of the property during the course of the marriage, as required by MCL 552.401. In *Hanaway*, the trial court distributed the husband's separate property, consisting of family business stock, to his wife because the wife contributed to the marital effort as a whole. *Id.* at 283-286. The court reasoned that the wife contributed to the company's value by taking care of the house physically and financially, and by caring for the children while the husband devoted himself to the business by working long weeks. *Id.* at 293. Unlike in *Hanaway*, plaintiff here did not contribute to the acquisition, improvement, or accumulation of the property. In fact, there was no evidence that plaintiff's actions had *any* bearing on the amount of appreciation in the Smith Barney account. In *Hanaway*, the wife cared for the house *so that* the husband could spend his time working. Here, both parties carried on with their normal daily activity while the investment account grew. Further, although plaintiff claims that the appreciation in the account was active, and not passive, this is incorrect. From the record, it appears that Smith Barney managed the account and neither plaintiff nor defendant had to actively handle the account. Therefore, plaintiff's argument that she contributed to the acquisition, improvement, or accumulation of the property fails, and the trial court did not err in concluding that the initial lawsuit proceeds were defendant's separate property.

The next and related issue is defendant's challenge to the trial court's decision that the appreciation realized from the separate funds was marital property because of "commingling." Defendant maintains that, because lawsuit proceeds were separate property, the appreciation from

those funds should also be considered separate property, and challenges the trial court's decision to treat this appreciation as marital property. We agree.

"Generally, assets earned by a spouse during the marriage are properly considered part of the marital estate and are subject to division, but the parties' separate assets may not be invaded" unless one of two statutory exceptions are met. *Korth*, 256 Mich App at 291. As noted, the two exceptions that will allow separate assets to be invaded are: (1) when one party demonstrates additional need, or (2) when one party significantly assists in the acquisition or growth of the other party's separate asset. MCL 552.23; MCL 552.401. Separate assets may be treated as marital property where the funds are commingled with marital assets, which causes them to lose their character as separate property. *Pickering v Pickering*, 268 Mich App 1, 3, 10-11; 706 NW2d 835 (2005).

Separate property is "commingled" when it is combined with marital property and loses its original character. For example, in *Pickering*, a lawsuit involving the defendant began and concluded during the course of the parties' marriage. Also, both parties were named as plaintiffs in the civil action and the settlement check was issued to both parties. *Id.* at 11. The settlement funds were then used to pay taxes, pay car insurance, pay the remainder of the home mortgage, purchase a family car, pay medical expenses, and to pay off debt. *Id.* Clearly, in *Pickering*, the funds were commingled and indistinguishable from the other funds used by the family. *Id.* at 12.

The facts as found by the trial court in this case are significantly different than those presented in *Pickering*. Here, defendant's lawsuit settlement funds were not intermingled with the parties' marital funds. Those funds were instead segregated into a separate investment account at Smith Barney. Defendant testified that his original settlement amount was \$135,000, and that he used a portion of the money to buy a television set, a stereo system, and to install a garage addition. The balance of the remaining settlement was roughly \$113,000, and this amount was placed into the separate investment account. The only other funds placed in that account were the result of defendant's stock options through his employer. Nevertheless, from the Smith Barney account summary, the stock funds were clearly distinguishable from the settlement funds. Defendant later transferred the principal from this account, along with the applicable appreciation, to an account in defendant's name only, allegedly to ensure that the funds would be transferred to his children upon his death. Subsequently, plaintiff authorized the creation of the individual account, although she testified that she still thought that the settlement proceeds would be used for the parties' retirement, and was not aware that money had already been transferred to defendant's individual account.

While the parties provided contradictory testimony about the purpose for the creation of the second account, the evidence and testimony demonstrate that the funds were, in fact, not commingled with marital property before appreciating in value, but instead were held in a separate account with very limited activity in terms of deposits and withdrawals. The funds remained easily traceable, were not combined with other marital assets, and in fact were transferred into an individual account with plaintiff's authorization. We thus find that the trial court incorrectly concluded that the funds gained through appreciation were commingled. The initial funds remained defendant's separate property, as did the appreciation attributable to these initial funds. On remand the trial court should modify the judgment to treat the total account as defendant's separate property.

## II. ATTORNEY FEES

Defendant next argues that the trial court abused its discretion by awarding attorney fees of \$8,000 to plaintiff. We agree.

We review a trial court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). However, the trial court's factual findings are reviewed for clear error and questions of law are reviewed de novo. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

A party to a divorce action is not entitled to attorney fees as of right, but may be awarded where necessary to preserve a party's ability to carry on or defend the action, see MCL 552.13, or because of misconduct in the litigation under MCR 3.206(C)(2)(b). *Id.* at 165. "Either by statute or court rule, attorney fees in a divorce action may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Id.* at 164 (citations omitted).

Here, the trial court did not award attorney fees based on plaintiff's need for financial assistance. Indeed, it specifically found that plaintiff could afford her attorney fees. And, as plaintiff recognizes in her appeal brief, the trial court did not find that any of plaintiff's attorney fees were caused by defendant's delay or misconduct<sup>1</sup>, but instead awarded attorney fees because of defendant's actions during the marriage. However, the award of attorney fees is not permitted as a form of punishment in a divorce action. Therefore, we vacate the trial court's award of attorney fees.

### III. 1967 CHEVELLE

Defendant next argues that the trial court erred in concluding that a 1967 red Chevelle that he purchased and restored in the 1970s, long before his marriage to plaintiff, was the parties' marital property. We disagree. We review a trial court's findings of fact relative to property distribution for clear error. *Sparks*, 440 Mich at 151.

Here, although the court recognized that defendant owned the vehicle long before his marriage to plaintiff, it concluded that the vehicle was marital property. The court accepted plaintiff's testimony that the car had been restored during the parties' marriage as support for its conclusion, and also opined that a high school student did not have the money to maintain a car in classic condition.

The record included un rebutted testimony that defendant purchased the vehicle when he was in high school and brought the vehicle into the marriage. Because defendant brought the vehicle into the marriage, it should have been considered defendant's separate property. However, the trial

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<sup>1</sup> Plaintiff does argue that the record would have supported such a finding. However, the simple fact is that the trial court did not make such a ruling.

court's finding that the parties performed restoration to the vehicle during the marriage, thus establishing a statutory basis to invade the property, was not clearly erroneous. MCL 552.401.

At trial, defendant testified that he did not spend significant money during the marriage to restore the vehicle, but instead indicated that the vehicle had been restored in 1978 or 1979. Plaintiff, on the other hand, testified that during the marriage work had been done on the car's tires and headliner, that the "trunk was completely redone", that she had painted part of the car between the two headlights by hand, and also referenced work done to the car's seat covers and carpets. She further testified that springs had been purchased for the car. Although the trial court was not presented with evidence concerning the car's condition before the marriage, or its increase, if any, in value due to the parties' activities, plaintiff sufficiently established that she contributed to the enhancement of value of this separate property. We therefore affirm the trial court's decision to treat the automobile as marital property for the purposes of property division.

#### IV. 1969 CHEVELLE

Defendant's final argument on appeal is that the trial court clearly erred in its valuation of the parties' 1969 Chevelle. We again disagree.

Both plaintiff and defendant offered expert witness testimony regarding whether the vehicle had been modified in accordance with the high-performance standard of Dale Berger<sup>2</sup>, and the value of the vehicle as it existed at the time of trial. Defendant does not agree with the trial court's credibility determination concerning the valuation.

However, a trial court is in the best position to judge expert witness credibility and has great latitude in arriving at a final valuation of an asset where there is diverging testimony about the asset's value. *Stoudemire*, 248 Mich App at 338-339, citing *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988). Here, the trial court properly considered the witnesses testimony and accepted plaintiff's appraisal as accurate. This finding is not clearly erroneous, and the trial court did not err in adopting plaintiff's determination that the 1969 Chevelle was a high-performance Berger vehicle with a value of \$40,000.

We affirm in part, vacate in part, and remand for modification of the judgment in accordance with this opinion. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Henry William Saad  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray

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<sup>2</sup> Apparently such a modification commands an appreciable premium.