

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA J. ZUIDGEEST,

Plaintiff-Appellant,

v

ROBERT ZUIDGEEST,

Defendant-Appellee.

UNPUBLISHED

February 1, 2011

No. 293924

Kent Circuit Court

LC No. 05-003293-DM

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment entered in this divorce action, challenging the trial court's rulings regarding the property division of the parties' marital residence. We reverse and remand for further proceedings consistent with this opinion.

Below, the trial court agreed with defendant's position that the proceeds from the sales of the previous marital residence and property owned by defendant's business were his separate, premarital assets, and therefore not subject to distribution. The trial court awarded the current marital residence on Wild Rose Lane in Grand Rapids, Michigan, valued at \$812,000, to defendant, and after deducting his premarital assets, the trial court ordered him to pay plaintiff for her share of the remaining value of the residence, which amounted to \$172,750.

On appeal, plaintiff's sole allegation of error relates to the trial court's aforementioned ruling, which we review de novo. *Reeves v Reeves*, 226 Mich App 490, 501; 575 NW2d 1 (1997). A trial court's dispositional ruling should be affirmed unless this Court is left with the firm conviction that the property division was inequitable. *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005). Generally, marital assets are subject to being divided between the parties, but separate assets may not be invaded. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). Separate assets, however, may become marital property when they are commingled with marital assets and the parties treated such assets as marital property. *Pickering*, 268 Mich App at 12-13.

In 1988, defendant purchased a residence on Audobon Street in Grand Rapids, plaintiff moved into that residence in 1992, and the parties subsequently married. While defendant owned the Audobon residence free and clear of any encumbrances, the record reveals that plaintiff paid half of the household expenses, which were drawn from the parties' joint account, including utilities, property tax, home improvements, groceries, and child support for

defendant's two other children. The Audobon residence sold in 2000 for \$262,070, and that amount was deposited into the parties' joint account. The trial court ruled that the proceeds realized from the sale of the Audobon residence were defendant's separate property, because plaintiff's contribution was passive.

The trial court's findings regarding the Audobon residence are clearly erroneous. Here, any down payment, any equity built up before the parties' marriage, and any appreciation that occurred before the parties' marriage would have constituted defendant's separate property. *Reeves*, 226 Mich App at 496. However, the sharing and maintenance of the Audobon residence affords the parties an interest in any increase in its value over the duration of the marriage. *Id.* at 495. Nevertheless, while some of the Audobon residence proceeds amounted to defendant's separate property, such property became marital property through commingling. See discussion, *infra*.

Defendant established a business in 1977, and the company purchased real property in 1982. In 2002, defendant and his business partner sold the real property. Defendant received \$288,287.37 as his share from the sale's proceeds; he again deposited that amount into the parties' joint account. There is no indication that plaintiff had any involvement with defendant's business. The trial court found that defendant was entitled to the business property proceeds less the amount of an outstanding line of credit (amounting to \$75,500 at trial) on the Wild Rose residence that was used to pay the capital gains tax on the business property proceeds. While plaintiff reduced her work schedule to spend more time caring for the children and household, it cannot be stated that the business property appreciated due to defendant's efforts, facilitated by plaintiff's activities at home. See *Reeves*, 226 Mich App at 497. Thus, viewed alone, the proceeds of the sale of the business property were defendant's separate property. Once again, however, this property became marital property through commingling. See *infra*.

"The actions and course of conduct taken by parties are the clearest indicia of whether property is treated or considered marital, rather than separate, property." *Cunningham v Cunningham*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 285541, issued July 13, 2010), slip op at 7. Defendant poured the Audobon residence and business property proceeds into the Wild Rose residence. It is undisputed that both parties contributed in funding the lot and construction of the Wild Rose residence, which amounted to \$831,000. The parties used \$100,000 from their joint account to purchase the lot, and both parties contributed to the construction costs. Defendant used the Audobon proceeds to pay part of the construction costs. However, \$468,930 in construction costs remained, and the parties used their savings and obtained a loan (in the amount of \$260,000) to cover such costs. According to defendant, he deposited the business property proceeds (\$288,287.37) into the parties' joint account, and then he used part of those proceeds to satisfy their outstanding loan obligation of \$253,982. Less than \$35,000 remained from the proceeds of the sale of the real property after the outstanding loan was paid; however, there was testimony from both parties that they incurred further costs in completing the Wild Rose residence, including more than \$27,000 for furnishings, \$10,000 for landscaping, \$30,000 for kitchen cabinets, and \$5,000 for laundry room cabinets. Ultimately, defendant commingled the entire Audobon residence and business property proceeds into the parties' joint account, which was used to jointly pay for the Wild Rose residence wherein the parties resided for the duration of the marriage. Even though part of the Audobon residence proceeds and all of the business property proceeds are traceable as defendant's separate property,

defendant's actions after receiving the funds conclusively demonstrate that he intended to contribute all of those funds to the marital purpose of acquiring a new marital residence and obtaining its various accoutrements. *Id.* Those funds lost their character as separate property when used with other marital assets to obtain the new marital residence. *Id.* We conclude that defendant's separate property became marital property when it was commingled with marital assets, and the parties treated such assets as marital property. *Pickering*, 268 Mich App at 12-13; *Cunningham*, slip op at 8.

On remand, the trial court must consider the amounts disputed on appeal, which were contributed by defendant to the purchase of the new marital residence and its accoutrements, as part of the marital estate. *Cunningham*, slip op at 8. The trial court may conduct additional hearings and receive additional evidence as necessary. *Id.*

Reversed and remanded. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder