

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT VERTZ,

Plaintiff-Appellant,

v

MARY SUSANN VERTZ,

Defendant-Appellee.

UNPUBLISHED

June 28, 2011

No. 294406

Schoolcraft Circuit Court

LC No. 2008-004091-DO

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

In this divorce dispute pertaining to marital property, plaintiff Robert Vertz appeals as of right from the trial court's entry of a judgment of divorce. Plaintiff challenges on several grounds the portions of the order directing him to pay defendant Susan Vertz \$38,500 to balance the division of the marital estate and alimony of \$1,000 a month for 36 months. We affirm.

I

Plaintiff first complains that the trial court improperly "treated the parties' home as a marital asset" subject to distribution because he bought the home before the marriage, he alone "paid the mortgage and the property taxes," he paid for improvements to the house during the marriage with his funds, and he "performed all the labor" necessary for the improvements. We review for clear error a trial court's findings of fact relative to a property distribution. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding qualifies as clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm conviction that the lower court made a mistake. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). "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." *Sparks*, 440 Mich at 151-152.

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). "Generally, assets earned by a spouse during the marriage are properly considered part of the marital estate and are subject to division." *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003). A spouse's separate property consists of property earned or obtained before a marriage. *Reeves*, 226 Mich App at 493, 496. A court may invade the parties' separate assets only if one of two statutory exceptions exists: (1) "one party demonstrates additional need," or (2) one party "significantly assists in the acquisition or growth of a spouse's

separate asset.” *Korth*, 256 Mich App at 291-292 (internal quotation omitted); MCL 552.23(1); MCL 552.401. This Court has also upheld the distribution of separate assets where a party has commingled separate funds with marital assets, thus destroying “any characteristic of being separate property.” *Pickering v Pickering*, 268 Mich App 1, 13; 706 NW2d 835 (2005).

The trial court treated the premarital equity in the parties’ home as plaintiff’s separate property, but viewed as marital property the appreciation of the home during the parties’ marriage. The trial court took an approach consistent with the law proscribing the invasion of separate assets, *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009), while still recognizing that a premarital asset’s appreciation during the marriage remains subject to division, unless the appreciation occurred in a “wholly passive” fashion. *McNamara v Horner*, 249 Mich App 177, 183-184; 642 NW2d 385 (2002). The record reveals that the marital home’s increase in value during the marriage was not wholly passive, but that at least a portion of the appreciation owed to plaintiff’s investment in the home through the addition of a sunroom and pole barn. Under these circumstances, the passive appreciation principles did not preclude the trial court from dividing the marital equity in the home.

Plaintiff insists that because “he alone paid for” the marital home improvements that occurred in the course of the marriage with his own, separate funds, including pension and disability benefits, the trial court erred to the extent that it treated the improvement money as marital funds. This Court has held that the “right to vested pension benefits accrued by a party during the marriage must be considered part of the marital estate subject to award upon divorce.” *Pickering*, 268 Mich App at 7-8, citing MCL 552.18(1). Here, plaintiff undisputedly accrued all his pension benefits before the parties’ marriage. However, the “trial court may treat as part of the marital estate subject to division those pension benefits that accrued before the marriage if such treatment is ‘just and reasonable, after considering the ability of either party to pay and the character and situation of the parties and all the other circumstances of the case.’” *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992), quoting MCL 552.23(1). Plaintiff’s expenditure of his pension funds toward improving the parties’ marital home in the midst of their marriage strengthens the treatment of these pension funds as marital property. And in light of the “other circumstances of the case,” MCL 552.23(1), such as the large disparity in the parties’ income levels, the trial court accurately deemed it “just and reasonable” to distribute the marital home equity growth during the marriage as marital property, even though a portion of plaintiff’s pension funds paid for the improvements.

Moreover, the amount of plaintiff’s disability benefits that went toward paying for the marital home improvements amounted to marital property. In *Cunningham v Cunningham*, ___ Mich App ___; ___ NW2d ___ (Docket No. 285541, issued July 13, 2010), slip op p 6, this Court held that amounts of workers’ compensation benefits paid to a spouse during a marriage, for an injury that the party suffered before the marriage, belonged to the category of marital assets. The Court observed that the workers’ compensation payments were intended to benefit the injured worker “and his dependents.” *Id.*, quoting *Petrie v Petrie*, 41 Mich App 80, 83; 199 NW2d 673 (1972) (emphasis in original). The Court reasoned, “Workers’ compensation benefits received by a spouse are synonymous with a spouse’s earnings, and a spouse’s earnings accrued during the course of a marriage are presumed to be marital property.” *Id.* Consequently, plaintiff’s “Veterans Administration and Social Security benefits,” which he received during the marriage as a replacement for his earnings, qualified as marital property. To the extent plaintiff

spent these funds to pay for the marital home improvements, plaintiff funded the improvements with marital property. Because the trial court did not clearly err in finding that plaintiff used marital property to fund the marital home improvements, we conclude that the court properly treated the marital home's appreciation in value as a component of the marital estate subject to distribution.¹

II

Plaintiff maintains the trial court erred by failing to order rehearing or a new trial despite "the court's admitted error in calculating the marital equity in the" parties' home. In plaintiff's estimation, the court incorrectly calculated the appreciation of the marital home when it selected as the starting figure the value of the marital home together with a 40-acre parcel of land, but proceeded to compare this figure with an ending value consisting of the marital home plus 80 acres. According to plaintiff, the court's inadvertent mistake caused a \$34,000 understatement in the marital home's starting value, and eventually resulted in an overstatement of marital equity in that amount. We review for an abuse of discretion a trial court's decision on a motion for reconsideration. *Woods v SLB Property Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008).

After a hearing on plaintiff's motion, the trial court issued a lengthy bench opinion, the highlights of which follow:

. . . Looking back, now, I agree with the Plaintiff that I should have . . . looked and made it clear whether the extra 40 acres was in or out. . . . To remain consistent, the Court would have said that the 40 acre interest should have been to him. And, to again remain consistent, that would have established the marital equity . . . in that real estate to be somewhat less. And, whether the Court would have started at 125 at that point, I can't say . . . because I did find that there was some level of appreciation beyond the SEV and beyond the earlier appraisal. Having said that—again, I don't know where the numbers would have gone; but, Mr. Vertz does . . . have a valid point that the 40 acre parcel was owned prior to the marriage and was not something that the Court wanted to put in the marital estate. . . . [O]n balance as I look at the numbers I can't say that anything in the final award was inequitable. I still think there's sufficient equity within what I am determining to be the marital estate. If you go back to my summary and instead of putting \$75,000 as the approximate marital equity in the home, you substitute 45 or even 50; because, again, I'm not going to just say that we need to take the

¹ Contrary to plaintiff's suggestion that the trial court may not have viewed his other parcels of land as separate property, we discern no error with respect to the court's treatment of plaintiff's other parcels of land. The trial court's list of each party's awarded property places all the remaining parcels, 1, 2 and 3, in the category of plaintiff's nonmarital assets, each valued at \$25,000. Under the heading "[p]laintiff (Marital Assets), the court denotes as \$0 the "marital value of parcels #1, #2, #3."

full value of that 40 acres and . . . excise it from there. I still think we get to some level of fairness in equity . . . without a need to invade Mr. Vertz's separate assets, which, again, . . . those 40 acres are awarded to Mr. Vertz. In fact, every speck of real estate was awarded to Mr. Vertz. It's just that we've established . . . some cash adjustment to be fair and equitable. And, on balance, the Court tried to do that. . . . I've looked at this . . . and I recognize that there is some merit to Mr. Vertz's position at this point; but, . . . I can't tweak the numbers in good conscience. I think that they are fair . . . on balance when you look at everything that's going on here. And, in that regard, . . . the Court's final opinion will remain the same. . . . And, I attempted in my opinion to be as thorough as I could have. I sure wish that I had been clearer with the 40 acres because I would have . . . certainly referenced that as well. . . . I apologize to the parties because it's . . . being less than thorough on that one aspect. . . . I certainly don't blame [plaintiff's counsel] or Mr. Vertz for bringing that in. And, I would have, . . . no question in my mind, limited the marital equity by excising that . . . 40 acres and placing some value on it. . . . I think the conclusion is fair despite the fact that . . . there should have been a little bit . . . less marital value in that one asset. . . .

The ruling confirms that the court acknowledged error and recognized that a correction of the mistake would have increased plaintiff's separate property and reduced the equity in the marital estate. But after reconsidering the record, the court opined that the end result of its property division efforts remained fair and equitable. Because the trial court reaffirmed its crafting of an ultimate property distribution that appears equitable and fair under the circumstances of this case, we conclude that the court acted within its discretion when it denied plaintiff's motion for rehearing. *Woods*, 277 Mich App at 629; *Draggoo*, 223 Mich App at 429.

III

Plaintiff additionally disputes that defendant introduced sufficient evidence of the value of the real estate at issue to support the trial court's findings. The party seeking to include an asset in the marital estate "bears the burden of proving a reasonably ascertainable value." *Wiand v Wiand*, 178 Mich App 137, 149; 443 NW2d 464 (1989). "For the purposes of dividing property, marital assets are typically valued at the time of trial or the time judgment is entered, although a court may, in its discretion, use a different date." *Woodington v Shokoohi*, 288 Mich App 352, 365; 792 NW2d 63 (2010). If the parties dispute the value of an asset, the court must specifically make a valuation. *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003).

Defense counsel conceded that he optimally would have wanted appraisals of the real property, but that defendant did not have sufficient funds to pay for appraisals. Thus, defense counsel utilized the "poor man's appraisal" of the property values, a doubling of the state equalized value of the subject properties. Plaintiff proposed valuing the real estate at the amounts that he paid to purchase the properties, given that "they're not for sale. Both parties plainly presented their respective, competing positions on the reasonably ascertainable value of the property. More than one method exists for proving real property value, and Michigan law does not obligate a party to supply an appraisal, but instead simply requires some proof of "a reasonably ascertainable value." *Wiand*, 178 Mich App at 149. In this case, the county

documents offered by defendant sufficed as substantiation of reasonably ascertainable property values.

IV

Plaintiff further challenges the trial court's award of alimony as "excessive" and with inadequate supportive findings. This Court reviews for an abuse of discretion a trial court's award of spousal support. *Olson*, 256 Mich App at 631. An abuse of discretion occurs if the trial court selects a decision falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We review for clear error a trial court's factual findings in relation to an award of spousal support. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 655.

An award of spousal support, or alimony, intends "to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore*, 242 Mich App at 654. In figuring a suitable amount of spousal support, "[r]elevant factors include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case." *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996).

In plaintiff's brief on appeal, he points to the trial court's opinion and order as nearly devoid of alimony findings. Although the court's opinion and order did not contain a detailed spousal support analysis, plaintiff ignores that at the conclusion of the trial, the court made extensive findings on the record that encompassed each support factor. For example, the court noted that the parties had a short-term marriage. With regard to the parties' ability to pay, the court observed that plaintiff received income of \$76,000 each year, and that a disparity existed between the parties' incomes. The court found that while plaintiff was the primary contributor to the marriage, defendant also contributed by doing cooking and housework. The court expressed concern about defendant's limited earning capacity; even though defendant had a high school diploma and a subsequent certification, she had "no real work history." The court characterized defendant's certification as "not critically important to . . . the computation of alimony." The court looked at the conduct of the parties and found that both contributed to the marital breakdown, but "that the bigger cause for the breakdown lies with" defendant. Regarding the ages and needs of the parties, the court recognized that defendant's "needs and her health are a primary concern."

The trial court did not reiterate its spousal support findings in its opinion and order, but our review of the record confirms that the court considered the relevant spousal support factors and made findings concerning each on the record. "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts." MCR 2.517(A)(2). On the basis of the trial court's findings, it calculated an award to defendant of \$1,000 a month for 36 months, which we conclude was fair and equitable in light of the facts.

Plaintiff lastly contends that the trial court's error in assigning a value to the marital home caused the court to improperly invade his separate property, in violation of the postnuptial agreement. According to plaintiff, the court underestimated the value of plaintiff's separate equity in the marital home by making an incorrect comparison of the premarriage and postmarriage values of the home, understating plaintiff's premarriage equity in the home by roughly \$34,000 and grossly overstating the marital equity figure at \$75,000.

A trial court may invade a spouse's separate estate if, after dividing the marital assets, "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party." MCL 552.23(1); *Korth*, 256 Mich App at 291-292; *Reeves*, 226 Mich App at 494. Here, the trial court awarded plaintiff \$91,500 in marital assets, including \$75,000 of marital equity in the parties' home. The court intended to ensure some provision for defendant's needs, indicating at the outset of the opinion and order that it would invade plaintiff's separate assets, if necessary. However, the court also subsequently found "that there is enough equity within the marital estate to approach an equitable result here," signifying that it would not need to invade plaintiff's separate property. Even assuming that the trial court may have incorrectly overstated the marital equity in the parties' home, the record amply supports the trial court's determination that adequate assets existed in the marital estate to give defendant a cash adjustment of \$38,500. Because the marital estate contained sufficient assets to cover the cash adjustment awarded to defendant, and in light of defendant's demonstrated need, we conclude that the \$38,500 cash award to defendant was "fair and equitable in light of those facts." *Sparks*, 440 Mich at 151-152.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher