STATE OF MICHIGAN

COURT OF APPEALS

SUSAN JANE ROE, Plaintiff-Appellee,	UNPUBLISHED July19, 2011
v	No. 297855 Gladwin Circuit Court
GARY DEAN ROE, Defendant-Appellant.	LC No. 09-004486-DM

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Gary Dean Roe challenges the trial court's property division provisions within the judgment of divorce. Specifically, Roe contests the trial court's rulings pertaining to the division of the real property surrounding the parties' marital home and their retirement assets. We affirm in part, reverse in part, and remand.

"In divorce actions, findings of fact made in relation to the division of marital property are reviewed under the clearly erroneous standard."[1] "A finding is clearly erroneous if, after a review of the record, the reviewing court is left with a definite and firm conviction that a mistake was made."[2] "The court's dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable."[3]

Roe initially contends that the trial court erred in finding that the acreage surrounding the marital home was marital and not separate property, subject to distribution. In 1991, Roe purchased the property, which included a mobile home and 19 acres of land. The parties married in September 1992, but began commingling assets before their marriage. Roe does not dispute that the marital home and two acres of land constituted a marital asset subject to equitable division but claims that the surrounding 17 acres is separate property, the value of which should be allocated to him alone. We disagree.

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[1] *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

[2] *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

[3] *Pickering*, 268 Mich App at 7.

"Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage."[4] Marital property is subject to division, but separate property generally "may not be invaded."[5] "[S]eparate assets may lose their character as separate property and transform into marital property if they are commingled with marital assets and 'treated by the parties as marital property.'"[6] "The actions and course of conduct taken by the parties are the clearest indicia of whether property is treated or considered as marital, rather than separate, property."[7]

There was no evidence to indicate that any steps were taken to maintain the acreage as separate property during the marriage or that the parties ever treated the acreage as separate property. In actuality, the evidence demonstrated that the parties commingled their separate and marital assets to improve, maintain and reside on the property. During the marriage, they built a new home on the property with joint and separate funds, including monies from a construction loan they jointly obtained, which encumbered the entire property including the surrounding acreage. Testimony also indicated that, during the course of their 17-year marriage, they jointly paid for the maintenance and taxes on the property from marital funds and both contributed physical labor to improve and retain the property. Roe consistently referred to the land as "our" property and never treated the additional acreage as a parcel separate from the marital home until the divorce proceedings initiated. Although Roe never conveyed a legal interest in the property to his wife, her name was never added to the deed simply because they did not want to incur the expense necessary to effectuate the change.[8]

We agree that the property was sufficiently commingled and treated by the parties as a marital asset throughout the duration of the marriage thereby transforming its character as separate property.[9] The actions and conduct of the parties relative to the acreage clearly indicated that it should be construed in its entirety as marital rather than separate property.[10] We find no error in the trial court's characterization of the home and surrounding acreage as a marital asset subject to equitable division.[11] As previously explained by this Court, "the sharing and maintenance of a marital home gives both spouses an interest in any increase in value during

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[4] *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010), citing MCL 552.19.

[5] *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003); MCL 552.19.

[6] *Cunningham*, 289 Mich App at 201, quoting *Pickering*, 268 Mich App at 10-12.

[7] *Cunningham*, 289 Mich App at 209.

[8] "The mere fact that property may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital." *Cunningham*, 289 Mich App at 201-202.

[9] *Id.* at 201-202, 208-209.

[10] *Id.* at 209.

[11] *Pickering*, 268 Mich App at 7-8.

the course of the marriage" and the increase in value is marital property subject to equitable division.[12]

Roe next asserts that the trial court's division of the marital property was inequitable based on the use of arbitrary dates for valuation of the various assets. He contends that the court should have divided the value of the parties' retirement assets and the marital home and surrounding property as of April 7, 2009, the filing date of the complaint for divorce. We agree, in part.

"Findings of fact [in divorce proceedings], such as a trial court's valuation of particular marital assets, will not be reversed unless clearly erroneous."[13] "The determination of the proper time for valuation of an asset is in the trial court's discretion."[14] "An abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes."[15]

"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."[16] "[I]n determining the valuation date, the circuit court must and does retain considerable discretion to see that equity is done."[17] This Court has held that a trial court has discretion to use the date of filing as the valuation date where it had a "plausible reason for choosing the date on which the divorce complaint was filed rather than the date of divorce judgment."[18] "[T]he termination date of the marriage for asset valuation purposes need not be irreducibly identical with the calendar date on which the judgment of divorce was entered."[19]

The trial court did not abuse its discretion in valuing the marital home and surrounding property as of October 1, 2009. The most recent appraisal of the property occurred on October 2, 2009, providing the court with a plausible reason for the date chosen for valuation of the property.[20] Because the court's valuation of the property at $170,000 was within the range established by the proofs, clear error has not been demonstrated.[21]

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[12] *Reeves v Reeves*, 226 Mich App 490, 495; 575 NW2d 1 (1997).

[13] *Woodington*, 288 Mich App at 355.

[14] *Id.*

[15] *Id.*

[16] *Id*. at 365.

[17] *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997).

[18] *Thompson v Thompson*, 189 Mich App 197, 199-200; 472 NW2d 51 (1991).

[19] *Id.* at 199.

[20] *Woodington*, 288 Mich App at 355; *Thompson*, 189 Mich App at 199-200.

[21] *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

We likewise find no error in the court's use of April 1, 2009, for valuation of the parties' Individual Retirement Accounts (IRAs). The parties agreed during court-ordered mediation that their retirement assets would be valued as of the complaint filing date of April 7, 2009. The April 1, 2009, valuation date is the closest beginning of month date to the agreed upon valuation date of April 7, 2009. As the trial court had a plausible reason for the date selected for valuation of the IRAs based on its indication that it was easier for the retirement fund companies to use month end dates, there was no abuse of discretion.[22]

We agree, however, with Roe that the trial court should have also valued the parties' employee retirement accounts as of April 7, 2009. The mediation agreement evidences the mutual intent of the parties to value the retirement assets as of April 7, 2009. This agreement was enforceable and binding.[23] "Property settlement provisions in a divorce judgment typically are final and cannot be modified by the court."[24] "Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through negotiation and agreement of the parties."[25] Because the trial court's valuation of the parties' employee retirement assets as of October 1, 2009, modified their mediation agreement and the record did not indicate a plausible reason for doing so, we find that the trial court's decision fell "outside of the range of reasonable and principled outcomes" resulting in an abuse of discretion.[26] Modification of the judgment is warranted as we are unable to determine if the trial court's error was harmless based on whether additional contributions were made or interest may have accrued.[27]

Affirmed in part, reversed in part, and remanded for modification of the judgment of divorce consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

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[22] *Woodington*, 288 Mich App at 355; *Thompson*, 189 Mich App at 199-200.

[23] MCR 3.216(H)(7).

[24] *Baker v Baker*, 268 Mich App 578, 585-586; 710 NW2d 555 (2005).

[25] *Id.*

[26] *Woodington* 288 Mich App at 355.

[27] MCR 2.613(A).