

STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. CROMIE,

UNPUBLISHED

January 24, 2013

Plaintiff-Appellee,

v

No. 308271

Saginaw Circuit Court

KAREN M. CROMIE,

LC No. 09-007435-DO

Defendant-Appellant.

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Defendant Karen M. Cromie appeals by right the trial court's judgment of divorce entered after a bench trial. Specifically, she challenges the trial court's decision to award plaintiff John R. Cromie certain property. Because we conclude that there were no errors warranting relief, we affirm.

This Court reviews for clear error a trial court's factual findings related to the division of marital property. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if the Court is left with a definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). "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. But . . . the dispositional ruling . . . should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable.” *Sparks*, 440 Mich at 151-152.

When dividing a marital estate, the goal is to make an equitable division of the marital property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Mathematical equality is not required, but “significant departures from congruence must be explained clearly by the court.” *Id.* at 114-115. Relevant factors include “the duration of the marriage, the contribution of each party to the marital estate, each party’s station in life, each party’s earning ability, each party’s age, health, and needs, fault or past misconduct, and any other equitable circumstance.” *Id.* at 115, citing *Sparks*, 440 Mich at 158-160. The circumstances of each case will determine the weight given to each factor. *Id.*

When dividing property in a divorce, the trial court's first consideration is to determine what property is marital and what property is separate. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). "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." *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010), citing MCL 552.19. However, property that would otherwise be treated as separate property may, under some circumstances, lose its separate character and become marital property:

[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. 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. [*Id.* at 201-202 (internal quotation marks and citations omitted).]

"Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded." *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). A court may award one spouse some of the other's separate property where the spouse needs it for suitable support and maintenance, or where one spouse has significantly assisted the other in the acquisition, improvement or growth of that other's separate asset. *Reeves*, 226 Mich App at 494-495; see also MCL 552.23(1). Although property earned during the marriage is normally part of the marital estate, this does not include passive appreciation in value during the course of the marriage of what was initially a separate asset. *Reeves*, 226 Mich App at 497.

Defendant argues that the court erred in dividing the balance of a trust account equally between the parties. The court found that the account was "a marital asset established as part of [a] trust, with Plaintiff to be beneficiary in event of Defendant's death." Defendant claims that the court's finding that both parties were owners of the account is clearly erroneous because the account, which she asserts was funded with monies she inherited, belonged to her trust. Plaintiff and defendant were cotrustees of the trust. As such, they were joint tenants and legal owners of the property. See *Kennedy v Potts*, 128 Neb 213; 258 NW2d 471, 474 (1935). Moreover, the trust provided for distribution

to the Donor [defendant], or to her husband, or expend for the benefit of Donor or her husband, so much of the net income and sufficient principal which, together with income from other sources known to the Trustee, and consistent with the value of the Trust, will maintain Donor *and her husband* as nearly as possible in the mode of living to which they have been accustomed. [Emphasis added.]

Additionally, plaintiff was named a beneficiary of the trust who was to receive the remaining trust assets after distributions were made, including plaintiff's "personal and household effects," and an outright gift of \$550,000 to plaintiff's sons, thereby making defendant a holder of equitable as well as a legal title. Accordingly, we cannot conclude that the trial court clearly erred when it found that the trust was marital property and cannot conclude that the decision to divide it equally between the parties was inequitable. *Sparks*, 440 Mich at 151-152.

Defendant also argues that the trial court erred in awarding plaintiff half the proceeds from the sale of a Texas condominium. She asserts that it erred by turning a “blind eye” to plaintiff’s alleged wrongful transfer of money from her trust. According to defendant, plaintiff forged her signature on checks made out on the trust account. Plaintiff asserts that they purchased the condominium mostly with S distributions from Visiting Angels, an assisted-care business that defendant operated, which had been deposited in the parties’ joint checking account. At its essence, defendant takes issue with the court’s weighing of competing evidence and its assessment of credibility of the witnesses before it. However, this Court will defer to the trial court’s superior ability to judge the weight and credibility of the evidence. *Sparks*, 440 Mich at 147. And, on this record, we are not convinced that the trial court clearly erred in its resolution of the competing evidence. *Id.*

Next, defendant argues that the court erred by dividing the assisted-care business equally between the parties. Defendant notes that plaintiff conceded that the business belonged to her, and asserts that “she alone was responsible for the benefits as well as the burdens of the business.” However, defendant acknowledged at trial that plaintiff had worked in the business on a full-time basis without taking a salary following his retirement and that he had worked in the business on a part-time basis since its inception. In addition, it was undisputed that plaintiff provided the startup loan for the business. Whether plaintiff was entitled to half of the value of the business as a marital asset was within the court’s discretion to determine. We are not left with a definite and firm conviction that a mistake has been made with respect to the court’s division of this asset. *Id.*

Defendant similarly argues that plaintiff was not entitled to half of the parties’ 2009 federal income tax return, and that the trial court erred by failing to divide the refund proportionately to the parties’ individual tax totals on their separate returns under an Internal Revenue Service Regulation. See 26 CFR 1.6654-2(e)(5)(ii)(b). Below, defendant filed a motion asking the court to reopen the proofs on this issue based on her accountant’s ongoing communication with the IRS about the refund, which the court denied.

Although the IRS’ regulation governs the *allocation* of tax payments, it does not purport to govern whether and to what extent a refund must be considered marital or separate property in a divorce action. See *McCarty v McCarty*, 453 US 210, 220; 101 S Ct 2728; 69 L Ed2d 589 (1981) (stating that whole subject of domestic relations is a matter of state law and holding that state family and property law must do major damage to a clear and substantial federal interest before the Supremacy Clause will demand that state law be overridden), superseded by 10 USC § 1408. Rather, Michigan law governs the determination as to whether property is marital or separate and dictates the proper distribution of that property. See, e.g., MCL 552.19; MCL 552.23. And we are not convinced that the trial court clearly erred in finding that the tax return was a marital asset. As noted, the trial court determined that the assisted-care business was a marital asset and the evidence showed that the refund was occasioned by payments that this business made in 2009. Because the tax payments were made with marital property, the trial court could—consistent with its related findings—find that the refund should also be deemed marital property. Therefore, the trial court did not clearly err in so finding and did not err when it determined that plaintiff was entitled to half the amount (however the IRS might choose to allocate the payments). *Sparks*, 440 Mich at 147.

Defendant further argues that the trial court should have divided plaintiff's Vanguard Savings Plan equally between the parties as marital property. Plaintiff notes that he contributed to his savings plan "for 37 years prior to his marriage to" defendant, and that when he retired in 2001 he stopped contributing to it. Plaintiff argues that he has maintained the plan as a separate asset since 2004, when he transferred the account to a Vanguard IRA. The trial court decided that the plan should be awarded to plaintiff, "with credit to Defendant for \$76,000," as the approximate amount contributed during the parties' marriage.

Although the parties arguments are centered on the discussion in *Reeves* about passive appreciation, the essence of defendant's argument is that it is inequitable for plaintiff to retain this money (minus the credit) because plaintiff "lived exclusively off her business income and did not draw down the funds in his Savings Plan since retirement." This is a challenge to the equity of the award. In looking to the overall award of property between the parties, and considering their circumstances, we are not "left with the firm conviction that the division was inequitable." *Sparks*, 440 Mich at 152. And defendant has not shown that this separate asset should be invaded. See MCL 552.23(1).

Defendant also asserts on appeal that plaintiff removed \$17,000 from the parties' joint Vanguard account two weeks before he filed for divorce. Defendant acknowledges that she also removed \$5,000 from the account at some point. According to defendant, the court erred in dividing the remaining balance of the account, \$1,691, equally between the parties, and it should have awarded an additional \$6,000 to defendant in order to "equalize the amount that was withdrawn by the parties." Plaintiff testified at trial that during the marriage defendant began requiring him to pay the household expenses out of his personal account, so he withdrew \$17,300 from a joint Vanguard account funded by his retirement income in December 2009, which required defendant's signature. According to plaintiff, after initially agreeing to cosign for the withdrawal, defendant reneged and said that she would only cosign if "she got a check for 5,000-some dollars." We will not question the reasonableness of the agreement reached by the parties prior to initiation of divorce proceedings. The court divided the balance of the account at the time of the divorce, which was proper.

Defendant claims that the court erred in dividing the balance of her Citizens Bank account because the balance was from defendant's paychecks deposited after February 2010, following plaintiff's December 2009 divorce filing. However, defendant has not supported this allegation. Accordingly, on this record we cannot conclude that the trial court's decision was inequitable. *Sparks*, 440 Mich at 152.

Defendant argues that the parties' joint checking account with the Frankenmuth Credit Union did not exist at the time of the divorce. Defendant also argues that the trial court's valuation of this asset at \$7,178 was erroneous because there was only \$4,000 in the account when the court considered it. Defendant states that she is entitled to the full \$4,000 balance because plaintiff "had previously used funds in this account to pay his personal bills before the account was closed in August 2009." Defendant does not offer any evidence to support her allegation, and once again, her request to this Court to redistribute monies based on the parties' choices as to how to use their money during the marriage is not a proper issue for adjudication.

Defendant argues it was error for the trial court to award plaintiff one week of the parties' two-week Las Vegas time-share. Plaintiff testified that two deeds existed for the time-share, one for each week. He agreed that he would pay the fees associated with one deed, and defendant would pay the other. Plaintiff also agreed to defendant's retaining a time-share in Orlando and one in Traverse City. In light of these circumstances, it was not inequitable for the trial court to award the parties one week each to the Las Vegas time-share. *Id.*

Defendant requests the court to order plaintiff to return "gifts that were given to [her]" by plaintiff, which he took with him when he left the marital home in December 2009, "such as the 1927 St. Guaden [sic] gold piece, a diamond heart necklace, a dragonfly Tiffany lamp and electric blanket." In its opinion, the court mentions only the "St. Gauden [sic] gold piece with necklace," which it awarded to plaintiff; however, the court awarded one-half of its current value to defendant. Defendant did not mention these items specifically in her post-trial brief, nor did she offer testimony regarding the return of items of personal property. Plaintiff testified at trial that defendant had possession of the gold piece, and asked the court to award it to him. Because defendant did not request these items from the court, she is not entitled to relief on this issue on appeal.

There were no errors warranting relief.

Affirmed.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Michael J. Kelly