

STATE OF MICHIGAN
COURT OF APPEALS

RHONDA HUMPHREY

Plaintiff-Appellee/Cross-Appellant,

v

JAMES D. HUMPHREY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

December 20, 1996

No. 188278

LC No. 94-003107-DO

Before: Sawyer, P.J., and Markman and H.A. Koselka,* JJ.

PER CURIAM.

Defendant appeals as of right and plaintiff cross appeals from the circuit court's judgment of divorce. We affirm.

Defendant's first issue on appeal is that the trial court erred in including in the marital estate the appreciation in value of a parcel of land, half of which was owned jointly by plaintiff and defendant, that occurred during the time of the marriage. Defendant argues that plaintiff is not entitled to a share in the appreciation of this non-marital asset because she does not need the extra financial support inclusion would provide and because she did not contribute to the acquisition, improvement, or accumulation of the parcel. We disagree.

Our Supreme Court has held that the division of property in a divorce action is not governed by set rules. *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992). The following factors are to be considered in dividing the marital estate whenever they are relevant to the circumstances of the case: (1) duration of the marriage, (2) contribution of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. *Sparks, supra* at 159-160.

Defendant argues that plaintiff is not entitled to any share in the appreciation in value of the parcel because the trial court ruled that the parcel is a non-marital asset, and plaintiff does not meet the

* Circuit judge, sitting on the Court of Appeals by assignment.

entitlement criteria. Plaintiff would only be entitled to a share in the appreciation in value if the remaining property was insufficient for the suitable support and maintenance of plaintiff, MCL 552.23; MSA 25.103, or if plaintiff had contributed to its acquisition, improvement, or accumulation, MCL 552.401; MSA 25.136. *Lee v Lee*, 191 Mich App 73, 79; 477 NW2d 429 (1991). Yet we have held that while normally property rights acquired prior to marriage will be awarded to the party who acquired the rights, such rule is not absolute. *Rogner v Rogner*, 179 Mich App 326, 329; 445 NW2d 232 (1989). The major consideration in distributing property rights is the security of the family and the trial court may utilize any property in the real and personal estate of either party to achieve suitable support for the family as the trial court “considers 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.” *Rogner, supra* at 329-330 (citing *Zimmers v Zimmers*, 346 Mich 28; 77 NW2d 267 [1956], and *Reitz v Reitz*, 338 Mich 309; 61 NW2d 81 [1953]).

Defendant correctly notes that plaintiff was earning \$35,000 a year at the time of the divorce. But plaintiff had to support two minor children on that salary as well as herself. Plaintiff testified that her mother had to give her five thousand dollars so that she could furnish an apartment for herself and the children. Further, while the improvements to the jointly held portion of the parcel were financed largely by defendant, plaintiff contributed to defendant’s ability to pay for the improvements by working throughout the marriage so that plaintiff and defendant could pay their household bills. We find that the trial court’s dispositional ruling awarding plaintiff a share in the appreciation in value of the parcel during the marriage was fair and equitable in light of the facts. *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

Defendant’s second issue on appeal is that the trial court incorrectly included the appreciation in value of certain assets in the marital estate, because the appreciation in value was due directly to premarital holdings of defendant. We disagree.

Defendant contends that the trial court erred in calculating the amount of appreciation in value during the time of the marriage in the parcel of land owned in part by both plaintiff and defendant, because no evidence was presented at trial to support the court’s calculation. We disagree.

The general rule applicable to valuation of marital assets is that the party seeking to include the interest in the marital estate bears the burden of proving a reasonably ascertainable value; if the burden is not met, the interest should not be considered an asset subject to distribution. *Wiand v Wiand*, 178 Mich App 137, 149; 443 NW2d 464 (1989). Plaintiff met this burden by establishing that defendant bought the parcel for forty thousand dollars in 1985, she had acquired a joint interest in a portion of the parcel in 1991, and that the property was worth \$150,000 at the time of the divorce. These facts enabled the trial court to reasonably ascertain the value of the parcel during the time of the marriage. *Wiand, supra* at 149.

Defendant argues that he should have received a larger share of the appreciation in value of the partially jointly owned parcel because most of the improvements to this parcel were financed by liquidation of his own assets. We disagree. While a division of property in a divorce need not be equal,

it must be equitable. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). An equitable distribution of marital assets means that they will be roughly congruent. *Id.* The trial court made a roughly congruent distribution by requiring defendant to pay \$46,623 to plaintiff, so that each party would receive about \$65,000 in assets. Plaintiff is entitled to a congruent share of the assets because the trial court did not find either party at fault for causing the divorce. *Jansen, supra* at 171; *Shaw v Shaw*, 364 Mich 560; 111 NW2d 873 (1961).

Defendant contends that plaintiff was not entitled to a share in the total appreciation in value of his pension and profit sharing plans, because most of the appreciation came from premarital assets. We disagree. As we noted in *Boonstra v Boonstra*, 209 Mich App 558, 562; 531 NW2d 777 (1995), the language of MCL 552.18(1); MSA 25.98(1) does not restrict the trial court's jurisdiction to pension contributions made within the confines of the marriage. The language is inclusive and mandates what must be taken into account, but does not exclude consideration of other contributions. *Id.* We find that the trial court's dispositional ruling awarding plaintiff a congruent share in the appreciation in value of the partially jointly owned parcel and in defendant's pension and profit sharing plans was fair and equitable in light of the facts. *Hanaway, supra* at 292.

Defendant's third issue on appeal is that the trial court did not make a sufficient finding of fact to support its denial of alimony to him. We disagree.

A court has the discretion to award alimony under MCL 552.23; MSA 25.103, as it considers just and reasonable in light of all the circumstances. *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993). The court should consider 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. *Id.* The trial court should make specific findings of fact regarding those factors that are relevant to the particular case. *Id.*

The trial court based its denial of alimony to defendant on defendant's almost-completed master's degree, and the assets awarded to defendant, separately and out of the marital estate. The award of assets was based on the trial court's findings that defendant's business and personal assets had been depleted substantially during the marriage. The trial court noted that defendant could support himself through employment and the careful use of the awarded assets. Thus, the trial court clearly considered defendant's conduct, needs and ability to work in reaching the decision to deny alimony to defendant. *Ianitelli, supra* at 643. We find that the trial court was aware of the issues involved and correctly applied the law, and that its factual findings were sufficient to support denial of alimony to defendant. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

Plaintiff's first issue on cross appeal is that the trial court erred in failing to award a parcel of land wholly owned by defendant to plaintiff, because the land was a marital asset, plaintiff received no real estate in the distribution of property and plaintiff contributed a monetary amount greater than the value of the parcel to the marital estate at the time of the marriage. We disagree.

In awarding ownership of this parcel to defendant, the trial court followed the factors outlined in *Sparks, supra* at 159-160. The trial court awarded all of the real property in the marital estate to defendant, finding that plaintiff was earning \$35,000 a year at the time of the divorce while defendant had liquidated many of his income-producing assets to support plaintiff and her children during the marriage. The trial court also noted that defendant's interest in the property predated the marriage, since he had used the parcel to store equipment for ten years before he bought it. We find that the trial court's dispositional ruling awarding the wholly owned parcel to defendant was fair and equitable in light of the facts. *Hanaway, supra* at 292.

Plaintiff's second issue on cross appeal is that the trial court erred in not including the net value of the parcel partially owned by both plaintiff and defendant in the marital estate. We disagree. Defendant testified that he placed half of the parcel into joint ownership with plaintiff to provide plaintiff with security after his death, rather than to create a traditional tenancy by the entirety. The trial court evidently found this testimony of plaintiff credible. The credibility of witnesses is for the trier of fact to ascertain. We will not resolve it anew. *Thames v Thames*, 191 Mich App 299, 311; 477 NW2d 496 (1991). We find that the trial court's dispositional ruling awarding plaintiff a share in the appreciation in value of the partially jointly owned parcel during the time of the marriage only was fair and equitable in light of the facts. *Hanaway, supra* at 292.

Affirmed.

/s/ David H. Sawyer

/s/ Stephen J. Markman

/s/ Harvey A. Koselka