

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT J. HAMPSON, JR.,

Plaintiff-Appellant,

v

PAMELA B. HAMPSON,

Defendant-Appellee.

UNPUBLISHED

June 27, 1997

No. 189784

Mecosta Circuit Court

LC No. 94-010442-DM

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce, challenging the property settlement. We reverse and remand for further proceedings.

Plaintiff first contends that the trial court erred by including in the marital estate and dividing equally between the parties, the balance of an account held at Comerica Bank in plaintiff's name that had been a gift to plaintiff from his father and that was received by him after the parties separated. The trial court also awarded defendant \$2,500 from plaintiff's share of the Comerica account to offset a \$5,000 withdrawal from the account made by plaintiff. We review the trial court's factual findings for clear error. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). We review dispositive rulings to decide if they are fair and equitable in light of the facts, and affirm unless we are left with a firm conviction that the final decision was inequitable. *Id.*

The trial court's finding that plaintiff treated the balance held in the Comerica account as a joint asset by commingling it with joint marital assets was clearly erroneous where both parties testified that plaintiff never placed the gift into a joint account. Plaintiff removed some of the funds from the Comerica account and commingled them, but the balance held in the account was never treated as a joint asset by plaintiff. Since the trial court's characterization of the balance of the Comerica account as a joint asset was based on an erroneous finding of fact, the characterization was legal error.

The trial court further erred when it failed to address whether invasion of the balance held in the Comerica account was necessary to make a property division sufficient to support defendant. The

individual assets of a party to a divorce may be invaded in making a property division if the requirements of MCL 552.23(1); MSA 25.103(1) are met:

Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and alimony out of the estate real and personal, to be paid to either party in gross or otherwise as the 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.

The trial court did not address whether § 552.23(1) applied in the instant case. Under the statute, a claimant must meet the statutory burden of proving that insufficient assets are available from joint assets to provide for the claimant's support before the separate assets of the other party may be invaded. The trial court must first make a finding of what constitutes suitable support for a § 552.23(1) claimant and then determine whether sufficient joint assets exist from which that need can be met before invading the separate property of the other party. If necessary, a disproportionate division of the joint assets is permitted to provide for an appropriate level of support for the claimant. *Demman v Demman*, 195 Mich App 109, 113; 489 NW2d 161 (1992). It was error for the trial court to invade the balance of plaintiff's Comerica account without first making a finding of what constituted sufficient support for defendant and a finding of whether joint assets might first be allocated in such a way as to avoid the distribution of plaintiff's separate property. *Lee v Lee*, 191 Mich App 73, 78; 477 NW2d 429 (1991); *Davey v Davey*, 106 Mich App 579, 583; 308 NW2d 468 (1981).

Plaintiff also claims that the trial court's division of the marital credit card debt was inequitable. However, in light of our determination that this case should be remanded for further factual findings and reconsideration of the property distribution, we decline to address this question because the marital debt will have to be considered when structuring the final property disposition in this matter.

Finally, plaintiff claims that the trial court abused its discretion in ordering plaintiff to pay defendant's attorney fees in the amount of \$3,500. The trial court apparently made this award to compensate defendant for the fact that plaintiff had paid a similar amount on his attorney fees out of the joint marital assets prior to trial. As such, the award of attorney fees appears to be an attempt to balance the equities rather than an award based on a finding that an award of attorney fees was necessary to enable defendant to carry on or defend this action. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). In light of our determination that this case should be remanded, the trial court should reconsider whether an award of attorney fees to defendant is necessary under *Hanaway* or whether defendant should receive an offset based on plaintiff's invasion of the joint assets to pay his attorney fees in structuring the final property disposition of this matter. Further, the court should clarify on which basis such an award, if any, is being made.

The judgment of divorce is reversed and this matter is remanded for further proceedings consistent with this opinion and MCL 552.23(1); MSA 25.103(1).

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski