STATE OF MICHIGAN

COURT OF APPEALS

GARY D. EMERSON,

Plaintiff-Appellant/Cross-Appellee,

v

MARY A. EMERSON,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
September 26, 1997

No. 195957
Jackson Circuit Court
LC No. 95-073498-DO

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Both plaintiff and defendant appeal as of right from the trial court's judgment of divorce awarding defendant alimony in the amount of $135 per week for ten years and fifty-five percent of the marital estate. We affirm.

I

Plaintiff first argues that the lower court's property division was inequitable because the court erred in including the $20,000 plaintiff received from the sale of properties he once maintained through his partnership before the parties married, as well as $42,000 in equity he received from a post-marriage sale of property he purchased before marrying defendant as divisible marital assets. Plaintiff also argues that he is entitled to obtain six percent interest on the $4,500 inheritance he received in 1980, giving him a total premarital credit of approximately $72,785. Plaintiff maintains that although the funds were commingled with marital funds, the assets were clearly traceable as premarital property. We disagree.

The goal in distributing marital assets in a divorce proceeding is to reach a "fair and equitable" distribution of property in light of all the circumstances. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987). To reach an equitable division, the trial court is given broad discretion in fashioning its rulings and is held to no strict mathematical formula. *Sands v Sands*, 442 Mich 30, 34-35; 497 NW2d 493 (1993).

Although neither statute nor case law has supplied a clear definition of "marital property," the term is commonly understood to include property accumulated during the marriage as a result of one or both parties' contributions or efforts, whereas "separate property," also lacking a clear definition, has been understood to mean property that is not divisible at divorce, including property owned by one party before the marriage, property acquired by one spouse through gift or inheritance during the marriage, or property secured by one spouse after separation or filing for divorce. MCL 552.19; MSA 25.99 requires a court, upon the judgment of divorce, annulment, or separate maintenance, to restore to either party all or a just and reasonable part "of the real and personal estate that shall have come to either party by reason of marriage," which also has generally been interpreted to mean property that was acquired during the marriage.

Generally, property a party owned before the marriage is treated as separate property. See *Lee v Lee*, 191 Mich App 73, 79; 477 NW2d 429 (1991). However, in some cases, our courts have found that the circumstances before it warrant a division of premarital assets. For example, in *Reitz v Reitz*, 338 Mich 309; 61 NW2d 81 (1953), the Court awarded the husband's premarital property to the wife based on the husband's fault and the wife's needs. Moreover, in *Travis v Travis*, 19 Mich App 128, 130-131; 172 NW2d 491 (1969), this Court held that property the husband owned before the marriage was subject to division because individual contribution is only one factor to be considered in property division cases. Similarly, in *Feldman v Feldman*, 55 Mich App 147, 153 n 1; 222 NW2d 2 (1974), this Court found that a home owned by the husband before the marriage was marital property and subject to division, reasoning that MCL 552.19; MSA 25.99 says a court *may* restore to a party property that he or she owned before the marriage, but that such a result is not mandatory.

When deciding whether to treat property as either marital or as separate property, Michigan courts have taken into consideration the length of the marriage, see *Ross v Ross*, 24 Mich App 19; 179 NW2d 703 (1970), the parties' needs, MCL 552.23; MSA 25.103; *Reitz, supra*, whether the other spouse in any way contributed to the "acquisition, improvement, or accumulation of the property," MCL 552.401; MSA 25.136, or more importantly, whether the property in question has been converted to joint property. Where property has been commingled with marital property or used for joint purposes, courts have tended to presume that the parties intended to treat it as marital property. See, e.g., *Polate v Polate*, 331 Mich 652; 50 NW2d 190 (1951); *Ross, supra*.

At trial, plaintiff urged the lower court to take into account three distinct premarital assets that he secured before marrying defendant and to award him property to offset a total credit of approximately $72,785. The premarital assets claimed by plaintiff included: (1) a life insurance policy worth approximately $5,800; (2) $20,000 he received from the premarital sale of a residential home and party store once owned by his partnership; (3) $42,000 he received from a postmarital sale of property he purchased before marriage; and (4) a $4,500 inheritance, plus six percent interest, that he received in 1980. The lower court ruled that plaintiff was entitled to the original amount of the inheritance received by plaintiff and contained in the Lord Abbott account, as well as his life insurance policy, but held that the remaining property would be divided as marital assets because they had been "sufficiently commingled with other marital assets so as to disallow separation by the [c]ourt." Based on the testimonial record in this case and the wide latitude afforded the trial court when dividing property in

divorce cases, we find that the lower court's decision with respect to the division of the parties' property was fair and equitable under the circumstances.

First, the record establishes that although plaintiff secured $20,000 from the sale of partnership property before marrying defendant, he reinvested that money into other properties that were purchased and maintained during his marriage, and eventually awarded pursuant to the judgment of divorce. There was also evidence presented to indicate that plaintiff drew his salary from the same account in which he deposited the $20,000, that the money in that account was regularly used toward monthly marital budget expenses, and that plaintiff was unable to separate and identify the monies which were premarital, as opposed to those that were deposited after the parties married. We agree with defendant that to now afford plaintiff a credit for that money, as well as award him the properties he ultimately purchased with it, would allow plaintiff to "double dip" into the available assets.

Next, with respect to the $42,000 equity claim, the record shows that although plaintiff purchased the property before the marriage, he did not sell it until almost two years after marriage and had also significantly commingled that money with marital funds. The evidence indicates that the money was deposited into a savings account to which both he and defendant had access, that $32,000 had recently been deposited into that same account after the parties sold a piece of property they co-owned, and that the account (at the time of divorce) maintained a balance of only $33,000. Plaintiff also admitted that portions of the $42,000 had been spent on the marital home.

Last, with respect to plaintiff's $10,785 credit claim, representing a six percent interest on his inheritance, plaintiff presented no evidence to establish that his inheritance, if saved, accumulated six percent interest, as opposed to three or four percent interest, nor presented any authority to support his argument that he is entitled to the speculative amount in interest he is now claiming. We note that even though premarital inheritances and gifts of one spouse are commonly withheld from the divisible marital estate, as with other premarital property, courts do have the discretion to include them, and are typically prone to do so where those funds are not readily identifiable or "separate" from marital funds. See *Polate, supra*; *Ross, supra*. Here, like plaintiff's other claims, any interest that may have accrued before the inheritance was spent was clearly not readily identifiable to the court. Consequently, we conclude that the lower court did not err in including each in the divisible marital estate.

II

Plaintiff next argues that the lower court erred in attributing fault in the breakdown of the parties' marriage to him and in turn divided the martial assets inequitably. We disagree.

In the present case, the lower court attributed fault to plaintiff (relying upon defendant's and her daughter's testimony) for the breakdown of the marriage, finding that plaintiff had chosen to abandon defendant simply because of her age and her inability to financially contribute to the relationship. The court was also convinced that the desire to part lives was not mutual and indicated that it intended to divide the marital assets so as to award defendant fifty-five percent and plaintiff forty-five percent. Plaintiff now claims that his conduct or reasons for wanting a divorce, even if they are as the court found, were nonetheless insufficient to qualify as "fault."

A division of property need only be "fair and equitable" under the circumstances and property need not be equally distributed between the parties. *McDougal v McDougal*, 451 Mich 80, 88-91; 545 NW2d 357 (1996). To reach an equitable division, the trial court may consider factors such as: the source of the property, the contributions of the parties toward its acquisition, the duration of the marriage, the needs of the parties, the parties' ages, the parties' health, the standard of living of the parties, the parties' earning abilities, the past conduct of the parties, and the cause of the divorce. *Id.*; *Sands, supra*. The fault of one party remains a valid consideration in matters of property division, but must not be a dispositive factor, or one that spurs the court to divide the marital property so as to punish the wrongdoer. *McDougal, supra* at 89-91; *Sparks v Sparks*, 440 Mich 141, 157-158, 163; 485 NW2d 893 (1992).

In *Sparks, supra* at 157, our Supreme Court held that a trial judge must fashion the division of property under the statutory scheme and the relevant case law as they existed before the 1971 "no fault" amendment of the divorce act. In *Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995), this Court stated:

> The relative value to be given the fault element in a particular case and the extent to which particular actions are regarded as fault contributing to the breakdown of a marriage are issues calling for a subjective response; such matters are left to the trial court's discretion subject to the requirement that the distribution not be inequitable. The trial court is in the best position to determine the extent to which each party's activities contributed to the breakdown of the marriage.

We conclude that the lower court's property division was fair and equitable and should not be disturbed even if the trial court erred in attributing fault to plaintiff. See *Hanaway, supra* at 292, holding that property dispositional rulings are to be affirmed unless this Court is left with the firm conviction that the distribution is inequitable and, *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995), where this Court refused to reverse the trial court's decision where the right result was reached for the wrong reason.

First, we note that although the lower court announced that it intended to split the parties' property 45/55 in favor of defendant, the actual division was relatively equal and did not reflect a true five percent fault factor (with the exception of the ordered sale of the marital home). Moreover, we find that not only is plaintiff younger, gainfully employed, and able to continue working without inhibition (as opposed to defendant), he was awarded several properties that are themselves income producing. Considering the circumstances, we conclude that the lower court's property distribution was not inequitable, irrespective of its finding as to fault.

III

Finally, both plaintiff and defendant argue that the lower court's alimony award was inequitable, plaintiff arguing that it was excessive, while defendant argues that it is grossly inadequate. However, after reviewing the entire record, we are left with no definite and firm conviction that a mistake has been

made and find that the court's award is "just and reasonable" under the facts of this case. *Ackerman, supra* at 301-302.

In awarding defendant $135 per week for ten years, the lower court determined that both parties had worked and contributed to building the marital estate during their ten-year marriage, that defendant was forced into early retirement due to health problems, and was no longer able to work and generate an income, while plaintiff was able to continue working and enjoyed a substantial income, presumably more than the $35,000 to $40,000 plaintiff reported during trial. The court also found plaintiff more at fault for the breakdown of the marriage, noted the disparity in the parties' ages and their health, and found that although the parties once enjoyed a very comfortable standard of living, defendant was now dependent on her retirement income and social security benefits, totaling approximately $1,050 monthly. Last, the court found that plaintiff still had several good income-producing years before him and certainly had the ability to pay alimony.

We find that the testimonial record presented at trial supports the trial court's findings and establishes plaintiff's ability to pay the awarded alimony and defendant's need for it. The lower court's award is fair and equitable and will not impoverish either party.

Affirmed.

/s/ Richard Allen Griffin
/s/ Myron H. Wahls
/s/ Roman S. Gribbs