

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JANET D. DEPLAE,

Plaintiff-Appellant,

v

GERALD DEPLAE,

Defendant-Appellee.

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UNPUBLISHED

June 19, 2007

No. 271286

Wayne Circuit Court

Family Division

LC No. 05-500319-DO

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

In this divorce case, plaintiff appeals by right the trial court's decision to equally divide the entire value of the marital residence between the parties. We affirm.

In April 1996, defendant purchased a lottery ticket, which he subsequently determined was worth \$100,000. Defendant gave the lottery ticket to plaintiff. The parties drove together to the Lottery Bureau to cash the ticket. After deducting taxes, plaintiff was issued a lump sum payment in her name in the amount of \$67,600. Plaintiff placed the entire amount in a separate bank account, which she opened individually in April 1996. Plaintiff used \$46,900 of this amount to purchase a home in Lincoln Park (the "Applewood residence"). The Applewood residence was titled solely in plaintiff's name, and there was no mortgage on the home. Shortly after plaintiff purchased the home, defendant moved in. The parties were married in May 2001.

In January 2006, plaintiff filed for divorce. Following a bench trial, the trial court found that defendant had not intended to gratuitously pass title to the lottery ticket to plaintiff, and included the Applewood residence in the marital estate. The trial court awarded each party a 50 percent interest in the entire value of the residence.

Plaintiff argues that the trial court erred when it concluded that defendant did not intend to gratuitously pass title to the lottery ticket as a gift. Furthermore, plaintiff contends that the trial court erred when it included the Applewood residence in the marital estate and divided the entire value of the residence evenly between the parties. After a review of the lower court record, we conclude that the trial court properly found that the lottery ticket was not a gift, and correctly granted each of the parties a 50 percent interest in the full value of the Applewood residence.

We review for clear error a trial court's findings of fact in a divorce case. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). Findings of fact are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992). We give special deference to a trial court's factual findings when they are based on witness credibility. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the factual findings are upheld, then this Court must determine whether the dispositional ruling was fair and equitable in light of those facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). Dispositional rulings are affirmed unless this Court is left with the firm conviction that the division was inequitable. *Id.*

"The distribution of property in a divorce is controlled by statute." *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). Assets earned by a spouse during a marriage are generally considered marital assets. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). Generally, separate assets include property owned by one party prior to a marriage. See *Lee v Lee*, 191 Mich App 73, 77-79; 477 NW2d 429 (1991). Courts have the discretion to include in the marital estate otherwise separate property that has been commingled or used for joint purposes during the marriage. See, e.g., *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951).

Plaintiff argues that the lottery ticket was a gift given to her by defendant before the marriage and that the proceeds of the lottery ticket were her separate property. We disagree. The trial court correctly declined to characterize the lottery ticket as a gift to plaintiff. "In order for a gift to be valid, three elements must be satisfied: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession, and (3) the donee must accept the gift. Acceptance is presumed if the gift is beneficial to the donee." *In re Handelsman*, 266 Mich App 433, 437-438; 702 NW2d 641 (2005), quoting *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997). The trial court specifically found that defendant gave the lottery ticket to plaintiff in order to avoid paying any portion of the money to his ex-wife Victoria or to the IRS. The trial court noted that "[i]t would appear the intent of the parties, at least Mr. Deplae, was to give the money to Ms. Deplae for purposes other than an outright gift."

The lower court record reveals that, at the time defendant determined that he won the lottery, he was married to Victoria and he was having "problems" with the IRS. Further, defendant testified that he did not intend the lottery ticket to be a gift to plaintiff and that he and plaintiff had an agreement to use the lottery ticket proceeds to purchase a house in the future. In divorce actions, the trial court "has the best opportunity to view the demeanor of the witnesses and weigh their credibility." *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). This Court gives special deference to a trial court's findings when based on the credibility of witnesses. *Draggoo, supra* at 429. Notwithstanding plaintiff's suggestion at trial that the lottery ticket was a gift, we conclude that the trial court did not clearly err in determining that defendant did not intend to pass title of the lottery ticket to plaintiff as a gift before the marriage. *In re Handelsman, supra* at 437-438; *McNamara, supra* at 182-183.

After correctly concluding that defendant did not intend to give the lottery ticket to plaintiff as a gift, the trial court engaged in a somewhat confusing and convoluted analysis, first

classifying the Applewood residence as plaintiff's separate property, but then including the home's entire value in the marital estate. We conclude that this elaborate analysis was unnecessary because the parties' respective premarital interests in the Applewood residence were commingled with one another for joint purposes during the marriage.

The Applewood residence was wholly acquired before the parties' marriage. It is true that the residence was titled solely in plaintiff's name at the time it was purchased, and that it was purchased solely with funds from plaintiff's individual bank account. However, it is also true that plaintiff obtained those very funds by redeeming the lottery ticket at issue in this case, and that defendant had merely passed the lottery ticket to plaintiff in an effort to avoid paying any portion of the money to his ex-wife or the IRS. Based on the record before us, we conclude that both parties had equivalent premarital interests in the Applewood residence that were substantially commingled with one another for joint purposes during the marriage.

The goal in distributing assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara, supra* at 188. "A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy." *Walworth v Wimmer*, 200 Mich App 562, 564; 504 NW2d 708 (1993). As noted above, a court may include in the marital estate otherwise-separate property that has been commingled or used for joint purposes during the marriage. See *Polate, supra* at 654-655. We are not left with the firm conviction that it was inequitable for the trial court to include the parties' premarital interests in the Applewood residence among the marital estate, or to equally divide the entire value of the Applewood residence between the parties in this case.<sup>1</sup> *Sparks, supra* at 151-152.

We reject plaintiff's suggestion that, as in *Reeves*, the trial court should have awarded her the entire *premarital* value of the Applewood residence, and should have divided between the parties only the equity that was built up in the residence after the date of marriage. This suggestion presupposes that the residence was plaintiff's separate property before the marriage. However, as we have already discussed, each party had a largely equivalent interest in the Applewood residence before the marriage, and the home was neither party's separate property. The residence was essentially a joint asset even before the parties' marriage, and the facts of this case are therefore entirely different than those presented in *Reeves*.

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<sup>1</sup> We wish to make clear that in reaching this conclusion, we have not impermissibly considered the parties' premarital status. Although the court may divide property that came "to either party by reason of the marriage," MCL 552.19, Michigan does not recognize common-law marriages, *Reeves, supra* at 494 n 1. Thus, when determining the contents of marital estate, a court must only look to the period that began with the marriage and may not expand this period to include any cohabitation that may have occurred before the parties married. *Id.* Here, while the parties acquired the Applewood residence and began to use it for joint purposes before the marriage, they continued to use it for joint purposes during the marriage as well. Accordingly, it was properly included in the marital estate. See *Polate, supra* at 654-655.

Plaintiff also argues that the statute of frauds and the doctrines of promissory estoppel and equitable estoppel bar defendant from claiming an interest in the Applewood residence. Generally, an issue is preserved if it was raised before and addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In the present case, plaintiff failed to properly raise these arguments below. “Issues raised for the first time on appeal are not ordinarily subject to review.” *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Accordingly, we decline to address these remaining issues.

Affirmed.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette