

STATE OF MICHIGAN
COURT OF APPEALS

ANN MARIE LANALA,

Plaintiff-Appellant,

v

GERALD DOUGLAS TERVO,

Defendant-Appellee.

UNPUBLISHED
October 23, 2012

No. 306197
Baraga Circuit Court
LC No. 10-006061-DM

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this divorce case, plaintiff appeals by leave granted the judgment of divorce wherein the trial court awarded defendant the marital home and his entire retirement account. Because we conclude that the trial court inequitably divided the parties' marital assets, we vacate the trial court's judgment in part and remand for further proceedings consistent with this opinion.

On December 22, 2006, during the parties' marriage, plaintiff was injured in an automobile accident. Plaintiff filed a lawsuit to recover damages in the matter, an action in which defendant expressly declined any involvement. Plaintiff settled her claims, receiving a net recovery of \$117,000, after accounting for attorney's fees, to compensate her for pain and suffering. Plaintiff deposited the settlement proceeds into a bank account separate from the parties' marital property.

In the trial court, defendant asserted that the settlement proceeds are marital assets because specific amounts were not allocated for compensation for her injuries, medical expenses, pain and suffering and lost wages. Defendant maintained that to the extent the proceeds compensated plaintiff for her lost earning capacity, those sums were marital property. Defendant also argued, alternatively, that if the settlement proceeds were separate assets the assets were subject to invasion because he contributed to the preservation of those proceeds by supporting plaintiff while she could not work. The trial court rejected defendant's claim, and to the contrary, held that the settlement proceeds were plaintiff's separate asset and were not subject to invasion. In making its findings of fact from the bench, the trial court stated "the accident settlement proceeds . . . are plaintiff's separate property." The trial court reiterated this finding later, stating again that "plaintiff has been awarded the full accident settlement proceeds without being subject to invasion by the defendant." Consistent with the trial court's findings of fact, the judgment of divorce provides that plaintiff is awarded her bank account "which holds proceeds

the plaintiff recovered for injuries she suffered in an automobile accident. That account and the settlement proceeds it contains are the plaintiff's separate property."¹

Plaintiff's sole claim on appeal is that the trial court's reliance on the settlement proceeds, which it found to be her separate property, to balance the award of the defendant's retirement account and the marital home to defendant was error and rendered the distribution inequitable. We agree.

"In a divorce action, we review for clear error a trial court's factual findings related to the division of marital property." *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010). A finding of fact is clearly erroneous if after reviewing all the evidence this Court "is left with the definite and firm conviction that a mistake has been made." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). "The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id.* at 429-430.

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). Separate property generally must not be considered by the trial court when distributing the parties' property because distribution of property pertains only to marital assets. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). The marital estate need not be divided into mathematically equal portions, but significant departures from equal division must be clearly explained. *Berger*, 277 Mich App at 717.

At trial, the evidence showed that defendant's retirement savings account and the marital home, which were awarded to defendant, were valued at approximately \$95,000. In contrast, the trial court only awarded plaintiff the real property located in Portage Township that was valued at most at approximately \$9,500.² The trial court stated that it believed that this distribution was equitable because "plaintiff has been awarded the full accident settlement proceeds without being subject to invasion." Thus, it is apparent that the trial court used plaintiff's separate property to offset the obvious disparity in the distribution of marital property awarded by the trial court.

¹ We note that defendant has not cross-appealed this finding by the trial court. Further, an examination of the trial record shows that the trial court's conclusion that the settlement proceeds were separate marital property is consistent with testimony offered during trial by plaintiff's personal injury attorney demonstrating that the settlement proceeds were awarded entirely for compensation of plaintiff's pain and suffering, and defendant failed to present any evidence that would support invasion as provided by law. See MCL 552.23(1); MCL 552.401.

² Different values were assigned to this property at different points during the proceedings; these values were presumably based on the state equalized value of the property in 2010 and the prospective value of the property in 2011. While it is not clear exactly what value the trial court eventually assigned the property, the highest value of the property advanced during the proceedings was the 2010 state equalized value of \$9,480.

We conclude that the trial court's reliance on plaintiff's separate property to balance the distribution was error and that this error renders the division of the marital property inequitable. The trial court's holding that the settlement money was plaintiff's separate property rendered that asset exclusively hers and precluded reliance on it to balance the distribution of the actual marital assets. *Reeves*, 226 Mich App at 494 (separate property generally must not be considered when distributing the parties' marital assets). Accordingly, we vacate the portion of the trial court's judgment dividing the parties' property and remand for further proceedings. On remand, the trial court must redistribute the marital assets equitably and without consideration of plaintiff's separate property.

Vacated in part and remanded. We do not retain jurisdiction. Plaintiff may tax costs pursuant to MCR 7.219, having prevailed in full.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Joel P. Hoekstra