

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS E. BRACKETT

Plaintiff-Appellee,

v

KATHERINE L. BRACKETT,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 205684

Mason Circuit Court

LC No. 96-001111 DM

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, arguing that the trial court erred in both valuing and distributing marital property, in determining that certain real property was not a marital asset, in failing to award child support, and in failing to award defendant her attorney fees in light of the alleged wrongful acts by plaintiff. We affirm.-

First, defendant argues that the trial court erred in dividing the marital estate evenly between the parties given plaintiff's infidelities and his violation of a court order. The trial court's disposition of marital property is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). While the division of property in a divorce action is not dictated by statute or case law, as a general rule it is appropriate for a court to consider the "source of property; the parties' contributions toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; their ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and general principles of equity." *Hanaway v Hanaway*, 208 Mich App 278, 292-293; 527 NW2d 792 (1995).

In this case, plaintiff fathered at least one illegitimate child during the marriage. However, the record also reveals that the parties separated very frequently, once for as long as six to nine months. On this record, the trial court did not err in declining to assign fault based on plaintiff's past infidelities. With regard to plaintiff's violation of the court's order regarding the appraisal of plaintiff's truck by

Manistee Ford, the trial court adequately dealt with the violation by excluding the Manistee Ford valuation. Accordingly, we are not left with a firm conviction that the equal distribution of assets was inequitable.

Defendant also argues that the court essentially resorted to the pre-no-fault concept of condonation in equally dividing the marital assets and that the concept is invalid under our no-fault statute. Until passage of the Michigan no-fault divorce law, one spouse could seek to defend and defeat the action by arguing that the other spouse had condoned the defending spouse's activity. *Peltola v Peltola*, 79 Mich App 709, 713; 263 NW2d 25 (1977). Although the lower court in this case noted that defendant had been aware of plaintiff's indiscretions but had taken no action to terminate the relationship, it cannot fairly be said that the trial court relied on the theory of condonation in dividing the assets of the marriage.

Defendant next argues that the trial court erred in determining the value and ownership of certain assets. The inquiry regarding which assets comprise the marital estate is distinct from the question regarding the valuation of those assets. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). The trial court's first consideration when dividing property is the determination of marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The assets earned by a spouse during the marriage are properly considered part of the marital estate. See *VanderVeen v VanderVeen*, 229 Mich App 108, 112-113; 580 NW2d 924 (1998). Generally, the goal is to equitably divide the marital assets without reference to any individually-owned assets. *Reeves, supra* at 494. A trial court can invade non-marital assets if there are insufficient assets to suitably support or maintain the other spouse or when the non-owner spouse has contributed to the acquisition, appreciation, or improvement of the asset. *Id.* at 494-495; MCL 552.23; MSA 25.103 and MCL 55.401; MSA 25.136.

Defendant argues that the trial court erred in finding that the vacant land on Hawley Road was not a marital asset. She argues that she is entitled to at least half the value of the land because there are insufficient assets in the marital estate to suitably support or maintain her and because she contributed to the acquisition, appreciation or improvement of the asset. Generally, a gift from the parent of one of the parties is treated much like an inheritance, in that one party's inheritance is not treated as marital property unless the other spouse contributed to the asset's increase in value, literally or figuratively. *Lee v Lee*, 191 Mich App 73, 78-79; 477 NW2d 429 (1991). Defendant failed to present any evidence to demonstrate that her actions contributed to the acquisition, appreciation or improvement of the property, i.e., that she contributed to an increase in its value. The trial court specifically found that only plaintiff's mother had paid for the land, and plaintiff testified that no improvements had been made to the land since it was deeded to him. Therefore, the trial court did not clearly err in finding that defendant's actions did not contribute to the acquisition, appreciation or improvement of this land. Moreover, the marital estate includes a house, vehicles, and numerous household items. Although a relatively modest marital estate, it does not appear that defendant will be unable to support and maintain herself. She is employed full time as a nurse's aid, and she received the marital home, which had a \$12,000 mortgage balance and payments of \$255 per month. Therefore, it was unnecessary for the trial court to invade the non-marital estate for this purpose.

Regarding the finding that the Thundercat snowmobile was not a marital asset, the court based this finding on the Michigan registration, which reflected that the machine was owned by someone else. In light of the registration, it cannot be said that the trial court clearly erred in finding that the snowmobile was not a marital asset.

Defendant also challenges the values that the trial court assigned to plaintiff's Silverado pick-up truck and the marital home. In a divorce case, the trial court's findings of fact regarding the valuations of particular marital assets are reviewed under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). Where a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). Regarding plaintiff's pick-up truck, defendant argues that the court should have disregarded the \$6,500 appraisal that was admitted when offered by plaintiff and accepted the NADA Blue Book established value of \$10,500. Defendant argues that plaintiff's appraisal should have been excluded because he undermined defendant's efforts to get a valid appraisal in violation of the court's order. However, the trial court adequately dealt with this problem by excluding this unreliable appraisal. Further, the court found the truck to be worth \$8,000. As this falls well within the range of acceptable values, it cannot be said that the trial court erred in failing to find that the truck was worth the highest possible price.

Regarding the marital home, defendant bases her argument that it was overvalued plaintiff's failure to submit his appraisal into evidence. However, the trial court had before it the appraisal of defendant (\$48,000), the state equalized value (SEV) (\$61,000), and the testimony of the parties. Further, the judge took the condition of the home into consideration, noting that he would not find the home to be worth the SEV value because of pressing repair needs. A trial court may accept the state equalized value as some evidence of the value of the home. *Lee, supra* at 76. Further, the court may also rely on the testimony of the parties in finding the value of the home. *Id.* at 76. The value of a home need not be established by expert testimony. *Id.* at 76-77. In this case, the \$50,000 value falls within the range established by the appraisal submitted by defendant, the SEV, and the testimony of the parties.

Defendant also complains that the trial court erred in finding that the parties owed approximately \$12,000 on the mortgage. Plaintiff testified that as of January 1996 they owed \$12,494 on the mortgage. Defendant testified that as of the date of filing they owed approximately \$12,000. As the parties themselves testified that the money owing on the home was either \$12,000 or \$12,494, it cannot be said that the court erred in accepting the lesser figure.

Next, defendant argues that the trial court erred in refusing to set child support. The trial court's decision regarding child support is reviewed for an abuse of discretion. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1993). MCL 552.15(1); MSA 25.95(1) provides that after the filing of a divorce complaint, either party may move for child support or the court itself may, of its own accord, award child support. Although defendant would have been entitled to child support during the pendency of the divorce because she had custody of the couple's minor daughter, a custodial parent has only a limited right to seek retrospective support and can do so only when seeking a modification of a preexisting order. MCL 552.603(2); MSA 25.164(3)(2). In this case, defendant did not seek child

support until the time of trial, when she requested a retrospective award in her trial brief filed March 28, 1997. Although the trial court could have ordered child support before entry of judgment, defendant did not move for a child support award; therefore, the date from which such an award could run is the date of the trial court's opinion in which it first considered the request, pursuant to the discretion of the court to consider motions for child support. MCL 552.15; MSA 25.96. A trial court setting support may depart from the child support guidelines, but the specific reasoning for the deviation is required. MCL 552.16(2); MSA 25.96(2).

In denying defendant's request for an award of child support, the trial court stated that the minor daughter's receipt of disability benefits would rule out an award of child support. Although payments of federal benefits made directly to the child are not credited against the non-custodial parent's obligations, receipt of such benefits may be considered by the court when setting or modifying child support. *Jenerou v Jenerou*, 200 Mich App 265, 268; 503 NW2d 744 (1993). In our view, the trial court properly considered the minor child's direct receipt of disability benefits, and the court sufficiently explained its reasons for not awarding child support.

Finally, defendant argues that the trial court abused its discretion in refusing to award defendant her attorney fees. The trial court's decision to deny attorney fees in a divorce action is reviewed for an abuse of discretion. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). A court may award a party in a divorce action "any sums necessary to enable the . . . party to carry on or defend the action, during its pendency." MCL 552.13(1); MSA 25.93(1); see also MCR 3.206(C)(2); *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Moreover, attorney fees may be awarded when the party requesting payment has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. *Hawkins, supra*.

Defendant argues that plaintiff's actions forced her to incur greater expenses than otherwise would have been incurred. Defendant has pointed to a number of acts by plaintiff, which she alleges were wrongful, but has failed to analyze on appeal how any of those actions caused her to incur greater attorney fees. Because defendant did not develop a record that would allow this Court to provide meaningful review, we have no basis for finding any abuse of discretion on the part of the trial court.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot