

STATE OF MICHIGAN
COURT OF APPEALS

HENRY ECKHARDT,

Plaintiff-Appellant,

v

ROSEMARY ECKHARDT,

Defendant-Appellee.

UNPUBLISHED
September 9, 2003

No. 239195
Saginaw Circuit Court
LC No. 00-033845-DO

Before: Meter, P.J., Talbot, and Borrello, JJ.

PER CURIAM.

Plaintiff appeals his judgment of divorce contending, in part, that his summer home which was purchased prior to the marriage is exempt from the marital estate. However, plaintiff conveyed title to the defendant during the marriage, thereby making the property a marital asset. Plaintiff also contends that the trial court erred in the distribution of stock, some personal items purchased prior to the marriage and on the distribution of life insurance policies on himself and his two sons. The personal property complained of and the stocks were clearly plaintiff's separate estate and there was no statutory reason found in the record to justify invasion of plaintiff's separate estate. The court did award each party life insurance in their name, however, did not make a finding on the two life insurance policies on plaintiff's sons. Without a proper record before us, we are unable to reach a decision on the two life insurance policies on plaintiff's two sons. We therefore affirm in part, reverse in part, and remand back to the trial court the issue of the two life insurance policies on the plaintiff's sons.

Plaintiff first argues that the court erred by determining that all the parties' assets were marital property subject to distribution, excluding three life insurance policies. In reviewing a trial court's property distribution, this Court begins by determining whether the trial court's findings of fact were clearly erroneous. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A factual finding is clearly erroneous if, after review of the trial court's entire record, this Court has the definite and firm conviction that a mistake was made. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). If the findings of fact are upheld, this Court must next determine whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152. However, the dispositional ruling is an exercise of discretion and should be affirmed unless this Court has the firm conviction that the property division was inequitable. *Sparks, supra* at 152. We do not find that the property division was inequitable.

When the trial court divides property in a divorce proceeding, its first consideration is the determination of marital and separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 Nw2d 1 (1997), citing *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). In determining which assets are part of the marital estate, the trial court should include all property that came “to either party by reason of the marriage.” *Reeves, supra* at 493, quoting MCL 552.19. This has been construed to mean the accumulation of assets “between the beginning and the end of the marriage.” *Id.*, quoting *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986) (emphasis omitted). Therefore, property that a party brought into the marriage is deemed that party’s separate property.

This Court has also considered the parties’ intent when the parties have commingled their separate property or used it for joint purposes thus, having the discretion to include the assets in the marital estate. See *Ross v Ross*, 24 Mich App 19, 30-31; 179 NW2d 703 (1970); *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951).

Typically, the marital estate is divided between the parties, and the separate estate remains each party’s separate property to take at the end of the marriage with no invasion from the other party. *Reeves, supra* at 494. However, a party’s separate estate, once properly characterized, can be invaded for redistribution under two statutory exceptions. *Id.*

Plaintiff first argues that the trial court erred by characterizing the Topinabee property as a marital asset. The trial court found that the Topinabee property was part of the marital estate because plaintiff had conveyed, by valid transfer, this property to defendant through a quitclaim deed during the marriage. Plaintiff contends that the transfer was provoked by constant nagging, from the defendant, whereas defendant claims the property was transferred to avoid plaintiff’s first wife from receiving any monetary benefit from the property. We concur with the trial court’s finding that “Whether the motivation was to stop nagging that apparently exceeded what Prometheus endured from the harpies, or to execute an end run around any potential alimony claims of the ex-wife, the Court finds that the property is a marital asset.” Having found intent to transfer the property into the marital estate, “[t]his Court gives special deference to the trial court’s findings where they are based on the credibility of witnesses.” *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990).

Separate property has also been interpreted to include property acquired by one spouse through inheritance during the marriage. *Lee v Lee*, 191 Mich App 73, 78-79; 447 NW2d 429 (1991). Similarly, this Court has also treated gifts acquired by one spouse during the marriage as separate property. *People v Wallace*, 173 Mich App 420, 428; 434 NW2d 422 (1988). However, courts do have the discretion to include property acquired by gift or inheritance in the marital estate where the separate property has been commingled with the marital property or used for joint purposes. *Polate, supra; Ross, supra*. After the transfer of the Topinabee property to defendant, the parties continued to treat the property as marital property for over eleven years. Further, plaintiff continued to pay the taxes, utilities, and maintenance on the property after the transfer.

Plaintiff next argues that the trial court erred by characterizing the Topinabee property’s furnishings; Advanced Pattern and Machine Company assets; an antique gun collection; boats, sporting equipment, sports vehicles; and 720 shares of Sun Life stock as marital property. We agree in part. Plaintiff asserts that because he was awarded a majority of this property in his first

divorce and thus brought it into this marriage with defendant; he is entitled to have this property characterized as his separate property. The parties presented conflicting testimony concerning the furnishings and the gun collection. The trial court found these assets to be marital property. This Court gives deference to the trial court's findings of fact when they are based on the witnesses' credibility. *Stanton, supra* at 255. The court's findings of fact were supported by the record and were not clearly erroneous. Thus, as it pertains to the furnishings and the gun collection, the trial court did not err by characterizing these assets as marital.

The trial court also characterized the Advanced Pattern and Machine Company assets, including power tools and office supplies;¹ the 14' boat; the canoe; and the motorcycle as marital property. There is no conflicting testimony in the record concerning these assets. Plaintiff argues that he brought these assets into the marriage and, therefore, is entitled to have them characterized as his separate property. In determining which assets are part of the marital estate, the trial court should only include the property that came "to either party by reason of the marriage." *Reeves, supra* at 493, quoting MCL 552.19. Therefore, property that a party brought into the marriage is deemed that party's separate property. However, even if this Court finds that the property is separate, a spouse's separate estate can be opened for redistribution when one of the two statutory exceptions is met. *Sparks, supra*. The first exception to the doctrine of noninvasion of separate estates is found at MCL 552.23. Subsection 1 of this statute permits invasion of the separate estates if after division of the marital assets the estate, "...is insufficient for the suitable support and maintenance of either party..." In this case, the trial court found that the parties had been married since 1979, that plaintiff is 82 years of age and defendant is 73 years of age. Defendant did not work during the marriage, and plaintiff retired at age 65. Their primary source of income appears to have been from social security, investment returns and leases. However, defendant will be adequately compensated by the sale of assets ordered by the court. The second statutory exception is when the other spouse "contributed to the acquisition, improvement or accumulation of the property." MCL 552.401. There is nothing in the record which suggests that defendant engaged in any of the activities suggested in MCL 552.401 that would justify invasion of the plaintiff's separate estate. Therefore, the court's order of the sale of these items was clearly erroneous.

The 720 shares of Sun Life stock were obtained during the parties' marriage when the company from which plaintiff bought his three life insurance policies went public and issued him 720 shares of stock for his interest in the company as the owner of the policies. However, the three policies had been purchased by plaintiff before his marriage to defendant. Although the courts allow the appreciation of a premarital asset to be included in the marital estate, the marital estate does not include the appreciation of a premarital asset if that appreciation was wholly passive. *Reeves, supra* at 497. This case is similar to the fact pattern set forth in *Sparks, supra*, when that panel of this Court held that appreciation of an asset that was wholly passive is not deemed a marital asset. The trial court in this case did not find any of the two statutory exceptions had been met to justify invasion of plaintiff's separate estate. Therefore, the trial court's findings of fact were not supported by the record because there was no competent

¹ Distributed by the trial court in the judgment of divorce as "machinery."

evidence to establish that defendant contributed in a meaningful way to the appreciation of the stock; or that there is any additional need on the part of the defendant. We find that the court's opinion on this matter was clearly erroneous.

Plaintiff also argues that the trial court made no findings of fact or distributional ruling concerning the three life insurance policies he has on himself and his two sons. Although the trial court made no determinations of factual findings in its order of divorce, the judgment of divorce, which is the binding document, states: "each party is awarded all rights in any policy or contract of life insurance, endowment, or annuity on his or her life."

However, although the judgment of divorce distributed the life insurance policy on plaintiff, the trial court did not make any factual findings or distributional rulings on the two insurance policies plaintiff had on his sons. Without sufficient findings of fact or a ruling on the issue, this Court cannot properly review this issue. *Sparks, supra* at 159. Thus, this issue should be remanded for a characterization of these two policies and how they should be distributed.

After correctly characterizing the parties' property, the trial court may consider whether invasion of the property is necessary. *Reeves, supra* at 497.

Plaintiff last argues that, assuming that the Topinabee property is a marital asset, the trial court's distribution as a whole was unfair and inequitable. We disagree. After making findings of fact concerning the relevant factors, *Sparks, supra* at 159, the trial court made an almost completely equal division, giving plaintiff a slightly larger amount. In light of all the circumstances, the trial court did not err in its property distribution.

Affirmed in part, and reversed and remanded in part for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello