

STATE OF MICHIGAN
COURT OF APPEALS

MEREDITH LUHRS,

Plaintiff/Counter-Defendant-
Appellee,

v

MICHAEL S. WERTHEIM,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

May17, 2007

No. 271672

Houghton Circuit Court

Family Division

LC No. 05-013017-DO

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment of divorce. We affirm. The parties in this case married in 1992, when plaintiff was 55 years old and defendant was 61 years old. It was the second marriage for both parties and both had three children from their previous marriages. The parties spent most of their lives on the East Coast and moved to Michigan when defendant became a professor at Michigan Technological University. Plaintiff traveled extensively, and the parties spent a great deal of their marriage apart. After 1997, plaintiff rarely returned to the marital home in Michigan, but she did not file for divorce until 2005.

Defendant first argues that the trial court abused its discretion in using the date the divorce complaint was filed as the valuation date for his pension instead of using the date on which, in his opinion, the parties manifested an intent to live separate lives. We disagree. We review for an abuse of discretion a trial court's decision on a valuation date. *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). Although it is presumed that an asset should be valued from the date of trial or the entry of judgment, the circumstances of a case may warrant an earlier valuation date. *Byington v Byington*, 224 Mich App 103, 114, n 4; 568 NW2d 141 (1997); see *Thompson v Thompson*, 189 Mich App 197, 199-200; 472 NW2d 51 (1991). However, even in *Thompson*, which upheld an earlier valuation date because the objects of matrimony were destroyed before the complaint was filed, this Court did not try to determine the date of irreconcilable separation, but affirmed the trial court's determination that the date of the complaint could properly serve as a valuation date. *Thompson, supra*.

Coupled with this argument is defendant's challenge that the trial court clearly erred by finding that the parties did not manifest their intent to lead separate lives until plaintiff filed for divorce, and that the couple actually separated before 1997. We disagree. We review for clear

error a trial court's findings of fact in a divorce action. *Sparks v Sparks*, 440 Mich 141, 146, 151; 485 NW2d 893 (1992). Here, the record supports the trial court's finding that, despite the parties' unconventional marriage and frequent time apart, especially after 1997, they did not manifest their intent to lead separate lives until plaintiff filed for divorce in 2005. Plaintiff and defendant consummated their marriage whenever they were together. The parties vacationed together as husband and wife, and defendant visited plaintiff on various occasions. The pair attended social events together as husband and wife. Plaintiff was named as defendant's wife on the wedding invitation of defendant's daughter, and the parties attended the wedding as husband and wife. The parties made a mutual decision to have plaintiff begin drawing her social security benefit and went to the social security office together to fill out the paperwork. Further, defendant continued to pay for plaintiff's expenses, and plaintiff remained on defendant's health plan. Plaintiff testified that she never felt that she left defendant in 1997, just that she left Michigan. The trial court also found that the couple was accustomed to long periods of separation even before they married. After reviewing the evidence presented, we are not persuaded that the trial court clearly erred by determining that the couple manifested their intent to continue their marriage until the complaint was filed. Therefore, the record indicates that the parties did not manifest their intent to lead separate lives until after the complaint for divorce was filed, see *Wilson v Wilson*, 179 Mich App 519, 523-524; 446 NW2d 496 (1989), and the parties clearly did not separate, for property accumulation purposes, until plaintiff sued for divorce. See *Byington, supra* at 115-116. Because the trial court's factual and legal conclusions found evidentiary support, the trial court did not abuse its discretion in using the date the complaint for divorce was filed as the valuation date for defendant's pension. See *Thompson, supra*.

Defendant also argues that the trial court clearly erred by determining that plaintiff contributed to the marital estate after the parties separated in 1997. We disagree. Defendant's challenge lacks factual support. The trial court did not specifically find that plaintiff contributed anything in the way of money or service to the marital estate after 1997. Instead, it found that the couple did not manifest any intent to live separate lives until plaintiff filed the complaint for divorce. Although a lack of contribution may indicate a need to equitably adjust the trial court's apportionment of the marital estate, assets earned by a spouse during the marriage are generally considered part of the marital estate and subject to division. *McNamara v Horner*, 249 Mich App 177, 183-185; 642 NW2d 385 (2002). Therefore, we reject defendant's claim of error.

Defendant next argues that the trial court erred by declining to impute income to plaintiff despite finding that plaintiff had the ability to earn. We review for an abuse of discretion a trial court's decision to impute income. See *Rohloff v Rohloff*, 161 Mich App 766, 776; 411 NW2d 484 (1987). One of the factors to be considered in dividing the marital estate is the parties' ability to earn. *Sparks, supra* at 160. The trial court found that plaintiff had earning ability because of the potential she had to sell her sculptures, so it reduced her award of spousal support accordingly. However, the trial court declined to impute income to plaintiff, in recognition of the fact that she had not previously sold her work commercially. A trial court's decision to impute income must be based on a party's "actual ability and likelihood of earning the imputed income." *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998). Plaintiff had never relied on her sculpture as a source of income. Indeed, aside from two isolated instances, she had not received monetary compensation for her sculptures. The trial court did not clearly err in finding that plaintiff had earning ability. However, given the uncertainty that plaintiff would ever earn income from selling her work commercially, the trial court did not abuse its discretion

in declining to impute income to plaintiff. It should also be noted that in distributing the marital estate, the trial court properly attributed fault to plaintiff for her extensive travel and prolonged absences and adjusted its disposition accordingly. In light of all the facts, the trial court did not abuse its discretion by dealing with plaintiff's potential art income in its limited spousal support award rather than guessing at the appropriate amount of income to impute to plaintiff.

Defendant next argues that the trial court erred in considering his retirement income in relation to his earning ability. However, the record reveals that while the trial court referenced defendant's retirement income in relation to defendant's earning ability, it ultimately found that defendant did not have any ability to find work and earn an income. The trial court's brief reference to defendant's retirement income, in context, was an understandable reference to the parties' relative financial state. A thorough review of the record indicates that the trial court correctly found that defendant's working days were over, so defendant's claim of error fails.

Defendant next argues that the trial court's apportionment of his pension was not fair and equitable. We disagree. We will affirm a trial court's dispositional ruling unless we are "left with the firm conviction that the division was inequitable." *Sparks, supra* at 152. No single factor should be given undue weight, and the trial court's goal should be to achieve equity, not to punish one of the parties. *Sands v Sands*, 442 Mich 30, 36-37; 497 NW2d 493 (1993). Here, the trial court's distribution to plaintiff of less than half the amount defendant's pension earned during the marriage took into account all relevant factors, including plaintiff's fault. Again, defendant's reliance on the couples' "separation" from 1997 onward is unfounded. Under the circumstances, the distribution was fair and equitable in light of all the facts of the case.

Defendant next argues that the trial court erred by refusing to consider the appreciation in plaintiff's house as marital property subject to division. We disagree. Defendant did not preserve this issue below, and we review unpreserved claims of error for plain error. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004). In *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997), we held, "Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate assets with no invasion by the other party." A statutory exception exists under MCL 552.401 if one spouse "contributed to the acquisition, improvement, or accumulation of the property." Under this exception, if a spouse "significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Reeves, supra* at 495.

Defendant argues that he significantly assisted in the growth in value of plaintiff's home. However, the record reveals that plaintiff made improvements to her house immediately upon receiving it in the divorce settlement from her first marriage, thus contributing to its active appreciation. After plaintiff married defendant, she only invested routine maintenance and upkeep to the house, contributing to its passive appreciation through the usual inflation of real estate value over time. See *Reeves, supra* at 495; see also *Dart v Dart*, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999). Moreover, defendant's financial contributions to plaintiff's travel to her house, where she engaged in regular housekeeping activities, did not justify invasion of the asset under MCL 552.401, because they were "indirect and minor in nature." *Grotelueschen v Grotelueschen*, 113 Mich App 395, 401; 318 NW2d 227 (1982).

Defendant next argues that the trial court erred in awarding plaintiff a set of café tables, which plaintiff brought into the marriage. Defendant testified that the tables were virtually worthless until he paid to have them refinished. However, even if defendant's financing of the restoration of the café tables constituted a contribution significant enough to justify invasion under MCL 552.401, he fails to present any evidence that the trial court's award of the café tables to plaintiff was unfair and inequitable. The tables were part of set and were items of personal property which plaintiff brought into the marriage, presumably having some sentimental value. Without more, we will not disturb the trial court's award of the tables to plaintiff.

Defendant also argues that the trial court erred in awarding 25 percent of the value of the marital home to plaintiff and 75 percent of the value of the marital home to defendant. When defendant accepted the professor position at Michigan Tech, the parties were engaged, and traveled together to the Upper Peninsula to select the marital home. Defendant purchased the marital home and had the house titled in both parties' names as joint tenants with rights of survivorship, in anticipation of the impending nuptials. Defendant financed, and plaintiff assisted in conducting, repairs, renovations, and remodeling before the parties married. During the marriage, the parties shared basic household chores, and plaintiff designed some household furniture. The parties also did landscaping work together. The marital home, including the improvements made before the marriage, all of which defendant financed with his personal funds, constituted defendant's separate property. *Reeves, supra* at 493-494. Accordingly, "the equity built up before the parties' marriage, and any appreciation that occurred before the parties' marriage [was] defendant's separate estate." *Id.* at 496. Conversely, "[t]he sharing and maintenance of a marital home affords both spouses an interest in any increase in its value . . . over the term of a marriage. Such an amount is clearly part of the marital estate." *Id.* at 495-496.

Here, plaintiff contributed to the acquisition, improvement, and accumulation of the property, and significantly assisted in the acquisition and growth of the marital home. The trial court recognized that the marital home was defendant's separate property and that plaintiff would generally only be entitled to a portion of its increase in value which occurred during the marriage, had it not been for her contribution to its acquisition and growth. However, the trial court attributed significant weight to the fact that defendant financed the entire purchase of the house, and awarded only 25 percent of the value of the home to plaintiff, and 75 percent of the value of the home to defendant. The trial court's dispositional ruling was fair and equitable in light of the facts of the case.

Defendant next argues that the trial court failed to consider the relevant factors when awarding spousal support to plaintiff. We review for clear error a trial court's factual findings relating to an award of spousal support. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). In determining whether an award of spousal support is warranted, the trial court may consider the ability of the parties to work, as well as the ability of the parties to pay spousal support. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). Although the trial court only directly referred to the parties' ability to earn, it is clear from the trial court's statements that this encompassed the ability of the parties to work and pay spousal support. Therefore, defendant's argument is unfounded. Defendant argues that the trial court failed to address the source and amount of property awarded to the parties in determining whether an award of spousal support was warranted. However, the record demonstrates that the trial court distributed

the marital estate between the parties immediately before rendering its award of spousal support and that the limited award of spousal support was anticipated throughout the division of marital property. Therefore, this argument also fails.

Defendant next argues that the trial court's award of spousal support to plaintiff in the amount of \$500 a month for three years was not fair and equitable in light of the facts. "The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case." *Id.* In deciding an appropriate amount of spousal support, the trial court attributed significant weight to its finding that plaintiff had the ability to earn from her sculpting, but that she had not previously used her sculpting as a regular source of income. On this basis, the trial court indicated that it was significantly reducing plaintiff's award of spousal support. Plaintiff's only source of income, aside from her share of defendant's pension, was \$550 a month in social security. Defendant's income, by his own account, was approximately \$47,000 a year. The trial court's award of \$500 a month, totaling \$6,000 a year, for the limited duration of three years, will not require defendant to dissipate his property award or his premarital assets. The trial court's award of spousal support achieved the objective of balancing the incomes and needs of the parties in a way that will not impoverish either party, and was just and reasonable under the circumstances of the case. *Id.*

Defendant also argues that the trial court erred in its management of the trial, including the parties' closing arguments. We review this unpreserved claim for plain error. *Veltman, supra.* According to MCR 2.507(E), "the parties may rest their cases with or without final arguments." Similarly, MCR 2.507(F) provides, "The court may limit the time allowed each party for . . . final arguments. It shall give the parties adequate time for argument, having due regard for the complexity of the action . . ." A trial court has broad discretion in matters of trial conduct, including limiting arguments of counsel. *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971).

The record indicates that the trial court's time management of the trial was reasonable. The attorneys estimated a half-day trial, and this was a relatively straightforward divorce case with the parties as the only witnesses. Persevering into the early evening to complete the case was practical and efficiently used judicial resources. By the same token, limiting the parties' closing argument to specifically addressing the disputed issues at trial was also reasonable. The record reveals that the trial court did not want the parties to waste time making generalized arguments and reciting case law and factors related to property division and spousal support. Instead, the trial court requested the attorneys to provide specific valuation figures, as well as evidence supporting and the rationale for, those figures. The trial court's treatment of the case complied with MCR 2.507(F), because the attorneys were given adequate time to argue their positions and advocate for their clients on the disputed issues in the case. Under the circumstances, the trial court did not abuse its discrimination by limiting the parties' closing arguments.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis