

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS FREDERICK MARICK,

Plaintiff-Appellee,

v

MARY JO MARICK,

Defendant-Appellant.

UNPUBLISHED

December 21, 2023

No. 363945

Calhoun Circuit Court

LC No. 2021-003081-DO

Before: RIORDAN, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

In this appeal by right from a judgment of divorce (JOD) that dissolved the marriage of plaintiff, Thomas Frederick Marick, and defendant, Mary Jo Marik, defendant contends that the trial court erred by: (1) determining that plaintiff's trust account was separate property; (2) failing to equitably divide plaintiff's trust account and retirement account; (3) awarding defendant alimony in gross of only \$30,000; (4) deeming spousal support nonmodifiable; and (5) denying defendant's request for security for plaintiff's payment of the alimony in gross. For reasons explained herein, we affirm in part, vacate in part, and remand to the trial court for further proceedings consistent with this opinion.

I. RELEVANT FACTS

Plaintiff and defendant were married on December 13, 1991. At the time, plaintiff was 58 years old and defendant was 44 years old, and both had children from previous relationships. Plaintiff had worked for Post Cereal for more than two decades before the marriage, and he continued his employment until his retirement in 1996. Defendant worked as a customer service manager at Cello-Foil Products before and during the early part of the marriage, but her job was eliminated in 1994. The company offered her a different position that would have required a 90-minute, roundtrip commute. She and plaintiff agreed that she did not have to take the job, especially because of the commute. Over the years, she had seasonal, part-time jobs at a couple of retail stores, but at the time of the trial, she had been out of the job market for 28 years. Upon the passing of his mother in 2003, plaintiff inherited a family trust account that he intended to be for the benefit of his adult children.

The parties separated on or about October 9, 2021, when defendant moved out of the marital home. Plaintiff filed a complaint for divorce in November 2021. At the time of trial, plaintiff was 88 years old and defendant was 74 years old, and their testimonies and evidence primarily concerned how the trial court should treat plaintiff's trust account and individual retirement account (IRA), and whether to award spousal support. After the two-day bench trial, the trial court granted the divorce. The trial court found that the financial balances that each party accumulated in their respective IRAs before the marriage were separate assets to be awarded to the party who acquired the funds. As of September 20, 2021, the nonmarital portion of defendant's retirement account was approximately \$55,894; as of October 31, 2021, the nonmarital portion of plaintiff's retirement account was approximately \$764,862. The trial court found that each party had a half interest in the portion of the other party's IRA earned during the marriage and ordered calculation of these respective interests using a coverture factor. This resulted in plaintiff paying defendant \$58,991 by a qualified domestic-relations order. The trial court awarded to plaintiff as his separate property the trust account, which had a balance of \$420,481 as of October 31, 2021. The trial court awarded defendant \$30,000 in alimony in gross, to be paid in monthly installments of \$500 for five years. Defendant now appeals.

II. ANALYSIS

A. STANDARDS OF REVIEW

In deciding a divorce action, a trial court must make findings of fact and dispositional rulings. On appeal, we uphold factual findings unless they are clearly erroneous and dispositional rulings unless we are left with a firm conviction that they were inequitable. See *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). A trial court's legal conclusions are reviewed de novo. *Hein v Hein*, 337 Mich App 109, 115; 972 NW2d 337 (2021).

Whether to award spousal support is in the trial court's discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). On appeal, we review for clear error the findings underlying an order of support. *Id.* "The findings are presumptively correct and the burden is on the appellant to show clear error." *Id.* If the trial court's findings are not clearly erroneous, we must then determine whether the dispositional ruling was equitable in light of the facts, *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992), or constituted an abuse of discretion, *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). An abuse of discretion occurs when the result is outside the range of reasonable and principled outcomes. *Id.* The trial court's decision as to spousal support must be affirmed unless we are firmly convinced that it was inequitable. *Sparks*, 440 Mich at 151-152.

B. SEPARATE PROPERTY

Defendant first contends that the trial court erred by determining that plaintiff's trust account was separate property. Defendant argues that plaintiff's multiple transfers between the trust account and the parties' marital account rendered the entire trust account marital, and that the trust account was marital because plaintiff used it as a reservoir of funds to use to replenish the marital estate, if necessary. We disagree.

A "trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 493-494; 575

NW2d 1 (1997). Generally, an inheritance received by one spouse during the marriage, but kept separate from the marital property, retains its separate character. See *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010), citing *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). Nevertheless, “separate assets may lose their character as separate property and transform into marital property if they are comingled with marital assets and treated by the parties as marital property.” *Cunningham*, 289 Mich App at 201 (quotation marks and citation omitted). “The actions and course of conduct taken by the parties are the clearest indicia of whether property is treated or considered as marital, rather than separate, property.” *Id.* at 209.

The trial court acknowledged that plaintiff transferred \$235,058.77 from the trust account to the joint account, and then transferred \$79,370 back into the trust account. Although the trial court found that the approximately \$155,000 of trust account money that remained in the joint account was marital property, the trial court found that the transfers were insufficient to render the entire trust account as comingled and, therefore, that the trust account was plaintiff’s separate property. This finding was not clearly erroneous.

On appeal, defendant implies that the more than two dozen transfers of funds into and out of the trust account was evidence of the comingling of trust funds with marital funds. At trial, defendant focused on transactions that occurred in February 2018 and on plaintiff’s transfers of \$4,400 from his IRA into the trust fund between April 2021 and March 2022. However, defendant has presented no evidence that transactions other than those identified at trial were made between the trust account and the marital account. In addition, defendant has provided no evidence indicating that the amount that remained in the trust account after the February 2018 transfers was ever comingled with marital funds. Further, the \$79,370 that was transferred back into the trust account did not lose its character as separate property simply by being transferred into a marital account for a short period. See *id.* at 208 (indicating that the deposit of separate property into a joint account does not, in and of itself, render the property marital).

Defendant argues that plaintiff’s testimony that he “probably moved at different times different monies that just balance accounts, etcetera and wherever the funds were needed” indicated that the trust account served as a reservoir of funds to replenish the marital estate if and when the need arose, implying thereby that plaintiff intended the account to be a marital account. However, defendant provides no authority for her position that using the trust account as a short-term borrowing device by transfers from, and replenishments to, the account transforms the entire account into marital property. See *Hodge v Parks*, 303 Mich App 552, 557; 844 NW2d 189 (2014) (“Plaintiff fails to show that defendant’s actions constitute a comingling of assets—namely, she offers no authority that a properly accounted-for loan from, or repayment to, a premarital account transforms that premarital account into marital property.”). Despite this activity, neither plaintiff nor defendant treated the trust account as marital property. See *Cunningham*, 289 Mich App at 209. Plaintiff testified that he intended the trust to benefit his adult children from a previous relationship, and defendant testified that she had nothing to do with the trust account, and understood that plaintiff was leaving the trust account to his children and that she “would not get a penny of that money.” In light of the foregoing, we conclude that defendant has not established that the trial court clearly erred by finding that the trust account was plaintiff’s separate property.

Defendant next argues that the trial court should have invaded plaintiff’s separate assets, i.e., the trust account and plaintiff’s retirement account, to give her a larger property award in light

of the length of the parties' marriage, defendant's age, and general principles of equity. Defendant has not established error.

"Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Reeves*, 226 Mich App at 494. A trial court may award one party's separate property to another party if the claimant contributed to the "acquisition, improvement, or accumulation of the property," MCL 552.401, or if the claimant's award is "insufficient for the suitable support and maintenance" of the claimant, MCL 552.23(1). This Court has interpreted MCL 552.23 to mean "that invasion is allowed when one party demonstrates additional need." *Reeves*, 226 Mich App at 494.

Defendant argues that, given the length of the marriage, the fact that she diminished her retirement by leaving the workforce two decades before the traditional retirement age on the basis of plaintiff's representations that she did not have to work, that her age now prevented her from reentering the workforce, and the amount of assets available to plaintiff, she should not have to consume her property award to support herself but should be allowed to keep it intact in case she needs to enter an assisted living facility later in life.

The flaw in defendant's argument is that she does not account for the income that she can earn from the over \$400,000 in liquid assets that she was awarded in the divorce. Rather, her argument relies on cases in which this Court determined that parties to divorce actions should not have to consume their property awards to support themselves. See, e.g., *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995). This proposition arose, however, under circumstances involving sizable awards of property that were not income-producing and, therefore, were incapable of meeting the recipient's needs. See *Gates*, 256 Mich App at 437; *Hanaway*, 208 Mich App at 296.

In the present case, defendant has not argued that the trial court's award of significant, income-producing liquid assets is insufficient to meet her needs. Rather, she contrasts her postseparation life with that of plaintiff, stating that, although plaintiff's lifestyle remained roughly the same, she was "relegated to poverty" and barely able to rent a small basement apartment. However, the facts suggest that defendant's economic circumstances were changed by the award of substantial liquid assets, the investment of which could generate sufficient income to allow her to have a standard of living comparable in some respects to the one she enjoyed when married. Defendant cites no authority for her assumption that she should not be expected to use the income from income-producing assets to support herself. Because defendant's argument fails to consider the effect of the assets awarded her, she has not met her burden to prove that her award is insufficient for her suitable support and maintenance, MCL 552.23(1). We conclude, therefore, that defendant has not established that the trial court abused its discretion by declining to invade plaintiff's separate property.

C. SPOUSAL SUPPORT

Defendant contends that the trial court's award of \$30,000 in alimony in gross, payable in monthly installments of \$500 for five years, was inequitable because it failed to balance the income and needs of the parties. We agree.

MCL 552.13(1) authorizes a trial court to require either party in a divorce action to pay spousal support “for the suitable maintenance of the adverse party.” “The objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and support is to be based on what is just and reasonable under the circumstances of the case.” *Woodington*, 288 Mich App at 356. Trial courts may order support “in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.” MCL 552.23(1). Among the factors the court should consider when determining whether to award spousal support are the following:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties’ ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties’ health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party’s fault in causing the divorce, (13) the effect of cohabitation on a party’s financial status, and (14) general principles of equity. [*Loutts v Loutts*, 298 Mich App 21, 31; 826 NW2d 152 (2012) (quotation marks and citation omitted).]

“The trial court should make specific factual findings regarding the factors that are relevant to the particular case.” *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010) (quotation marks and citation omitted).

The trial court in the present case reviewed the foregoing factors on the record and made factual findings about each of them. Defendant implies on appeal that the trial court’s finding regarding plaintiff’s income was erroneous, and she argues that the alimony-in-gross award of \$30,000 was neither just nor reasonable given the length of the marriage, the age of the parties, and the disparity in incomes between plaintiff and defendant. This has some merit.

It appears from the record that the trial court erred in its findings regarding the parties’ postjudgment income by excluding from its estimation of plaintiff’s income the annual return from his IRA. When discussing plaintiff’s income, the trial court only mentioned plaintiff’s social security income and dividends, which the court estimated to total approximately \$40,000. It is clear from the record, however, that even if the corpus of the IRA was plaintiff’s separate property, the income from the IRA was a marital asset that both parties enjoyed during the marriage. Joint tax returns from 2018 to 2021 indicated that IRA income varied from \$64,209 in 2018 to \$68,265 in 2021. Even after transferring half the marital portion of his IRA to defendant (approximately 7%), plaintiff’s income from his IRA could still be expected to remain around \$60,000. Adding to this plaintiff’s approximately \$20,000 in social security income, it is likely that plaintiff’s annual income will approximate \$80,000, not counting any dividend income that he might receive. Moreover, plaintiff will not have the expense of a mortgage.

The trial court indicated that defendant’s annual income would be approximately \$15,708. This is 39% of the income that the trial court estimated for plaintiff, but less than 20% of plaintiff’s income when his IRA income is included. Adding \$500 in monthly alimony in gross would

increase defendant's amount to \$21,708 annually, 54% of the income ascribed to plaintiff by the trial court, but less than 30% of plaintiff's actual income. In addition, defendant will have the expense of establishing herself in housing. Certainly, the divorce award did not leave defendant impoverished, see *Woodington*, 288 Mich App at 356, and her investment of the liquid assets that she received in the JOD can, eventually, offset the disparity in the parties' incomes to a certain extent. Nevertheless, because the trial court appears to have based its alimony-in-gross award on an error in its estimation of plaintiff's income, the award does not balance the income and needs of the parties.

In light of the trial court's error in estimating plaintiff's income and the disparity between the parties' incomes and needs, the trial court's award of alimony in gross was neither just nor reasonable, as it did not balance the parties' incomes and needs. Therefore, we vacate the trial court's award of alimony in gross and remand the case to allow the trial court to structure an award that accurately reflects and balances the parties' incomes and needs.

Finally, defendant raises two other issues regarding the award of alimony in gross, neither of which has merit. She first contends that the trial court abused its discretion by inserting a waiver of modifiability of spousal support in the JOD. Defendant has waived this issue by acknowledging in the trial court that alimony in gross is nonmodifiable. See *Friend v Friend*, 486 Mich 1035, 1035 (2010) ("Alimony in gross is nonmodifiable."). Further, defendant's assertion that the trial court erred by inserting a waiver of modifiability has no basis in the language of the trial court's JOD.

Defendant next contends that the trial court erred by not providing security for her award of alimony in gross, given plaintiff's advanced age. The Uniform Spousal Support Order (USSO) that was entered with the JOD ordered plaintiff to pay defendant \$500 per month until August 1, 2027; the order does not terminate upon the death of the payer, the death of the payee, or the remarriage of the payee. Defendant does not address the terms of the USSO or explain how the USSO fails to provide the security she desires, nor does she provide any authority requiring the trial court to provide any security, let alone different or additional security, for her award. Under these circumstances, defendant has failed to establish error on the part of the trial court.

III. CONCLUSION

For the foregoing reasons, we vacate the trial court's grant of alimony in gross and remand to that court to allow it to craft an award that accurately reflects and balances the parties' incomes and needs. We affirm otherwise. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Christopher M. Murray
/s/ Michael J. Kelly