

STATE OF MICHIGAN
COURT OF APPEALS

JANE ELLEN McNAMARA,
Plaintiff-Appellee/Cross-Appellant,

v

ALBERT OCTAVE HORNER,
Defendant-Appellant/Cross-Appellee.

FOR PUBLICATION
January 11, 2002
9:05 a.m.

No. 216018
Oakland Circuit Court
LC No. 96-532736-DO

Updated Copy
March 15, 2002

Before: White, P.J., and Wilder and Zahra, JJ.

WHITE, P.J. (*concurring in part and dissenting in part*).

I agree that the trial court correctly determined that the entire appreciation of the Michigan Credit Union retirement funds and Mutual of America tax-deferred annuities during the marriage was part of the marital estate and thus join in § III A, *ante* at ____, of the majority opinion.

I do not, however, agree with the majority that the trial court failed to make sufficiently specific findings of fact regarding the property division or that it is necessary to remand to determine whether the fifty-five percent/forty-five percent division of the marital property was equitable. Thus, I dissent from § III B, *ante* at ____, and § III D, *ante* at ____, of the majority opinion. Regarding defendant's retirement/severance package from Credit Counseling Centers (CCC), I conclude that the trial court did not err in treating the payments as income, but would remand for reconsideration of certain payments received during the marriage.

I

The trial court's opinion of July 21, 1998, which is referred to in the judgment of divorce, states in pertinent part:

Plaintiff, Jane Ellen McNamara, and Defendant, Albert Octave Horner, were married on December 18th 1987. There were no children born of this marriage. Plaintiff was born on August 19, 1954, (now 44), and Defendant was born on March 7, 1926, (now 72).

Plaintiff filed her complaint for divorce on October 24, 1996, to which an answer to complaint was filed on May 7, 1997, with a counter-complaint for divorce and answer to counter-complaint having been filed on or about January 8, 1998.

This is the second marriage of Defendant, who has four adult children by his prior marriage, and the third marriage of Plaintiff, to whom no children have been born. Defendant, who has two years of college courses, founded Credit Counseling Centers, Inc., in 1963 [sic 1961¹]. At the time of the marriage he was the president and CEO of Credit Counseling Centers, Inc. Plaintiff possesses a master's degree in family and money management and at the time of the marriage was administrative assistant to Defendant. She had worked for the company for approximately seven years prior to the marriage.

Subsequent to their marriage, Plaintiff assumed an executive position with Credit Counseling Centers, Inc., and Plaintiff's anticipated replacement of Defendant as president and CEO of Credit Counseling Centers, Inc., has now occurred.

Each of the parties have, during the course of their marriage in their executive positions, enjoyed substantial compensation which will continue for Plaintiff, with Defendant now being limited to the compensation received annually for three years, pursuant to the provisions of the confidential release agreement, consulting agreement, and nondisclosure and agreement not to compete entered into October 22, 1997, between Defendant and Credit Counseling Centers, Inc.

After trial, both sides agreed to submit proposed findings of fact and conclusions of law and the Court took the matter under advisement.

FINDINGS OF FACT AND CONCLUSION [sic] OF LAW

The Court finds a breakdown in the marital relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. Thus, the Court will grant an absolute judgment of divorce to Plaintiff. Fault does not appear to be an issue in this case. Sadly, the parties appear to have just grown apart.

Property Division

It is undisputed that this Court has jurisdiction of the within cause and that a Judgment of Divorce should be granted. *The major issues in dispute are the manner of property division in view of the premarital assets of the respective*

¹ Defendant testified that he was one of the persons who originally founded CCC, in August 1961.

parties, the passive growth of same, and determining the appropriate date of valuation for said property division.

[discussion of applicable law and the date of valuation omitted]

. . . .In exercising its discretion [to determine the date of valuation], this Court does note that evidence was presented that the parties maintained a joint checking and savings account during the pendency of their marriage until January 23, 1998, out of which joint obligations, such as the mortgage on the marital home, were paid. All of the parties' employment compensation went into these accounts. And, throughout the marriage, the parties used these funds to keep up their premarital and postmarital assets. Accordingly, this Court finds that the case of *Byington v Byington*, 224 Mich App 103 (1997) is controlling.

* * *

Summary of Marital Assets

Joint Trial Exhibit No. 1 summarizes all of the assets which the parties agree identify all of the assets of the parties, either jointly or separately. . . .

* * *

Joint Exhibit 1 lists the sum of \$168,034.47 as a marital asset, being NBD Account []. Testimony at trial indicated that most of these amounts were deposited after the parties' physical separation and were made up of bonus and other compensation associated with defendant's *severance agreement and retirement package*. *Given the disparity of the parties' future income and earning potential, this Court will exclude all of this sum from its compilation of marital assets, choosing to treat said monies more like income rather than property.* [Emphasis added.]

The trial court awarded the parties the values of their respective premarital assets and one-half of the marital estate, including the retirement accounts and plaintiff's Huntington Bank stock, and excluding defendant's severance package.²

Plaintiff filed a posttrial motion, which was addressed as follows in the trial court's September 22, 1998, opinion and order:

In Plaintiff's first assertion of error, Plaintiff argues that the Huntington Bank stock, which was treated as marital property in the Court's July 21, 1998,

² Under the initial distribution, plaintiff received \$1,081,260.56 in marital property, and \$50,769.46, representing premarital assets, for a total of \$1,132,030.32. Defendant received \$1,081,260.57 in marital assets, \$334,053.81, representing premarital assets, and \$168,034.47 as proceeds from the severance agreement, for a total of \$1,583,348.75.

Opinion, should, in reality, have been treated as separate property and not included in the division of the marital assets.

After reviewing the matter, this Court agrees with Plaintiff's position. In so holding, it will be necessary for this Court to redivide the remaining marital assets as defined in this Court's Opinion of July 21, 1998. In dividing marital property, the Michigan Supreme Court in *Sparks v Sparks*, 440 Mich 141 (1992) has instructed Michigan trial courts to consider the following factors whenever they are relevant to the circumstances of a particular case in property division:

Duration of the marriage.

Contributions of the parties to the marital estate.

Age of the parties.

Health of the parties.

Life status of the parties.

Necessities and circumstances of the parties.

Earning abilities of the parties.

Past relations and conduct of the parties.

General principles of equity.

Any additional factors relevant to a particular case, such as the interruption of a party's career or education.

In weighing the foregoing factors, a court must not assign disproportionate weight to any one factor. *Id* at 158. The Supreme Court articulated the following guidelines:

"It is not desirable, or feasible, for us to establish a rigid framework for applying the relevant factors. The trial court is given broad discretion in fashioning its rulings and there can be no strict mathematical formulations But . . . while the division need not be equal, it must be equitable Just as the final division may not be equal, the factors to be considered will not always be equal. Indeed, there will be many cases where some, or even most, of the factors will be irrelevant. But where any of the factors delineated . . . are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors" *Id.*, at 158-159.

In applying the above-referenced principles, the Court has already found certain factors as articulated in its Opinion of July 21, 1998. By taking out the Huntington stock, the Court feels that an equal division of the property would not

*be equitable. Rather, a fifty-five to forty-five percent split in favor of Defendant would be more appropriate under the circumstances of this case. Given the age disparity of the parties and their present and future earning potential, such a division appears fair.*³ [Emphasis added.]

The trial court's opinions set forth facts regarding the duration of the marriage, contributions to the marital estate, life status, fault,⁴ earning abilities, ages, and education. As the trial court noted, the issues had been narrowed considerably before trial. I conclude that the trial court considered and made specific findings of fact concerning the factors relevant to this case. *Sparks v Sparks*, 440 Mich 141, 160; 485 NW2d 893 (1992). The factual findings were adequate and were not clearly erroneous.⁵

II

³ Under the revised distribution, plaintiff received \$807,414.64 in marital assets, \$50,769.46 representing premarital assets, and \$402,000 in Huntington Bank stock, for a total of \$1,260,184.10. Defendant received \$986,840.11 in marital assets, \$334,053.81, representing premarital assets, and \$168,034.47 severance proceeds, for a total of \$1,488,928.39.

⁴ The court found neither party solely responsible for the breakdown of the marriage, but rather, that they had grown apart.

⁵ I note that plaintiff's counsel's opening statement was similar to the trial court's statement of the facts in its July 21, 1998, opinion:

Your Honor, the evidence in this case will show, in accordance with the factors set forth in the case of *Sparks v Sparks*, that this is a ten-year marriage, that both of the parties worked throughout the duration of this marriage for the same corporation, and both of these parties made equal contributions, while working, to this marital estate. Not necessarily in terms of the income they contributed, but in terms of the efforts that they contributed.

The evidence of this case will show that my client is now 43 years old, and her husband is 72 years old. The evidence will show, or the lack of evidence will show that neither party is complaining of any health problem would [sic] be relevant to the *Sparks* factors.

The life status of the parties, the evidence in this case will show, that my client continues to work for the Credit Counseling Center, and that Mr. Horner, although he is retired from that company, is serving as a consultant, and is being compensully (phonetic)—handsomely compensated for his services.

But the real evidence that we're talking about here today, that this case will show, is that these people, between them, have approximately 2.9 million dollars

Defendant's retirement/severance package⁶ from CCC consisted of a consulting fee, to be paid out over three years beginning in 1998, a pension contribution, a payment in exchange for a release, bonus payments for 1996 and 1997, and benefits including health, life, long-term care and liability insurance, an automobile lease, country club membership dues, and expenses associated with CCC business. The documents also included an agreement not to compete and a release.

Defendant deposited in a National Bank of Detroit (NBD) account part or all of the monetary portion he received in 1998 from the CCC retirement/severance package, and the bonus he received in 1998 for 1997, his last year of employment with CCC. The trial court concluded regarding this NBD account:

Joint Exhibit 1 lists the sum of \$168,034.47 as a marital asset being NBD Account []. Testimony at trial indicated that most of these amounts were deposited after the parties' separation and were made up of bonuses and other compensation associated with Defendant's severance agreement and retirement package. *Given the disparity of the parties' future income and earning potential, this Court will exclude all of this sum from its compilation of marital assets, choosing to treat said monies more like income rather than property.* [Emphasis added.]

I think it clear from the trial court's decision that the court understood that the severance payments were a marital asset in the sense that the \$168,034.47 was listed as such on the exhibit and at least some of the payments were made during the marriage. The court, however, also considered, as the majority directs it to do on remand, whether in the context of the entire marriage, a division of the proceeds of the severance package would be equitable.

Defendant cofounded CCC in August 1961 and was its president and chief executive officer (CEO) until his retirement on December 31, 1997. When the parties married in December 1987, defendant had been at CCC for more than twenty-six years. Plaintiff filed for divorce in October 1996, at which time she was chief financial officer of CCC. Plaintiff testified that it had been anticipated since May 1994 that she would take defendant's place as president and CEO of CCC upon his retirement. At the time of trial in March 1998, plaintiff was president and CEO of CCC and was forty-three years old, while defendant had retired and was seventy-two years old. There was no reason to believe that plaintiff's employment as the CEO of CCC would not continue, with her earning compensation, bonuses, pension payments, and fringe benefits similar to those the parties had enjoyed in the past. While the three-year severance package may not have been the exact equivalent of plaintiff's expected compensation over the three-year period, there was sufficient parity to justify the court's decision to treat the severance proceeds "more like income rather than property."

I would, however, remand for further fact-finding with instructions to the court to reconsider the distribution of the payments received during the marriage to the extent that

⁶ The circuit court reviewed this confidential package in camera.

comparable payments to plaintiff had already been received and were treated as marital property. Thus, if the court determines that plaintiff's 1996 and 1997 bonuses were paid before trial and were incorporated into the marital estate, defendant's comparable bonuses should be similarly treated, or plaintiff's bonuses should be awarded to her as separate income.⁷ Likewise, to the extent that plaintiff's 1998 compensation was treated as marital property, a proper adjustment should be made.

In sum, while I join in § A of the majority opinion, I further conclude that the trial court's two opinions sufficiently explain the court's decision to divide the marital assets 45/55, that the division was equitable given the parties' life status, including the disparity in the parties' ages and earning potential, and that the court was justified in treating the severance payments more like income than property. Thus, I would affirm, except with regard to the limited issue set forth above.

/s/ Helene N. White

⁷ There was, in fact, testimony regarding the parties' bonuses and how they were computed, including that CCC began paying bonuses on a regular basis within the five years before trial, that both parties had received bonuses for the last five years, that the amount of the bonuses was up to fifty percent of base salary, and that bonuses were generally paid out during the calendar year following the year to which the bonus applied.