

STATE OF MICHIGAN
COURT OF APPEALS

STEWART L. GINGRICH,

Plaintiff-Appellant,

v

JOAN E. VANDERWERP,
f/k/a JOAN E. GINGRICH

Defendant-Appellee.

UNPUBLISHED

August 29, 1997

No. 185495

Macomb Circuit Court

LC No. 91-000610

Before: Doctoroff, P.J., and MJ Kelly and Young, JJ.

PER CURIAM.

On September 27, 1994, the trial court entered a Qualified Domestic Relations Order (QDRO) dividing plaintiff's military pension. This Court granted leave to appeal on August 25, 1995. We affirm.

Plaintiff and defendant were married in May of 1967. On February 11, 1991, plaintiff filed a complaint for divorce, and on May 11, 1992, a judgment of divorce was entered dissolving the marriage. The judgment provided that defendant was entitled to 50 percent of plaintiff's U.S. Coast Guard retirement pay, subject to its value on February 11, 1991. A copy of the judgment was submitted to the Coast Guard, but the Coast Guard rejected it as not complying with the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC § 1408. A referee hearing was held at which defendant called an expert witness who specialized in advising domestic relations lawyers on the division and valuation of military retired pay and civil service pensions. A QDRO, which was drafted by defendant's expert, was entered by the court on August 2, 1994. It provided for a determination of defendant's share of plaintiff's retirement benefits based on "retired pay of a person with Member's [plaintiff's] pay grade and time in service on February 11, 1991." An amended QDRO was entered on September 27, 1994, which replaced the above quoted language with "retired pay of a person with Member's pay grade and time in service on February 11, 1991, *using pay tables at time Member retires.*" (Emphasis added.)

The amended QDRO provided that defendant's share of plaintiff's retirement benefits was to be calculated according to a formula which determined the value based on plaintiff's pay grade and time of

service as of February 11, 1991, using the pay tables at the time plaintiff retires. In plaintiff's first argument, he contends that defendant's share should be a specific amount to which defendant would be entitled if plaintiff retired on February 11, 1991. Therefore, the difference between the amount suggested by plaintiff and the amount required by the QDRO is that the latter takes into account cost of living increases by using the pay table at the time plaintiff retires as opposed to the pay table at the time of divorce. Plaintiff argues that the QDRO was contrary to Michigan law which provides that the determination of a spouse's share of retirement benefits may not be based on credit accrued before marriage or after divorce. We disagree.

In reviewing a property distribution in a divorce, this Court must first review the trial court's findings of fact under the clearly erroneous standard. *McMichael v McMichael*, 217 Mich App 723, 728; 552 NW2d 688 (1996). If the findings are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Id.* The ruling should be affirmed unless this Court is left with a definite and firm conviction that a mistake has been made. *Id.* Generally, the party seeking to include a pension for distribution in the property settlement bears the burden of proving the reasonably ascertainable value of the pension. *Magee v Magee*, 218 Mich App 158, 164; 553 NW2d 363 (1996). Military retirement pay is properly considered a marital asset in Michigan. *Chisnell v Chisnell*, 149 Mich App 224, 227; 385 NW2d 758 (1986).

The USFSPA provides that a court may award a former spouse up to 50 percent of a service member's retirement benefits, in accordance with state law. 10 USC § 1408(c)(1). Section 1408(d)(1) further provides that, after effective service on the federal government, the government shall make payments from the disposable retired pay of the member directly to the former spouse in the amount specifically required in the court order.

MCL 552.18(1); MSA 25.98(1) provides:

Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.

We do not believe that a cost of living increase is equivalent to a service credit accrued after marriage. Because defendant would be entitled to the present value of plaintiff's pension were she to be paid now, and payment is deferred until plaintiff's retirement, a fair and equitable distribution of the pension requires that defendant should be given the value of the pension when plaintiff actually receives it. Accordingly, we find that, in awarding benefits to defendant, it was not error that the QDRO accounted for the pension's cost of living increases. Such award was properly within the discretion of the trial court. *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995).

Plaintiff next argues that the QDRO is inconsistent with the judgment of divorce. The judgment provides that plaintiff shall make effective service of process pursuant to the USFSPA to provide for

direct monthly payments to defendant of 50% of his disposable retired pay, subject to its value on February 11, 1991. The QDRO provides that defendant's share of plaintiff's retirement benefits must be based on the pay of a retired person with plaintiff's pay grade and time in service on February 11, 1991, using pay tables at time plaintiff retires. Because the judgment does not make reference to the pay tables, plaintiff argues that the QDRO is inconsistent with the judgment. We disagree.

Courts are bound to uphold property settlements reached through negotiations and agreement by the parties in a divorce action absent fraud, duress, or mutual mistake. *Vigil v Vigil*, 118 Mich App 194, 197; 324 NW2d 571 (1982). However, where a property settlement is ambiguous, the court has inherent power to interpret and clarify its terms. *Id.* In the instant case, the QDRO was necessary because the judgment did not conform to the requirements of the USFSPA. The QDRO and the judgment of divorce were consistent in that both required that the pension be valued according to plaintiff's rank and time of service as of February 11, 1991. Accordingly, the trial court did not err in entering a QDRO which clarified the terms of the divorce judgment by specifying the pay tables to be used when valuing plaintiff's retirement plan.

Lastly, plaintiff argues that the QDRO improperly limited his future employment options. We disagree. The QDRO provides:

13. Member shall not pursue any course of action that would defeat, reduce, or limit Former Spouse's right to receive the share awarded herein. Such prohibited actions include, by way of illustration and not limitation, acceptance of disability pay, waiver of retired pay to accept Veterans' Administration disability compensation, acceptance of employment that would reduce or limit his retired pay, and merger of his military retirement with any other retirement. Member shall indemnify and hold harmless Spouse for any breach of this provision from funds of whatever source.

14. Such indemnification shall be in an amount necessary to result in a payment to Former Spouse of the amount of retired pay that would have been paid notwithstanding action by Member. Member may make the necessary payment by an allotment from his retired pay or by direct monthly payments to Former Spouse or an account of her designation.

Defendant argues that this language does not foreclose plaintiff from future employment, but provides that plaintiff will indemnify defendant if he does anything to defeat or decrease her benefit. Neither party cites any authority to support their arguments. However, we believe that paragraphs 13 and 14 quoted above are consistent with the requirement in the judgment that plaintiff's pension be valued as of February 11, 1991. Accordingly, we cannot agree with plaintiff that such paragraphs in the QDRO constituted clear error. Moreover, we do not find that the language in the provisions attempted to limit plaintiff's future employment.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Robert P. Young, Jr.