

STATE OF MICHIGAN
COURT OF APPEALS

ELWIN GAY,

Plaintiff-Appellant,

v

CECELIA GAY,

Defendant-Appellee.

UNPUBLISHED
October 17, 1997

No. 177063
Wayne Circuit Court
LC No. 93-323130

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered on June 21, 1994, in which the trial court awarded defendant the marital home, its contents, and a portion of plaintiff's pension. We reverse and remand.

Plaintiff argues that the trial court's property division was inequitable based upon the short duration of the marriage and defendant's ability to earn wages. In a divorce case, this Court must review the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of the facts. The trial court's ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

The following factors must be considered whenever they are relevant to the circumstances of a property division in a particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. *Sparks, supra* at 158-160. The determination of relevant factors will vary depending on the facts and circumstances of the case. *Id.*

In the instant case, the parties were married for approximately six years. Plaintiff was employed throughout most of the marriage, and was sixty years old at the time of the divorce. Defendant was forty years old at the time of the divorce and was working as a housecleaner netting \$270 a week in wages. Plaintiff was temporarily unemployed at the time of the divorce, and was receiving \$368 a week

in unemployment. Prior to becoming unemployed, plaintiff was earning \$742 gross per week, which was the amount that he would earn if he went back to work at his employer.

The facts presented indicate that plaintiff attempted to transfer title to the marital home to his daughter immediately prior to filing his complaint for divorce. Defendant was unaware of this transfer. The trial court set aside this transfer and awarded the marital home and its furnishings to defendant because it believed that plaintiff deceived the trial court with respect to his assets, specifically as to the house.

It appears that trial court focused almost entirely on factor nine of the *Sparks* factors: general principles of equity. In *Sands v Sands*, 192 Mich App 698, 704; 482 NW2d 203 (1992), aff'd 442 Mich 30; 497 NW2d 493 (1993), this Court noted the maxim that one who seeks the aid of equity must come in with clean hands. In *Sands*, the husband attempted to conceal assets of the marital estate. This Court ruled that the husband must forfeit his interest in the assets that he attempted to hide. *Sands, supra*, 192 Mich App 704-705. The Michigan Supreme Court affirmed this Court's judgment, but cautioned that in each individual divorce case, the trial court must equitably divide assets on the basis of the facts. The Supreme Court ruled that there is no automatic rule of forfeiture. *Sands, supra*, 442 Mich 31.

The trial court in this case found that plaintiff did not have clean hands when he attempted to transfer the marital home to his daughter; thus, the home could not be an asset of the marital estate. When a party's motive is improper, forfeiture may be called for by the facts. *Sands, supra*, 442 Mich 31. Although a party's attempt to conceal assets is a relevant consideration, it is only one of many facts that the court must weigh. *Id.*

In this case, the house which the trial court awarded to defendant had been purchased and occupied solely by plaintiff before the parties' marriage. At the time of divorce, defendant was earning \$270 per week while plaintiff received \$368 per week in unemployment benefits. In addition, defendant was only forty years of age, and will thus be able continue to generate income for many more years. Plaintiff, on the other hand, was sixty years old and unemployed. Furthermore, the evidence indicated that defendant was the sole owner of a house in Trinidad, which she began building before the parties were married.

On these facts, we are left with a definite and firm conviction that the award of the entire marital home and all of its contents to defendant violated principles of equity and fairness. We find that, in making such an award, the trial court focused entirely on its finding that plaintiff attempted deception by deeding the home to his daughter. "We recognize that the conduct of the parties during the marriage may be relevant to the distribution of property, but the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Sparks, supra* at 158. While we agree that plaintiff's conduct was not appropriate, we do not believe that, under the facts of this case, his actions entitle defendant to the entire marital home and its contents. Although the trial court was permitted to consider plaintiff's alleged attempt at concealment, it still had a duty to equitably divide the assets on the basis of all the facts. *Sands, supra* at 442 Mich 31. We find that the trial court's award

of the entire marital home and its furnishings to defendant was not equitable under the facts of this case; thus we reverse the award.

Upon remand, the trial court shall consider all of the factors set forth in *Sparks, supra*. The trial court should consider the age of the parties, their relative incomes, the duration of the marriage, the fact that plaintiff was originally the sole owner of the marital home, defendant's custody of the minor child and any other relevant factors. Plaintiff's alleged deception shall be weighed in conjunction with all other relevant considerations. *Id.* at 163.

Plaintiff next contends that the trial court erred in granting defendant half of his accrued pension. We agree.

Although the parties were married only six years, plaintiff worked for General Motors for eighteen years, and his pension had accrued throughout that time. In the trial court's original order granting the parties a judgment of divorce, defendant was awarded fifty percent of the amount of plaintiff's pension *which he accrued during the time of their marriage*. However, under the terms of a proposed Qualified Domestic Relations Order (QDRO) submitted by defendant, plaintiff was to give 50% of the *total pension* accrued as of May 23, 1994, to defendant. Over plaintiff's objection, the trial court entered the QDRO, entitling defendant to fifty percent of plaintiff's monthly accrued pension benefit as of May 23, 1994.

We recognize that pension benefits are assets to be considered part of the marital estate subject to distribution in the discretion of the circuit court. *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995). The purpose behind this policy is to allow the trial court to arrive at a fair and equitable property settlement in light of *all* the circumstances. *Id.* Accordingly, the trial court's discretion with regard to premarriage and postdivorce pension contributions "must not be restricted unduly." *Id.* However, in this case, the trial court had already awarded defendant the entire marital home, which was originally bought solely by plaintiff. In addition, all of the contents of the marital home were awarded to defendant, and defendant possessed the ability and youth to earn at least \$270 a week for many more years. Plaintiff, on the other hand, was sixty years old and unemployed at the time of the divorce.

We believe that the trial court, in its discretion, could have awarded defendant fifty percent of the *portion of plaintiff's pension accrued during the marriage*. However, we find that, in light of all the circumstances of this case, principles of fairness and equity were violated when the trial court entered the QDRO granting defendant fifty percent of plaintiff's *total* accrued pension as of May 23, 1994. Accordingly, upon remand, the trial court shall enter an order granting defendant no more than fifty percent of the amount of plaintiff's pension *accrued during the parties' marriage*.

Although plaintiff raises the issue of attorney fees in his brief on appeal, this specific issue is not articulated in his statement of the issues presented. Therefore, this issue is not properly before us. MCR 7.212(C); *Maryland Casualty v Allen*, 221 Mich App 26, 33; 561 NW2d 103 (1997). In any event, the claim is without merit. *Donahue v Donahue*, 134 Mich App 696, 700-702; 352 NW2d 705 (1984).

Plaintiff also raises an issue regarding the custody of the parties' minor child. However, because plaintiff failed to refer to the custody contest in his claim of appeal, this issue is waived. MCR 7.204(D)(3). Therefore, we will not address it.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Richard Allen Griffin