

STATE OF MICHIGAN
COURT OF APPEALS

RACHELLE ANNE BACHRAN,

Plaintiff-Appellee,

v

LANCE WILLIAM BACHRAN,

Defendant-Appellant.

UNPUBLISHED

June 15, 1999

No. 211677

Houghton Circuit Court

LC No. 96-009565 DM

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

Defendant-appellant Lance W. Bachran appeals as of right from a judgment of divorce, challenging the distribution of certain assets—namely, mutual funds and individual retirement accounts (“IRAs”)—owned by the parties prior to their marriage as well as defendant’s military pension and the forced sale of real estate owned by the parties. We remand for further proceedings.

I. Basic Facts And Procedural History

Plaintiff-appellee Rachelle A. Bachran and defendant were married in August, 1988 after a very short courtship. Both parties had been married once before. Plaintiff had three children from her previous marriage, whereas defendant had a son from his previous marriage. During the marriage, plaintiff and defendant had one son who was born in November, 1989.¹

Plaintiff filed for divorce in January, 1996; defendant moved out of the marital home pursuant to a court order entered in April, 1996. Defendant stated that he took financial records when he left and destroyed some that he did not consider relevant to discovery. Prior to the marriage, defendant had been in the military for nineteen years; at the time of trial, defendant had twenty-three years of military service. Defendant did not become entitled to any military retirement benefits until he had completed twenty years of service and at that time defendant was eligible for fifty percent of his base pay at the time of retirement with an additional two and one-half percent to be added for each year of service after twenty years. Defendant completed twenty years of service in June, 1993, approximately five years after he married plaintiff.

Plaintiff and defendant lived in Texas at the time of their marriage. Defendant testified that he expected plaintiff to have a much higher income than that which was actually realized. Plaintiff held a master's degree in health education but for the previous fourteen years had been employed as a senior sales director for a cosmetics firm. Plaintiff, however, testified that moving from place to place—six times in eight years—affected her ability to make this business thrive.

Because of defendant's military responsibilities, the parties at one point moved to California and plaintiff testified that she then became the primary caregiver for the children, including defendant's youngest son. Plaintiff testified that she had always been the primary caregiver to the parties' son. The parties purchased a house in California, which plaintiff stated was "way over" their heads. Plaintiff claimed that defendant had always told her that this house was hers as a wedding present since they did not have a honeymoon, a claim that defendant denied.

In July, 1992, the family moved to Florida where eighty-five percent of their property was destroyed in a hurricane. Insurance claims were filed, but plaintiff testified that she never received any of the proceeds from such claims. According to plaintiff, she was not involved in making any of the insurance claims for hurricane damage. Plaintiff stated that she used funds from her cosmetics business to replace household items and that there was still a \$10,000 to \$20,000 insurance claim that had not been processed since the hurricane.

From Florida, the parties and their children moved to Michigan. Plaintiff continued to pursue her cosmetics business and had her children help her in caring for defendant's youngest son and the parties' son. Plaintiff testified that defendant was gone five out of the seven summers they were married and that she was the sole caregiver for the children during these times. Plaintiff stated that her net income for 1995 was approximately \$16,000. Defendant testified that he expended "thousands and thousands" of dollars of his income into plaintiff's cosmetics business. Plaintiff denied that defendant had supported her cosmetics business but admitted that marital funds had been used.

According to plaintiff, her total household monthly expenses at the time of trial were \$3,765. Defendant testified that his income was the primary support for plaintiff, her children, defendant's youngest son and the parties' son. However, defendant admitted that he benefited from taking tax deductions on plaintiff's three children and from losses incurred on plaintiff's rental properties.

At trial, plaintiff introduced a schedule of assets that included six real estate holdings; three had belonged to plaintiff prior to the marriage and three had belonged to defendant prior to the marriage. Also included on the schedule were various items of tangible personal property, a number of demand accounts, proceeds from the sale of the California house, an unpaid hurricane insurance claim, and defendant's military pension. Plaintiff stated that she came into the marriage with an MFA Capital Growth fund, two rental properties in Texas and a large variety of household furnishings.

Defendant also introduced a schedule of assets and liabilities at trial. According to defendant, all items on plaintiff's schedule were also listed on his schedule except for his military pension. Defendant testified that plaintiff had three areas of income: (1) proceeds from her cosmetics business; (2) rental income from two Texas properties plaintiff acquired prior to the marriage, one in San Antonio,

Texas and the other in Denton, Texas; and (3) income from investment and credit union funds. Defendant testified that at least \$7,500 in marital funds were expended on upkeep for the San Antonio property and at least \$5,000 in marital funds were expended for repairs to the Denton property. Defendant further testified that plaintiff's San Antonio property was refinanced during the marriage and that marital income was used to pay down the mortgage. According to defendant, marital income was also used to pay the mortgage on plaintiff's Denton property.

Defendant's interests in real properties acquired prior to the marriage included a rental home in California, a one-half interest in a duplex in Texas, and sixty-six acres of land in Colorado. Defendant testified that plaintiff's name was never placed on any of these properties and that she was never involved with them or contributed toward them. Defendant stated that the rent on the premarital California property exceeded the mortgage payment and was used to pay down the mortgage principal; no marital funds were used to pay down the mortgage on this property. With regard to the Texas duplex, defendant testified that rental income received from this property was used to pay the mortgage.

Plaintiff contended that she was entitled to fifty percent of defendant's military pension. As justification for this claim, she pointed out that she had to endure several moves to different states and her cosmetics business was negatively affected by the moves. Further, she claimed that defendant had used her cosmetics business and her children as tax deductions and as a result, she had accumulated no Social Security benefits during the marriage.

Defendant claimed that the mutual funds listed on his schedule did not include any marital contributions and partly came from proceeds from the death of his first wife. According to defendant, there were proceeds from the sale of the parties' house in California but over \$99,000 of defendant's premarital funds were used as a down payment when the house was purchased during the marriage. Defendant stated that five IRAs had been acquired by him prior to the marriage, that plaintiff never joined these accounts, and that no marital contributions were ever made to any of these accounts. According to defendant, plaintiff's MFA Capital Growth plan was opened prior to the marriage but contributions were made to it during the marriage. Defendant testified that his net worth decreased by approximately \$150,000 during the marriage due to having to use his premarital assets to fund the marriage.

Defendant stated that there was a loan from his parents that was incurred during the marriage, a loan from his former mother-in-law that was incurred prior to the marriage, two credit card debts that were incurred during the marriage, and one credit card debt incurred during the marriage for which he would be responsible. Defendant testified that he knew of no other joint debts.

In mid-June, 1997, the trial court issued a detailed opinion and order with regard to the divorce proceedings. The trial court ruled, after evaluating the appropriate factors but not making any specific findings on each factor individually, that plaintiff was to receive alimony at the rate of \$400 for eight months, \$300 for the next eight months, and \$200 for the next eight months. With regard to defendant's military pension, the trial court stated:

At the time of trial, Defendant had accumulated twenty-three and one-half years of military service which would be credited for retirement purposes. Approximately eight and one half years of that military service was during the marriage of the parties. Taking into account that data, together with all of the other facts and circumstances of this case, Plaintiff is hereby awarded one-third of Defendant's total military retirement benefits available to him at the time of his retirement. Counsel for Plaintiff shall prepare a QDRO to that effect in accordance with Air Force requirements for entry by this Court.

With regard to marital assets and liabilities, the trial court stated:

This Court has had the benefit of not only the testimony offered at trial, but also at least two post-trial submissions by each party, with respect to the division of marital assets and liabilities. Even so, the inability of the parties to agree upon even the most basic considerations, such as what is marital property and what is each parties [sic] pre-marital property, what assets were purchased with marital funds and what assets were purchased with pre-marital funds, and what each party should be credited for and debited for, makes it essentially impossible for this Court to make an intelligent item-by-item asset and liability distribution, thus requiring, at least in this Court's view, the plan of distribution which will follow. It is not known whether either party will find such fault with this Court's distribution plan that appellate review will be sought. Should that occur, the appellate Court is invited, and in fact encouraged, to not only examine the record but also the parties [sic] post-trial submissions. If upon appeal, should that occur, an appellate Court should find this situation to be less incomprehensible than does the undersigned, the appellate Court is to be commended.

The trial court then awarded plaintiff thirty-five percent and defendant sixty-five percent of the value of all the IRA accounts, regardless of when opened, by whom or who had contributed to them. The trial court further ordered that all remaining assets, other than tangible personal property, were to be converted to cash and all interests in real estate, regardless of which party was the owner of record, were to be disposed of "for the highest price obtainable" within four months of the date of the opinion and order. The proceeds derived from such disposal were then to be used to pay all debts due on the date plaintiff's complaint for divorce was filed, whether incurred by plaintiff, defendant or jointly. The trial court then awarded plaintiff forty percent and defendant sixty percent of any remaining funds. Finally, the trial court awarded plaintiff all assets and liabilities associated with her cosmetics business and awarded defendant the right to any insurance proceeds derived from the pending hurricane damage claim.

In mid-July, 1997, a hearing was conducted before the trial court on defendant's objections to the proposed judgment of divorce. At that time, the parties had been to the sheriff's department to divide up the disputed items of tangible personal property, pursuant to the trial court's order and opinion. The trial court determined that plaintiff was to receive the court ordered portion of defendant's military pension, whether his pension payments increased or decreased due to receiving disability or civil service pay. The trial court extended the four-month period in which to sell the parties' real estate properties to August 1, 1998 from October 20, 1997. The trial court required the parties to provide it

with additional information regarding all known debts and payments toward those debts by each party made after the filing of the complaint. Because the trial court was informed that it was defendant's intention to appeal this case, the trial court ordered that the Qualified Domestic Relations Orders implementing the division of the various IRAs be accompanied by injunctions restraining either party from making withdrawals from such accounts without further order from the trial court. Similarly, the cash in any of the accounts divided by the trial court was to be placed into interest bearing accounts pending appeal. Finally, the trial court determined that the monies being held in plaintiff's attorney's trust account would be divided, pursuant to the trial court's opinion and order, at the time the judgment of divorce was entered.

Defendant filed a motion for new trial in late October, 1997. The trial court denied defendant's motion without hearing oral arguments in late December, 1997, finding that all the issues raised had been considered. The judgment of divorce, embodying the essence of the trial court's June, 1997 opinion and order, was entered on May 8, 1998.

II. Standard Of Review

In deciding a divorce action, the trial court must make findings of fact and dispositional rulings. On appeal, this Court upholds the factual findings unless they are clearly erroneous. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). If the trial court's findings of fact are upheld, we must decide whether the dispositional ruling was fair and equitable in light of these facts. The dispositional ruling is discretionary, and we will affirm it unless we are left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

III. Defendant's Military Pension

Defendant argues that the trial court erred in awarding one-third of his total military pension to plaintiff. We note the unfortunate circumstance that, other than its finding that defendant had accumulated twenty-three and one-half years of military service that could be credited for retirement purposes and that approximately eight and one-half years of that service was during the marriage, the trial court made no specific or even general findings of fact with respect to defendant's military pension.

"In Michigan, the divorce code specifically states that rights to a vested pension are part of the marital estate." *Vander Veen v Vander Veen*, 229 Mich App 108, 110; 580 NW2d 924 (1998).² When pension benefits accrue both during and before or after the marriage, they should, absent particularized reasons to do otherwise, be allocated based on the ratio of years the parties were married while the employed spouse earned his or her pension to the total years in which the employed spouse worked to accrue the pension. *Id.* at 112, 115.³ However, the trial court awarded plaintiff *one-third* of defendant's total military retirement benefits available at the time of his retirement. Under the calculation in *Vander Veen*, one-third of the pension was subject to distribution and plaintiff should have been awarded *one-sixth*. Again, unfortunately, the trial court made no specific findings that might have justified an award greater than one-sixth.

We note that a party may contribute to the value of a marital asset in the form of providing household and family services and the asset may actually appreciate due to such activities, *Hanaway v Hanaway*, 208 Mich App 278, 294; 527 NW2d 792 (1995). On remand, we direct the trial court should articulate findings that would justify the award of one hundred percent of defendant's pension benefits accrued during the marriage—and therefore one-third of defendant's total pension—to plaintiff or, in the alternative, redistribute this asset in accordance with *Vander Veen*.

IV. The Parties' Respective Mutual Funds And IRAs

Defendant argues that the distribution unfairly and inequitably included the parties' respective mutual funds and IRAs. As noted above, defendant possessed five separate mutual funds prior to his marriage to plaintiff. No marital contributions were made to these funds, and no money was withdrawn from these funds during the marriage. Defendant also owned five separate IRAs prior to the marriage. Plaintiff was never joined to these accounts and no contributions were made to them during the marriage. Plaintiff owned one IRA prior to her marriage to defendant.

The trial court's first consideration when dividing property is the determination of marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The trial court may apportion all property that has come to either party by way of the marriage. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). The property that is subject to apportionment is considered "marital property," and it is this property that comprises the marital estate. *Id.* A spouse's separate estate may be invaded for distribution when: (1) after the distribution of the marital assets, the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party, MCL 552.23(1); MSA 25.103(1); or (2) it is found that the other spouse contributed to the acquisition, improvement or accumulation of the property. MCL 552.401; MSA 25.136.

Although the trial court dealt with the parties' respective mutual funds and IRAs under the heading "MARITAL ASSETS AND LIABILITIES," it once again made no specific determination that these mutual funds and IRAs were part of the marital estate. We therefore remand on this issue for a determination regarding whether the mutual funds and IRAs were part of the marital estate and the applicability of the statutory exceptions. On remand, the trial court should articulate findings that would justify the conclusion that the parties' respective mutual funds and IRAs were part of the marital estate. If the trial court is unable to make such findings, the trial court should consider (1) whether the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party or (2) make a finding, if justified, that the other spouse contributed to the acquisition, improvement or accumulation of the mutual funds and IRAs.

V. The Parties' Respective Real Estate Holdings

Defendant argues that the trial court erred in ordering that the premarital real estate holdings of the parties be sold and the proceeds divided between them. The trial court found that the properties had been "commingled" with other marital assets in that income generated from the premarital real estate during the marriage contributed to the payment of mortgages, taxes and insurance on the

properties owned by each party. Further, the trial court found that both parties were actively involved in the management of each other's real estate holdings. Based on these findings, which were supported by the record, we conclude that the trial court's distribution of the parties' real estate holdings was fair and equitable. Defendant's contention that the forced sale of such real estate affected the property rights of third parties is without merit. As a general rule, a court may make property dispositions that affect only the rights of the parties before it. *Wiand v Wiand*, 178 Mich App 137, 146; 443 NW2d 464 (1989). However, defendant failed to provide any evidence that there were any impediments to selling his interests in the real estate.

VI. Conclusion

We do not accept the proposition that, based on this record, it was impossible to make an intelligent distribution of the parties' assets, at least within the three general categories (defendant's military pension, the parties' respective mutual funds and IRAs, and the parties' respective real estate holdings) that we have outlined above. At a minimum, a trial court is required to make findings of fact that support its dispositional rulings. Here, unfortunately, the trial court avoided such findings of fact with respect to defendant's military pension and the parties' respective mutual funds and IRAs. Therefore, in light of *Vander Veen* and *Byington*, we remand this case to the trial court.

Pursuant to the calculation in *Vander Veen*, a proper distribution of defendant's military pension, *absent controlling findings of fact that would require another distribution*, would have been to award one-sixth of that pension to plaintiff. The parties' respective mutual funds and IRAs, *absent controlling findings of fact that would require another disposition*, were not part of the marital estate. We emphasize, however, that these general principles set forth in the *Vander Veen* and *Byington* decisions regarding the appropriate disposition of these assets are not strictly controlling on the trial court. We further emphasize, therefore, that the key task for the trial court to perform on remand is to make specific findings of fact as to these two areas that support its dispositional rulings. The trial court is by no means required to apply these general principles to the disposition of defendant's military pension and the parties' respective mutual funds and IRAs if it makes sufficient, particularized and controlling findings of fact that would require another disposition.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Stephen J. Markman

/s/ Peter D. O'Connell

¹ Because of a custody dispute over the son, much of the trial testimony involved witnesses who spoke to the integrity, character and familial relationships of plaintiff and defendant. However, custody is not an issue on appeal.

² See MCL 552.18(1); MSA 25.98(1):

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.

³ In fairness to the trial court, we note that although the judgment of divorce was formally entered after *Vander Veen* was decided in 1998, the trial court's substantive decisions in this case were made in 1997 without the benefit of *Vander Veen*.