STATE OF MICHIGAN

COURT OF APPEALS

NADA RANGEL,

Plaintiff-Appellee,

v

JOSE JESUS RANGEL,

Defendant-Appellant.

UNPUBLISHED
December 17, 1999

No. 212065
Saginaw Circuit Court
LC No. 96-014435 DM

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald*, JJ.

PER CURIAM.

Defendant appeals of right from the parties' judgment of divorce. We reverse and remand for further proceedings.

The parties had been married for approximately nineteen years when the judgment of divorce was entered. The parties are the parents of two minor children, Zachary (DOB 11/20/84) and Alexis (DOB 3/15/88). At the time of divorce, plaintiff was employed full-time by St. Mary's Medical Center, with an annual salary of approximately $20,000. Defendant had been a Sergeant with the Saginaw Police Department, serving a total of eighteen years and three months. On May 14, 1996, defendant began drawing a non-duty disability pension worth $47,500 per year.[1] In calculating defendant's pension, the city had added three years and ten months worth of military service time purchased by defendant for $10,724.06. The city also added six years and four months of disability service time credit, in order to bring defendant's age to fifty-five. Defendant's disability status is to be reevaluated each year for five years from the time he was first certified as disabled. If defendant is found to be capable of returning to work, he will lose the six years and four months of disability service time added on by the city.

Defendant argues that the trial court's property division was inequitable. Defendant's challenge focuses entirely on the part of the January 13, 1998 judgment of divorce that addresses the portion of defendant's disability pension that consists of his military service time credit and disability service time

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

add on. The disputed passage states that plaintiff will receive "One-half of Defendant's pension except the military years and any extra years because of disability will be credited to the Plaintiff's share. . . ."[2]

The trial court's September 12, 1997 opinion includes the following provisions addressing the division of the parties' pensions (emphasis added):

> The Plaintiff's pension will be divided so that the Defendant will receive payments equal to one half of the value of the pension that accrued during the marriage.
>
> The Defendant's pension will be divided in a similar manner *except the military years and any extra years added because of disability will be credited to the Plaintiff's share. . . .*

In his motion for reconsideration and/or clarification of the court's opinion, defendant argued that he and plaintiff had different understandings of what the highlighted passage meant. Defendant noted that plaintiff understood the passage to mean that she was entitled to one hundred percent of the military service time credit and disability service time add on. Defendant argued that the passage could be read as awarding plaintiff fifty percent of the military service time credit and disability service time add on. Even though the trial court acknowledged that the language was unclear, it nonetheless incorporated the disputed language into the judgment of divorce with no changes or clarifications.

We agree that this language is unclear. The passage could be read several different ways, depending on where the intended breaks in the sentence are supposed to fall. One such reading is in accord with the assertion that plaintiff is to receive one hundred percent of that portion of defendant's pension attributable to the military service time credit and the disability service time credit: "One-half of Defendant's pension[--]except the military years and any extra years because of disability will be credited to the Plaintiff's share." However, the passage can also be read as follows: "One half of Defendant's pension[--]except the military years and any extra years because of disability[--]will be credited to the Plaintiff's share." Under this interpretation, plaintiff receives fifty percent of defendant's pension, except for that part attributable to the military service time credit and the disability service time add on, from which plaintiff receives nothing. Additionally, the passage could be read as follows: "One-half of Defendant's pension[--]except the military years[--]and any extra years because of disability will be credited to the plaintiff's share." Under this interpretation, plaintiff receives fifty percent of defendant's pension, including fifty percent of that part attributable to the disability service time add on, while plaintiff receives nothing from that part attributable to the military service time credit. We disagree, however, that the passage can be read as indicating that plaintiff is to receive fifty percent of that portion of defendant's pension that is attributable to the military service time credit and the disability service time add on. The word "except' plainly signals that at least some of what follows will be excluded from the fifty percent formula.

On appeal, defendant has adopted the position that the court intended the passage to mean that plaintiff is to receive one hundred percent of the portion of defendant's disability pension that consists of the military service time credit and the disability service time add on. Given that this is one of the two alternative interpretations of the language presented to the court, and given that we have rejected the validity of the other interpretation, we will proceed as if this is the proper reading of the passage.

In a divorce case, this Court reviews the trial court's factual findings for clear error. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). "If the findings of fact are upheld, [this Court] must decide whether the dispositional ruling was fair and equitable in light of those facts." *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). The trial court's dispositional ruling will be affirmed unless this Court is left with the firm conviction that it was inequitable. *Id.* at 152.

In *Sparks*, our Supreme Court stated that when relevant, the following factors must be considered by a court when considering the equitable distribution of property in a divorce action:

> (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. . . . There may even be additional factors that are relevant to a particular case. . . . The determination of relevant factors will vary depending on the facts and circumstances of the case. [*Id.* at 159-160; citation omitted.]

The *Sparks* Court noted that this list is not exhaustive, and that the "determination of relevant factors will vary depending on the facts and circumstances of the case." *Id.* at 160.

After reviewing the record, we conclude that the trial court did not consider all of the relevant factors when arriving at a property division. Instead, the record indicates that the court focused solely and impermissibly on the issue of fault.[3] "The concept of fault cannot be given such a disproportionate weight." *Id.* at 163. "[F]ault is an element in the search for an *equitable* division – it is not a punitive basis for an inequitable decision." *McDougal v McDougal*, 451 Mich 80, 90; 545 NW2d 357 (1996) (emphasis in original). We therefore remand for reconsideration of the division of defendant's pension consistent with *Sparks*, *supra*, and *McDougal*, *supra*.

Defendant also contends that because an eligible domestic relations order (EDRO) could not be entered, the trial court failed to address how the pension was to be distributed. The trial court's order indicates that plaintiff "will begin collecting her payments when the Defendant retires or is considered permanently disabled by his employer subject to a[n] Eligible Domestic Relations Order (EDRO)." It is undisputed that defendant is already collecting an equivalent non-disability service pension and that unless he is certified eligible to return to work within five years following the date of his disability, this pension will automatically convert to a regular retirement pension when he reaches age fifty-five.

The Qualified Domestic Relations Order Act, MCL 38.1701 *et seq.*; MSA 5.4002(101) *et seq.*, indicates that a court may only issue an EDRO when it "is filed *before* the participant's retirement allowance effective date." MCL 38.1702(e)(viii); MSA 5.4002 (102)(e)(viii) (emphasis supplied). Neither "retirement allowance" nor "retirement allowance effective date" is defined in the act. The phrase "retirement allowance" has been defined by the Legislature in other contexts, however. For example, in the State Employees' Retirement Act, MCL 38.1 *et seq.*; MSA 3.981(1) *et seq.*, the

phrase is defined as "the sum of the annuity and the pension." MCL 38.1h(3); 3.981(1h)(3). In the Michigan Legislative Retirement System Act, MCL 38.1001 *et seq.*; MSA 2.169(1) *et seq.*, the phrase "means a series of equal monthly payments payable at the end of each calendar month to a person while he or she is a retirant." MCL 38.1012; MSA 2.169(12). The Public School Employees Retirement Act of 1979, MCL 38.1301 *et seq.*; MSA 15.893(111), defines the phrase to be "a payment for life or a temporary period provided for in this act to which a retirant, retirement allowance beneficiary, or refund beneficiary is entitled." MCL 38.1307(5); MSA 15.893(111)(5). Under the Judges Retirement Act of 1992, MCL 38.2101 *et seq.*; MSA 27.125(101), the phrase "means a series of monthly payments to a retirant or retirement allowance beneficiary from the reserves of the retirement system." MCL 38.2109(4); MSA 27.125(109)(4).

There was some testimony at trial indicating that the City of Saginaw would not honor an EDRO. Given that the record before us does not indicate the reason for the city's position, we can only assume that it is because the city considers that, under its retirement system, defendant is a retirant and his $47,500 annual non-duty disability pension is a retirement allowance.[4] We believe such a position, if held, is reasonable. Because we have concluded that a remand is necessary, we suggest that the circuit court make a clear record of the city's position on this matter in order to facilitate any possible further review.

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

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald

[1] The record indicates that defendant has a psychological disability that stems from a 1994 hunting accident.

[2] This language is used in both the section of the judgment of divorce addressing the personal property awarded to plaintiff, and that section addressing the personal property awarded to defendant.

[3] The court's findings of fact consist entirely of the following statement: "The issue of fault favors the Plaintiff."

[4] This assumption is supported by the fact that the city added the six years and four months disability service time credit in order to artificially bring defendant's age up to fifty-five.