

STATE OF MICHIGAN
COURT OF APPEALS

SALLI JO RICHMOND,

Plaintiff-Appellee,

v

DONALD D. RICHMOND,

Defendant-Appellant.

UNPUBLISHED

December 28, 1999

No. 207909

Calhoun Circuit Court

LC No. 96-002715 DO

Before: Griffin, P.J., and Wilder and R.J. Danhof,* JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right from the trial court's dispositional ruling awarding a portion of his pension benefits to plaintiff. We reverse and remand.

Defendant and plaintiff were married in August 1991. No children were born of the marriage, but plaintiff had an eighteen-year-old son from her previous marriage. Plaintiff, 41 years old at the time of the divorce, had been employed by Kellogg Company for twenty-two years and remained employed there at the time the judgment of divorce was entered. Defendant, 53 years old at the time of the divorce, had been employed by Kellogg Company for thirty-three years at the time he retired in 1996. In late 1995, Kellogg offered defendant an early retirement opportunity under which he would receive a pension benefit of \$1,921 per month, an enhancement of more than \$1,200 over the retirement benefit he would have received at normal retirement eligibility. Defendant accepted the early retirement option in November 1995. Shortly before defendant's retirement in 1996, plaintiff filed for divorce.

After a bench trial, the trial court rendered its factual findings. In pertinent part, the trial court found there was no basis to award plaintiff any part of defendant's pension plan which accrued before the marriage, and that equity did not support a 50% division of defendant's pension accrual during the marriage. The trial court then made a dispositional ruling which, in part, awarded plaintiff a \$475 per month distribution of defendant's pension benefits. Defendant filed a motion for reconsideration asking the trial court to reconsider its ruling distributing a portion of defendant's pension benefits to plaintiff.

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

The trial court denied the motion finding that the award of \$475 per month of defendant's pension to plaintiff represented an insignificant reduction in his pension.

On appeal, defendant does not challenge the original factual findings made by the trial court. Instead, defendant challenges the trial court's dispositional ruling, arguing that the trial court's award of \$475 per month of defendant's pension to plaintiff is inconsistent with the trial court's factual findings and an inequitable division of the marital estate. We agree.

When reviewing a trial court's dispositional ruling in a divorce proceeding, this Court first reviews the trial court's factual findings pursuant to the clearly erroneous standard. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). A finding is clearly erroneous when, based on all the evidence, the appellate court is left with a definite and firm conviction that a mistake has been made. If the factual findings are upheld, this Court must then determine whether the dispositional ruling was fair and equitable in light of those facts. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A dispositional ruling is discretionary and should be affirmed unless the reviewing court is left with the firm conviction that the division was inequitable. *Id.* at 151-152.

In support of his position that the trial court's dispositional ruling was erroneous, defendant relies on a line of cases which hold that, pursuant to MCL 552.18(1); MSA 25.98(1),¹ the portion of a pension that accrued before the marriage cannot be considered part of the marital estate subject to division. See *Lesko v Lesko*, 184 Mich App 395; 457 NW2d 695 (1990); *Kurz v Kurz*, 178 Mich App 284; 443 NW2d 782 (1989); *Kilbride v Kilbride*, 172 Mich App 421; 432 NW2d 324 (1988). However, we note that a more recent line of cases have held that the trial court has discretion to divide retirement benefits that have accrued before or after the marital period. See *Vander Veen v Vander Veen*, 229 Mich App 108; 580 NW2d 924 (1998); *McMichael v McMichael*, 217 Mich App 723; 552 NW2d 688 (1996); *Boonstra v Boonstra*, 209 Mich App 558; 531 NW2d 777 (1995); *Booth v Booth*, 194 Mich App 284; 486 NW2d 116 (1992), *Rogner v Rogner*, 179 Mich App 326; 445 NW2d 232 (1989). The apparent conflict between these two lines of cases has been expressly resolved in favor of the second approach, that is, the trial court has discretion to divide retirement benefits that accrued before or after the marital period. *Vander Veen, supra* at 111 n 2. Thus, we must first determine whether the trial court's factual findings that the premarital accrual of defendant's pension benefits should not be divided in any respect, and that the accrual during the marriage should not be evenly distributed, were clearly erroneous. Next, we must determine whether the trial court's division of defendant's pension benefits under the facts of this case was fair and equitable.

A judgment of divorce must include a determination of property rights of the parties. MCR 3.211(B)(3). When determining property rights in a divorce, the trial court may apportion all property that has come to either party by reason of the marriage. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). In distributing the marital assets, the trial court's goal is to reach an equitable distribution in light of all the circumstances, taking into account the following factors: (1) the duration of the marriage; (2) the contribution of each party to the marital estate; (3) each party's station in life; (4) each party's earning abilities; (5) the age, health and needs of the parties; (6) the fault or past misconduct of the parties; and (7) any other equitable circumstance. *McDougal supra* at 89; *Sparks, supra* at 158-160; *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

In this case, the trial court properly considered the foregoing factors and placed its relevant findings on the record. With respect to the last factor, the trial court found that there were “certain equitable considerations in favor of defendant which must be recognized”:

The Plaintiff’s present income from employment exceeds the Defendant’s and, given the Defendant’s age and lack of higher education or specialized training, it is a safe assumption that, not only the amount of income she receives, but her earning capacity as well, will substantially exceed his for the remainder of her working years.

Therefore, though this Court recognizes it may have the power to do so, there is no basis to consider awarding Plaintiff any part of the Defendant’s pension or savings and investment plans which he accrued before the marriage, as suggested in Plaintiff’s Trial Brief. Given the assets which exist in the marital estate, together with her earning capacity, there is no need to invade pre-marital assets to protect the Plaintiff.

The disparity in income and earning power, and the fact that this Court is satisfied that Defendant would not have chosen to retire at age 53 if he had known that the Plaintiff was going to divorce him, provide clear equitable grounds upon which to decline to evenly divid [sic] the marital estate, including the increases of these parties’ pension benefits and savings and investment plans which accrued during the marriage.

On our review of the record, we conclude that these findings by the trial court were not clearly erroneous. Despite those findings, however, the trial court nonetheless awarded plaintiff \$475 per month of defendant’s pension benefits. We find that this distribution was not fair and equitable in light of the findings of fact made by the trial court.

This Court has previously articulated a method for calculating the portion of a pension plan that is attributable to a marriage “when the period in which the pension was earned includes time in which the employee spouse was not married to the other party.” *Vander Veen*, *supra* at 111. When pension benefits accrue before, during, or after the marriage, they should, absent particularized reasons not to, 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 benefits. *Id.* at 112, 115.

In this case, the trial court awarded plaintiff \$475 per month, or approximately 25%, of defendant’s total pension benefits available at the time of his retirement. However, under the *Vander Veen* calculation, only fifteen percent of defendant’s pension was subject to distribution as a marital asset [five years of marriage divided by thirty-three years of employment]. Further, because the trial court did not articulate what percentage of the marital estate was being awarded to the respective parties, we are unable to determine from the record what portion of the 15% of the pension, if any, should have been awarded to plaintiff. We are also unable to determine from the record whether the \$1200 pension enhancement was construed by the trial court as having accrued before or during the marriage, or both. The trial court simply found that the facts of this case did not warrant an even

division of the marital estate, particularly defendant's pension benefits, without specifying a percentage as to how the assets should be distributed.

Thus, although we find the trial court's factual findings adequately supported by the record, in light of the trial court's explicit statement that "there was no basis to consider awarding Plaintiff any part of Defendant's pension or savings and investment plans which he accrued before marriage," and that it would only consider the portion of the pension benefits that accrued during the parties' marriage as part of the marital estate, we find that the trial court's award to plaintiff of 25% of defendant's total pension benefits is inequitable. Indeed, on the facts found by the trial court plaintiff was awarded substantially more of the pension than could be justified under *Vander Veen*, even if the pension enhancement in total is considered to have accrued during the marriage.

Accordingly, we reverse the trial court's dispositional ruling as it relates to the distribution of defendant's pension benefits. On remand, we direct that if the trial court is to make any distribution of defendant's pension benefits to plaintiff, the trial court must do so consistent with its factual findings and in accordance with the formula set forth in *Vander Veen*.

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

/s/ Richard A. Griffin

/s/ Kurtis T. Wilder

/s/ Robert J. Danhof

¹ 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.