

STATE OF MICHIGAN
COURT OF APPEALS

VICTORIA JEAN FIFER,

Plaintiff-Appellant,

v

TIMOTHY KENNETH FIFER,

Defendant-Appellee.

UNPUBLISHED

September 12, 2000

No. 216594

Washtenaw Circuit Court

LC No. 97-009500-DM

Before: Markey, P.J., and Gribbs and Griffin, JJ.

GRIFFIN, J. (*concurring in part and dissenting in part*).

I agree with and join the majority's decision affirming the trial court's award of alimony. However, I respectfully dissent from the reversal and remand regarding the setoff of the stipulated present value of plaintiff's anticipated social security benefits against defendant's pension.

At trial, *plaintiff* introduced into evidence an actuarial opinion regarding the present value of plaintiff's anticipated social security benefits:

Mr. Whall (plaintiff's counsel): Plaintiff will offer the two actuarial projections of both present money value of Mr. Fifer's interest in the retirement fund and the present money value of Mrs. Fifer's Social Security. And I believe it's stipulated to by counsel.

Mr. Daniels (defense counsel): That's correct, your Honor.

The Court: It's admitted. Thank you, Counsel. (at 2:22 p.m., PX 1 and PX 2 admitted.)

The Court: All right. Exhibit 1, then, is the present value of Social Security benefits of Mrs. Fifer. Exhibit 2 is the present value of retirement benefits of Mr. Fifer.

Mr. Whall: Your Honor, I believe we have covered all of the items which the parties have agreed to as the property settlement.

In fashioning an equitable property division, the Honorable John N. Kirkendall took into consideration the stipulated present values of both defendant's pension benefits and plaintiff's anticipated social security:

The court agrees with Mr. Fifer [defendant] that the social security income of his wife [plaintiff] should be an offset to the pension division. He is not entitled to social security. His pension is slightly higher as a result. His wife is sharing in that higher pension. He should be able to take into account all her retirement income when determining his pension division with Mrs. Fifer.

The judgment entered after a December 3, 1998, hearing provides that plaintiff's share of the assets shall include:

[A] twenty-six (26%) percent interest in the Defendant's vested pension plan benefits with the Michigan State Police Retirement System that accrued during the term of the marriage up to and including August 24, 1998, the date of trial in this case. . . . The remaining 74% interest is awarded to and shall remain the property of the Defendant, . . .

In deciding the twenty-six percent -- seventy-four percent division of defendant's pension, the court accepted the mathematical calculations presented by defense counsel in consultation with the actuary. The formula utilized the stipulated present values of defendant's age sixty pension benefits and plaintiff's age sixty-two social security benefits to achieve a fifty/fifty split of the present value of all retirement benefits.

On appeal, plaintiff argues first that the court erred as a matter of law in considering anticipated social security benefits for the property division. Second, plaintiff asserts that if social security benefits are to be considered, the pension award was unfair and inequitable. I disagree with both positions.

Pursuant to *Sparks v Sparks*, 440 Mich 141, 158-159; 458 NW2d 893 (1992), all relevant factors should be considered by the trial court in fashioning a fair and equitable property division. See also *Evans v Evans*, 98 Mich App 328, 330-331; 296 NW2d 248 (1980). In my view, anticipated social security benefits are relevant to the earning abilities of the parties. *Sparks, supra* at 160.

While holding the trial court may consider plaintiff's anticipated social security benefits, the majority concludes that the trial court erred in finding the social security benefits at issue were capable of a setoff. I disagree. Here, because the present value of the social security benefit has been stipulated by the parties, the asset "has a present ascertainable value" capable of being setoff. *Evans, supra* at 331.

In *Sparks, supra* at 152, the Supreme Court held "that the [dispositional] ruling [of the trial court] should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." Under the totality of the circumstances that include the stipulated

present values of both defendant's pension and plaintiff's social security benefits, I am not left with a firm conviction that the property division was inequitable. I would affirm.

/s/ Richard Allen Griffin