

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA SUE SMITH,

Plaintiff-Appellant,

v

PAUL DEAN SMITH,

Defendant-Appellee.

UNPUBLISHED

January 29, 2002

Nos. 222536; 225248

Genesee Circuit Court

LC No. 95-179086-DM

Before: Jansen, P.J., and Doctoroff and Owens, JJ.

JANSEN, P.J. (*concurring in part and dissenting in part*).

Except with regard to the pension issue, I agree with the majority's opinion. Regarding the distribution of the pension, I would affirm the trial court's award to each party of fifty percent of the pension valued at the time the complaint for divorce was filed.

The parties were married in 1965, the complaint for divorce was filed in 1995, and the judgment of divorce was entered in 1999. It is clear from the record that the trial court sought to divide the assets as evenly as possible, but acknowledged that the parties' health and earning capacities were different when it made its dispositional rulings. In this regard, the trial court's dispositional ruling in dividing the pension should be affirmed unless we are left with the firm conviction that it was inequitable. *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). I cannot conclude that the trial court's fifty percent award of the pension to each party, valued at the time the complaint was filed, was inequitable.

The trial court's distribution of pension benefits is within its discretion. *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995). In this regard, the trial court's discretion should not be restricted unduly, including premarriage and postdivorce pension contributions, to ensure that equity can be done. *Id.* The delay in the proceedings does not appear to be attributable to defendant. Moreover, the trial court awarded alimony to plaintiff and I cannot agree with plaintiff's assertion that the distribution of the pension was "grossly inequitable" given plaintiff's poor physical and mental health, the duration of the marriage, and defendant's "fault" (a factor specifically rejected by the trial court). The trial court acknowledged plaintiff's health and the duration of the marriage. Plaintiff has set forth no reason showing that the trial court actually abused its discretion in valuing the pension at the time the complaint was filed. See, e.g., *Thompson v Thompson*, 189 Mich App 197, 199; 472 NW2d 51 (1991) (the valuation date of a profit sharing and retirement plan is committed to the

trial court's discretion and the trial court had a plausible reason for choosing the date on which the divorce complaint was filed rather than the date of the divorce judgment).

I cannot conclude, based on the record before us, that the trial court abused its discretion in valuing the pension at the time the complaint was filed and awarding fifty percent to each party. I would affirm the trial court's distribution of the pension. In all other respects, I agree with the majority's opinion.

/s/ Kathleen Jansen