

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA KAY UBALDO,

Plaintiff-Appellee/Cross-Appellant,

v

RALPH JOHN UBALDO,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

September 13, 2002

No. 232322

Kent Circuit Court

LC No. 99-010078-DO

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce, challenging the trial court's award to plaintiff of the survivorship interest in defendant's pension and the court's decision to allow plaintiff to keep \$5,000 removed from a joint account. Plaintiff cross appeals the trial court's ruling that ordered plaintiff to return \$7,000 to defendant, which funds were also removed by plaintiff from the joint account. We affirm.

Defendant first argues that we should remand the case to the trial court with an instruction that the court place a value on the survivorship interest and divide it as marital property. We disagree.¹

In divorce actions, findings of fact made in relation to the division of marital property are reviewed under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). The court's dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). Questions of law are reviewed de novo. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

The judgment of divorce provided that plaintiff shall receive a fifty-percent share of defendant's pension, and that plaintiff "shall receive 100% of the Survivor Pension and attendant benefits after the death of Defendant." The trial court stated as follows in rendering its ruling from the bench:

¹ Although there was evidence concerning the value of the survivorship interest, the trial court did not make any finding of fact regarding value.

First and foremost is the interest of getting the plaintiff into a residence of her own where she no longer has to pay rent or where she can provide for herself at least a more normal life-style for the future. So, in connection with that, she'll get one half of the \$126,000 that was in the VALIC account

She will continue to receive one half of the social security and the pension and then, as we know, 100 percent of the pension at such time as he is deceased

That will not diminish the amount that she gets from the defendant, because at that point she will have to be purchasing medical insurance, so the amount that she receives on her own from her own social security I believe based on her husband's social security, any of that, that she can use that to purchase medical insurance, which will probably take almost all of that.

. . .

Now, this pension we've talked about, because he has been living in the house and she has had to pay rent, . . . and also she'll pay her own attorney fees, but that pension will not count in any way against her claim.

Federal law requires retirement plans to provide a divorced spouse retirement survivorship benefits if ordered by a court, and the former spouse may be designated as the surviving spouse under a qualified domestic relations order [QDRO] and receive the benefits pursuant to the QDRO. *Roth v Roth*, 201 Mich App 563, 568; 506 NW2d 900 (1993)(citing 26 USC 401(a) & 414(p)); see also 29 USC 1056(d). QDROs routinely contain provisions designating an ex-spouse as the surviving spouse, entitling him or her to survivorship rights in a former spouse's pension. *Roth, supra* at 566.

A right to vested pension benefits accrued during a marriage must be considered part of the marital estate that is subject to award on divorce. MCL 552.18(1); *Vander Veen v Vander Veen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998). However, depending on the equities and circumstances of the particular case, pensions may be distributed through either the property division or an award of alimony. *Magee v Magee*, 218 Mich App 158, 164-165; 553 NW2d 363 (1996). The methods used for valuation and distribution of pension benefits may vary. *Boyd v Boyd*, 116 Mich App 774, 782; 323 NW2d 553 (1982). With security of the family as a primary concern, a court can use property of either party to achieve just and reasonable support after taking into consideration the parties' ability to pay, the character and situation of the parties, and the circumstances of the case. MCL 552.23(1); *Booth v Booth*, 194 Mich App 284, 290; 486 NW2d 116 (1992).

Defendant's monthly pension benefit was \$2,220, and pursuant to a temporary order, half of each payment was forwarded to plaintiff who was no longer staying in the marital home. This division of defendant's pension was finalized in the judgment of divorce after trial. Because of the survivorship benefit, the monthly annuity payments were approximately fifteen percent less than without the benefit. Therefore, both parties are in effect funding the survivorship interest by each receiving less per month than the maximum amount allowed. Defendant is not requesting

that plaintiff be denied a survivorship interest, but only that the interest be valued and somehow divided. We find it unnecessary to do so.

Although not directly stated by the trial court, it is clear from the context of the court's ruling that it was concerned with plaintiff having a cash flow after the divorce in order for her to live out the latter years of her life in security, and that the survivorship interest, in part, would allow her to do so. Additionally, the trial court did not want its treatment of the pension to be held against plaintiff in relation to the distribution of the marital estate. Therefore, plaintiff's right to the survivorship interest can more accurately be characterized as a form of spousal support, which is being funded, in part, through a diminution in defendant's monthly pension benefit along with the continued diminution in plaintiff's half of the monthly pension benefit.

The support, or more properly coined the potential support, to someday be received by plaintiff is speculative. There is no need to place a value on this support. If we were to order the trial court to place a value on the survivorship interest as is done with other assets typically divided in a property distribution, an inequitable result could subsequently occur. First, the court would have to struggle with the manner in which it would somehow divide the asset or redistribute the property division after attempting to place a value on the survivorship interest. Based on calculations made in relation to different presupposed life expectancies, defendant presented evidence that the survivorship interest could be valued at \$267,496, \$228,465, or \$71,481.² Using the \$228,465 amount as an example, defendant's position apparently is that the trial court should consider the valued interest as a marital asset awarded to plaintiff, thereby requiring it to be offset by the distribution of other assets to defendant in order to reach an equitable division. The problem lies therein with the potential of defendant being awarded an extensive amount of property to offset the value of the survivorship interest, and plaintiff receiving the speculative award of future annuity payments dependent on the parties' date of death. If such an award was followed by the premature death by plaintiff or an extended life by defendant, plaintiff's award would be virtually worthless, whereas defendant's award would be unaffected. This clearly would be an inequitable result.

The question becomes whether the trial court's ruling was inequitable from defendant's standpoint because the survivorship interest was not valued and divided. We find that it was not. Defendant was awarded substantial assets from the marital estate, which should provide him security for the duration of his life. The cost to defendant in allowing plaintiff to maintain the survivorship interest, a seven-and-one-half percent reduction in monthly annuity payments, is minimal. The assets received by defendant are firm and existing, as opposed to the speculative nature of the survivorship interest awarded to plaintiff. The trial court did not err in awarding plaintiff the survivorship interest, and it did not err in failing to place a value on the interest and dividing it.

² At trial, defendant suggested to the trial court, in the face of concerns about the speculative nature of the survivorship interest, that the court could order that plaintiff receive the full pension benefits at a particular time regardless of life expectancies, such as in two years from trial, which would allow the court to place a definitive value on the interest.

Both parties challenge the order regarding defendant's motion for new trial, which provided that plaintiff pay defendant \$7,000 of the \$19,000 plaintiff removed from the parties' joint account, and which left plaintiff with \$12,000 of which \$5,000 was ostensibly used for living expenses. We find no error requiring reversal. On review of the trial court's order regarding the disposition of the \$19,000, when considered as part of the trial court's overall division of the fairly extensive marital estate, it was fair and equitable.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray