

STATE OF MICHIGAN
COURT OF APPEALS

JOAN L. ZAK,

Plaintiff-Appellee,

v

KENNETH J. ZAK,

Defendant-Appellant.

UNPUBLISHED

February 3, 2004

Nos. 243233; 243378

Wayne Circuit Court

LC No. 01-105017-DO

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In Docket No. 243233, defendant appeals by leave granted an order granting plaintiff half his severance payments. In Docket No. 243378, defendant appeals as of right the consent judgment of divorce. We affirm the decision of the trial court on all matters.

In both appeals, defendant contends that the trial court erred in entering an order for payment to plaintiff of half defendant's severance payments. In keeping with the intent of the parties that all property be divided equally, it would be unjust to allow defendant to receive two-thirds of a significant cash pay-off from a former employer simply because he failed to notify plaintiff that he received the pay-off. In fact, defendant comes dangerously close to forfeiting all payments under the guidelines set forth in *Sands v Sands*, 442 Mich 30; 497 NW2d 493 (1993).

In a property division in a judgment of divorce, we first review the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 495 NW2d 893 (1992); *Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003). A finding is clearly erroneous if after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made. *Draggool v Draggool*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the findings of fact are upheld, we must then determine if the trial court's dispositional ruling was fair and equitable under the circumstances. Unless we are left with a firm conviction that the division was inequitable, we must affirm. *Sparks, supra* at 151-152; *Draggool, supra* at 429.

Property division settlements in a judgment of divorce are final and may not be modified by absent a showing of fraud, duress, or mutual mistake. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). A property settlement agreement can be final and nonmodifiable even before the judgment of divorce is entered if the agreement was made in open court. MCR 2.507(H). Because the parties had placed the settlement agreement on the record in open court,

their agreement is binding. The trial court's decision to divide the severance payments equally was in accord with the settlement agreement agreed to by the parties.

We must next determine if the severance payments were properly divided by determining whether the severance payments represented a marital asset, and if so, whether the payments were fairly and equitably divided in light of the circumstances.

Assets earned by one spouse during the marriage are considered marital assets without regard to whether they were distributed before or after the judgment of divorce. *McNamara v Horner (After Remand)*, 255 Mich App 667, 670; 662 NW2d 436 (2003), citing *Vander Veen v Vander Veen*, 229 Mich App 108, 110; 580 NW2d 924 (1998); *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). Retirement and pension benefits earned during the marriage are included in the marital estate. MCL 552.18(1). A severance package earned during the marriage is also included in the marital estate. See *McNamara v Horner*, 249 Mich App 177, 187-188; 642 NW2d 385 (2002). The record in this case does not reflect whether defendant earned the entire amount of the severance payments during the parties' marriage. But defendant does not contend that any portion of these severance payments was earned before the marriage, and the parties equally divided the 401K and profit-sharing plans defendant earned from the same employer. Therefore, we find that the entire amount of the severance payments is a marital asset.

We also find that it was fair and equitable for the trial court to divide defendant's severance payments equally. When determining the equitable division of marital assets, the court must consider the:

(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. [*Sparks, supra* at 159-160.]

In this case, the parties were married for twenty-five years. Although plaintiff did not contribute financially to the marital estate to the extent that defendant did, plaintiff worked part-time and also raised the parties' sons, allowing defendant to concentrate on pursuing his career. See *Hanaway v Hanaway*, 208 Mich App 278, 293-294; 527 NW2d 792 (1995). Defendant's annual salary was considerably higher than plaintiff's salary at the time of the divorce. Furthermore, the parties agreed to divide the other marital assets equally. At the time of the divorce, defendant was earning a substantial sum of money, and plaintiff was working two part-time jobs, earning less than one-third of what defendant earned. Therefore, we find that it was fair and equitable to divide defendant's severance payments equally.

Defendant's contention that the trial court erred by modifying the settlement agreement without first holding an evidentiary hearing on plaintiff's fraud claim is without merit. As noted, the trial court's order did not modify the settlement agreement. An evidentiary hearing was not required to equally divide a marital asset where it was not contested that the asset was earned during the marriage, the judgment of divorce provided for plaintiff to receive half of any cash awards from defendant's employer, and the parties agreed to divide all marital assets equally.

Affirmed.

/s/ Donald S. Owens

/s/ Bill Schuette

/s/ Stephen L. Borrello