

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JANE ELLEN MCNAMARA,

Plaintiff-Appellee/Cross-Appellant,

v

ALBERT OCTAVE HORNER,

Defendant-Appellant/Cross-  
Appellee.

FOR PUBLICATION

January 11, 2002

9:05 a.m.

No. 216018

Oakland Circuit Court

LC No. 96-532736-DO

Updated Copy

March 15, 2002

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Before: White, P.J., and Wilder and Zahra, JJ.

WILDER, J.

Defendant appeals as of right a judgment of divorce and a related qualified domestic relations order. Plaintiff cross appeals by leave granted the judgment of divorce. We affirm in part, reverse in part, and remand.

I. Facts and Proceedings

Defendant formed Credit Counseling Centers, Inc. (CCC), in 1961, serving as its president and chief executive officer (CEO) until his retirement from the company on December 31, 1997. In 1980, plaintiff began working for defendant as the director of education and assistant to the president of CCC. On December 18, 1987, after working together for seven years, the parties were married. This marriage was the second marriage for defendant and the third for plaintiff. No children were born to the parties in this marriage, and plaintiff is childless. However, defendant has four adult children from his prior marriage.

Before the parties' marriage, plaintiff received a gift of Huntington Bank stock from her grandparents, which at the time of the marriage was worth approximately \$24,000. Plaintiff did not buy or sell any additional shares of stock in Huntington Bank during the marriage; nonetheless, at the time of the divorce, the stock had appreciated to a value of \$402,000. In addition, before the marriage plaintiff had a Michigan Credit Union retirement fund valued at \$3,326.81 and a Mutual of America tax-deferred annuity (TDA) valued at \$5,503.22. Defendant, before the marriage, also had a Michigan Credit Union retirement fund and Mutual of America TDA valued at \$132,876 and \$110,061, respectively.

Before defendant retired from CCC, he received a base salary of \$160,000, plus a bonus.<sup>1</sup> In 1997, defendant received a retirement package from CCC totaling \$860,000, which was to be paid to him over a three-year period, beginning on January 1, 1998. Upon defendant's retirement, plaintiff, as anticipated, became the president and CEO of CCC, with a salary of \$140,000 a year, plus a possible bonus.<sup>2</sup> From 1990 to 1997, plaintiff's salary was \$115,500, plus possible bonuses. Throughout their marriage, the parties deposited their paychecks into a joint account and shared their respective incomes. In addition, ten percent of each party's salary, up to the social security integration level, and 15.7 percent after that amount, up to a maximum of \$150,000, was put into their respective Michigan Credit Union retirement accounts by CCC. Further, each party contributed \$95,000—\$9,500 a year—to their separate TDAs. In both cases, the funds were deposited into retirement accounts and TDAs that had premarital assets. Thus, both plaintiff's and defendant's marital contributions to these accounts were commingled with their separate assets.

On October 24, 1996, after nine years of marriage, plaintiff filed for divorce. On July 21, 1998, the trial court, after a bench trial, awarded each party the assets they brought into the marriage, amounting to \$334,053.81 for defendant and \$50,769.46 for plaintiff.<sup>3</sup> In addition, the trial court excluded defendant's retirement package from the marital assets, deciding instead to treat it as income rather than property. The remaining value of the marital estate, including each party's Michigan Credit Union retirement plan and Mutual of America TDA, plaintiff's Huntington Bank stock, and all the appreciation of these assets, was divided equally between the parties. Subsequently, the trial court granted plaintiff's motion to exclude her Huntington Bank stock from the marital estate. The trial court further determined that instead of dividing the marital estate equally, defendant would be awarded fifty-five percent of the estate "[g]iven the age disparity of the parties and their present and future earning potential."<sup>4</sup> Accordingly, the judgment of divorce was entered on November 4, 1998. In addition, on January 6, 1999, a qualified domestic relations order was entered, pursuant to the judgment of divorce, awarding plaintiff \$326,945.26 of defendant's Mutual of America TDA.

## II. Standard of Review

In a divorce action, this Court's review of the trial court's factual findings is limited to clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Beason, supra* at 802;

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<sup>1</sup> The record does not indicate how much defendant's bonus was or how it was computed.

<sup>2</sup> As with defendant's bonus, the record does not indicate how plaintiff's possible bonus would be calculated.

<sup>3</sup> The parties stipulated these amounts during the trial.

<sup>4</sup> At the time of the trial, defendant was seventy-two years old, whereas plaintiff was forty-four years old.

*Draggou v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings of fact are upheld, we then must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152; *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999); *Draggou, supra* at 429. A dispositional ruling is discretionary and 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); *Welling, supra* at 709-710; *Draggou, supra* at 429-430. Further, assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate. *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). Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997).

### III. Analysis

#### A. Parties' Retirement Funds and TDAs

On appeal, defendant argues that the trial court erred by including each party's Michigan Credit Union retirement fund and Mutual of America TDA in the marital estate. Specifically, defendant contends that because each party had made contributions to their respective retirement funds and TDAs before the marriage, they were entitled to have part of the appreciation from these accounts excluded from the marital estate. We disagree.

In determining that the entire appreciation of the parties' retirement plans and TDAs should be included in the marital estate, the trial court relied on *Reeves*. There, this Court held that the marital estate did not include the appreciation in value of a party's premarital assets, if that appreciation was due to "wholly passive" appreciation. *Reeves, supra* at 497; see also *Dart v Dart*, 460 Mich 573, 585, n 6; 597 NW2d 82 (1999). However, here, each party's retirement fund and TDA did not appreciate solely because of passive investment. As stated previously, during the course of the marriage, each party contributed ten percent of their salary, up to the social security integration level, and then 15.7 percent after that amount, up to a maximum of \$150,000, to their separate retirement funds. Thus, while there is evidence that the parties contributed the same percentage of their salaries to their respective retirement plans, there is no evidence that the parties contributed an equal dollar amount to their retirement plans during the marriage. Instead, the evidence only indicated that each party contributed a percentage of their income to the plans and that they each contributed \$9,500 a year to their separate TDAs. Further, the evidence indicated that these funds were commingled with funds each party contributed before marriage. Thus, the assets in these "premarital accounts" did not increase in value because of "wholly passive" appreciation, *Reeves, supra*, but instead by additional contributions, as well as appreciation. Thus, because of the parties' commingling of premarital and marital assets, it is not possible to accurately determine the premarital appreciation of these assets. *Reeves, supra* at 496-497; see also *Dart, supra* at 585, n 6 ("We recognize that, in certain situations, a spouse's separate assets, or the appreciation in their value during the marriage, may be included in the

marital estate.") Accordingly, the trial court correctly held that the entire appreciation of the retirement funds and TDAs were part of the marital estate.<sup>5</sup>

#### B. Property Division Factors

On cross appeal, plaintiff argues that the trial court clearly erred in failing to make specific findings of fact on relevant property division factors. We agree. In reaching an equitable division of the marital estate, the trial court is to consider the following factors whenever they are relevant to the circumstances of the particular case:

(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.]

See also *Welling, supra* at 710, quoting *Byington, supra* at 115. Because of the wide array of factual circumstances involved in a divorce proceeding, the determination of relevant factors varies depending on the case. *Sparks, supra* at 160. Hence, there is no rigid framework for applying the relevant factors. *Id.* at 158-159. Nonetheless, where any of these factors are relevant to the value of the property or to the needs of the parties, the trial court must make specific findings of fact regarding those factors. *Id.* at 159. In so doing, the trial court must not assign disproportionate weight to any one circumstance. *Id.* at 158.

Here, the trial court's July 21, 1998, opinion considered fault and contributions of each party to the marital estate, as well as the earning abilities of each party, and determined that a "fifty-fifty division" of the marital assets would be an appropriate distribution. However, in its revised opinion of September 22, 1998, the trial court held that "given the age disparity of the parties and their present and future earning potential[.]" it would be more equitable to split the marital assets "fifty-five to forty-five in favor of [d]efendant." Thus, while there was evidence on the record regarding the duration of the marriage and the life status, necessities, and circumstances of the parties, the trial court made no findings of fact regarding these factors. See *Sparks, supra* at 162. In addition, there is no finding on the record that indicates that the trial court used other general principles of equity that might have been relevant to the property division. Further, while each factor need not be given equal weight, *Welling, supra* at 710; *Byington, supra* at 115, it appears as if here the trial court placed disproportionate weight on its nonspecific findings regarding the age and earning abilities of the parties. See *Sparks, supra* at 160. Therefore, we conclude that it is necessary to remand this case to the trial court so that it can make further findings of fact regarding the relevant property division factors.

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<sup>5</sup> In addition, we note that the principle amount contributed by each party to their respective retirement and TDA accounts, before their marriage, was properly removed from the marital estate as part of the stipulated premarital assets. *Reeves, supra* at 494.

### C. Defendant's Retirement Package

Plaintiff also argues that defendant's retirement package from CCC, instead of being treated as defendant's separate property, should have been included in the marital estate. As previously stated, assets earned by a spouse during the marriage are properly considered part of the marital estate. *Vander Veen, supra* at 110; *Byington, supra* at 110. This is true whether the assets are received during the existence of the marriage or after the judgment of divorce. *Id.* In addition, the separation of the parties before the date of the actual divorce is not relevant when determining what assets comprise the marital estate. *Id.* at 113.

Here, the trial court awarded defendant the full amount of his retirement package:

Joint Exhibit 1 lists the sum of \$168,034.47 as a marital asset, being NBD Account #187985-75. Testimony at trial indicated that most of these amounts were deposited after the parties' physical separation and were made up of bonus and other compensation associated with defendant's severance agreement and retirement package. Given the disparity of the parties' future income and earning potential, this Court will exclude all of this sum from its compilation of marital assets, choosing to treat said monies more like income rather than property.

We agree with plaintiff that, if any of the retirement package was earned during the marriage, then that portion of the package must be considered part of the marital estate. *Byington, supra* at 110. Therefore, on remand, we instruct the trial court to determine, without regard as to when the parties separated, *id.* at 113, whether defendant's retirement package was, in fact, earned during the marriage and, if so, whether, in the context of the entire marital estate, the current division of defendant's retirement package was equitable. *Id.* at 117. Consequently, on remand, the trial court may again conclude that the whole retirement package should be awarded to defendant, or it may, in light of the *Sparks* factors, decide to award a portion of the package to plaintiff. *Id.* In any event, the trial court must include any part of defendant's retirement package that was earned during the marriage as part of the marital estate.

### D. Equitableness of the Property Division

Finally, plaintiff argues that the trial court did not adequately explain its division of the marital assets, and that the division was inequitable. In dividing marital assets, the goal is to reach an equitable division in light of all the circumstances. *Welling, supra* at 710; *Byington, supra* at 114. While the division need not be mathematically equal, *Welling, supra* at 710; *Byington, supra* at 114-115, an equitable distribution of marital assets means that they will be roughly congruent, *id.* at 115; *Knowles v Knowles*, 185 Mich App 497, 501; 462 NW2d 777 (1990), and any significant departures from congruence must be clearly explained by the trial court, *Welling, supra* at 710; *Byington, supra* at 114-115.

The trial court's disposition of marital property is intimately related to its findings of fact. *Sparks, supra* at 162, n 31, citing *Beason, supra* at 798. In *Sparks, supra* at 162, the Supreme

Court stated that, where the case had to be remanded for further findings of fact regarding the relevant property division factors, "[t]he most effective appellate review [of the property division] obviously would result from more thorough fact finding." Similarly, in the instant case, because the trial court explicitly excluded defendant's retirement package from the marital property, see *Byington, supra* at 117, and because it failed to articulate which *Sparks* factors were relevant, it would be difficult for us to effectively review the marital property division for fairness. Thus, because this case is being remanded for further factual findings, we cannot reasonably determine at this time whether the property division before us is equitable. Cf. *Sparks, supra* at 163, citing MCR 2.517.

#### IV. Conclusion

In sum, we affirm the trial court's decision to include the parties' Michigan Credit Union retirement plans and their Mutual of America TDAs in the marital estate, reverse, on the basis of insufficient factual findings, the trial court's exclusion of all of defendant's retirement package from the marital estate, and remand for further proceedings consistent with this opinion.

The trial court is to hear and decide the matter within 120 days of the release of this opinion.

Affirmed in part, reversed in part, and remanded. This Court retains jurisdiction.

Zahra, J., concurred.

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra