

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA L. KUIPER,

Plaintiff-Appellant,

v

EDWARD A. KUIPER,

Defendant-Appellee.

UNPUBLISHED
October 31, 1997

No. 197640
Kent Circuit Court
LC No. 95-000017 DO

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

PER CURIAM.

Plaintiff appeals as of right from a divorce judgment that awarded her approximately half the marital estate, ordered defendant to pay her health insurance premiums for three years, and awarded her alimony of \$150 per week for a maximum of eight years. The parties had been married for approximately twenty-five years.

On appeal, plaintiff argues that (1) the circuit court's findings that she had an extramarital affair and that the affair was a primary cause for the divorce were clearly erroneous, (2) that the circuit court erred in using the date of the parties' separation for purposes of valuing defendant's pension, (3) that the circuit court failed to make sufficient findings of fact to support its division of assets and its award of spousal support, and (4) that both the property division and alimony award failed to achieve equity under the circumstances. We affirm the circuit court's findings on issue (1), but reverse and remand for further proceedings as to issues (2), (3), and (4).

Regarding the first issue, the circuit court found that plaintiff "had begun an affair with an inmate in the state prison system in the summer of 1994 and evidence had been introduced to indicate that certainly this was a primary reason for the dissolution of this relationship." Plaintiff argues that her relationship with the prisoner was but a "brief infatuation" that fulfilled a "sick need" that she claims resulted from living for many years as a victim of spousal abuse. Plaintiff further insists that there was never any physical contact between herself and her incarcerated friend.

This Court reviews a trial court's factual findings for clear error. "A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has

been committed. . . . [I]f the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

Plaintiff contends, in effect, that her extramarital relationship was the *result* of a failing marriage, not the *cause* of marital breakdown. While her explanation may be plausible, it is not this Court's purpose to entertain plausible alternative interpretations of the evidence presented; the test is whether the trial court's finding was clearly erroneous. Here it was not.

Letters in evidence that plaintiff wrote to the prisoner effuse with emotion and intimacy. One letter, as if to underscore the trial court's eventual conclusion as to the significance of the relationship, confesses, "I don't want to convey to anyone that you are the reason for the divorce." Even if this relationship was never physically consummated, the letters in evidence clearly evince plaintiff's emotionally intimate involvement with their intended recipient. This evidence amply supports the trial court's finding that there was an affair. Plaintiff's own words implicating her relationship with the prisoner in her decision to divorce, her leaving the marital home directly after defendant's discovery of the nature of that relationship, and both parties' filing for divorce within days of that discovery all support the trial court's conclusion that this extramarital relationship was a primary reason for the divorce. These conclusions were not clearly erroneous.¹

Plaintiff next argues that the trial court erred in using the date of the parties' separation for purposes of valuing defendant's pension. We agree. Any pension contributions earned before the entry of the judgment of divorce are marital property and are properly considered part of the marital estate. See *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997), lv pending. On remand, the trial court must determine the value of the pension at the time the judgment of divorce was entered. The trial court must then use that value when apportioning the marital estate. However, the trial court may consider the parties "manifestations of intent to lead separate lives" when apportioning the estate. *Id.* at 113-114.

Plaintiff next argues that the trial court failed to make sufficient findings of fact to support its decisions regarding the division of the marital estate and the award of spousal support. We agree. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution in light of all the circumstances. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987). The division need not be mathematically equal, *Impullitti v Impullitti*, 163 Mich App 507, 513; 415 NW2d 261 (1987), but any significant departure from congruence should be supported by a clear exposition of the court's rationale, *Knowles v Knowles*, 185 Mich App 497, 501; 462 NW2d 777 (1990). The factors the circuit court must consider, if relevant, are as follows: "(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." *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996), quoting *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).

In reviewing a divorce judgment, this Court must first review the trial court's findings of fact under the clear error standard. *Sparks, supra* at 151. If the trial court's findings of fact are upheld, this

Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling as to division of marital property should be affirmed unless this Court is left with the “firm conviction that the division was inequitable.” *Id.* at 152.

In this case, the trial court’s opinion noted the duration of the marriage, that the parties had children who were grown, and that the parties owned a home which was sold upon dissolution of the marriage. During a hearing, the court also noted that any property that plaintiff brought into the marriage had long since been dissipated by the parties. Finally, the court made one finding regarding the cause of the divorce, discussed above. With these few exceptions, the court issued no findings of fact. Of the nine factors above, the court did not address the age, health, life status, or earning abilities of the parties, nor did it make a definitive finding regarding fault.

While there is no dispute as to some issues, *e.g.*, the age of the parties, the remaining questions regarding the health of the parties, and especially their respective earning capacities, bear heavily on the fairness of the disposition, and thus require judicial resolution. While there may be no dispute as to the educational and employment histories of the parties, those histories nonetheless could give rise to significantly differing impressions as to the future earning capacities of the parties. This ambiguity is compounded by the possibility that plaintiff’s health problems may or may not affect her ability to support herself in the future. While this Court stands ready to afford the trial court the deference to its findings of fact that the clearly erroneous standard requires, this Court cannot do so when left to guess at how the trial court arrived at its conclusions.

The Supreme Court does not make any of the nine factors enumerated above discretionary; if they are relevant, the *must* be considered, and the trial court must issue “*specific* findings of fact regarding those factors.” *Sparks, supra*, 159 (emphasis added). Thus, on remand, the trial court must make specific findings regarding each of the nine factors. The trial court should then make clear which factors it relies on in distributing the marital assets.²

We affirm the circuit court’s factual findings regarding plaintiff’s affair. We reverse as to its division of marital property and its award of spousal support, and remand for a finding regarding the value of defendant’s pension at the time the judgment of divorce was entered, and for findings regarding the nine factors identified above. The trial court must then distribute the marital assets and award spousal support based on those findings. We express no opinion as to whether these additional factual findings will compel a different distribution of assets or a different award of spousal support.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion, such proceedings to take place within ninety days. We retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Myron H. Wahls
/s/ Roman S. Gribbs

¹ The trial court referred to this affair as *a* primary cause of the divorce, rather than *the* primary cause. Thus, the trial court did not indicate which party it considered primarily at fault. We note that there was evidence regarding fault on the part of both parties. Thus, while we conclude that the trial court's specific finding regarding plaintiff's affair was not clearly erroneous, we express no opinion regarding which party, if either, was primarily at fault. We leave that determination to the trial court on remand.

² Thus, if all factors are equal, the trial court could simply explain that, all factors being equal, the assets should be divided equally. On the other hand, if some factors favor one party, and some favor the other, the court must identify those factors and explain how it weighs them.