

STATE OF MICHIGAN
COURT OF APPEALS

SHERYL JO TOUPIN,

Plaintiff-Appellee,

v

KENNETH JAMES TOUPIN,

Defendant-Appellant.

UNPUBLISHED

April 21, 2000

No. 217825

Iosco Circuit Court

LC No. 97-000539-DO

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of divorce. He challenges the trial court's disposition of plaintiff's pension and its award of mediation sanctions to plaintiff under MCR 2.403. We affirm the disposition of the marital estate, but reverse the order requiring defendant to pay plaintiff's post-mediation litigation costs.

First, defendant contends that the trial court reached an inequitable division of the parties' assets when it awarded defendant a portion of plaintiff's monthly pension benefit to be paid only when plaintiff begins to receive the benefit at her retirement. We disagree. We review a trial court's findings of fact with respect to its division of marital assets for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A finding is clearly erroneous if, after a review of the entire record, we are left with the definite and firm conviction that the trial court made a mistake. *Id.* If the trial court's findings of fact are upheld, we must then decide whether the dispositional ruling was fair and equitable in light of those facts. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999). A dispositional ruling is discretionary and should be affirmed unless we are left with the firm conviction that the division of marital assets was inequitable. *Id.*

A trial court must consider vested pension benefits accrued during a marriage as part of the marital estate subject to award on divorce. MCL 552.18(1); MSA 25.98(1); *Vander Veen v Vander Veen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998). However, methods for the valuation and distribution of a pension's interest may vary. *Boyd v Boyd*, 116 Mich App 774, 782; 323 NW2d 553 (1982). The party seeking to include a pension in the marital estate bears the burden of proving a

reasonably ascertainable value. If the party does not meet the burden, the pension should not be considered. *Magee v Magee*, 218 Mich App 158, 165; 553 NW2d 363 (1996). Pension benefits that accrued both during the marriage and before or after it may be allocated based on the ratio of the years the parties were married while the employed spouse earned the pension to the total years that the employed spouse worked to accrue the pension. *Vander Veen, supra* at 113-115. A trial court has discretion to defer the distribution of pension benefits until the pension holding spouse begins to receive benefit payments. *Keen v Keen (After Remand)*, 160 Mich App 314, 317; 407 NW2d 643 (1987); *Boyd, supra* at 783.

In the present case, the evidence before the trial court adequately supported its finding that twenty-five percent of plaintiff's accrued monthly benefit at time of valuation was a marital asset. Based on that finding, plaintiff was ordered to pay defendant half of the marital portion of her pension when it is paid to her. We cannot say that the trial court's order for the division and disbursement of the pension was unfair or inequitable in light of all the facts before the court. Defendant offered no evidence regarding an appropriate method for valuing or disbursing plaintiff's pension. Plaintiff's pension statement only indicated her expected monthly benefit if she were to stop working at that time, and her expected monthly benefit if she continued to work until her normal retirement date at her then current rate of pay. Plaintiff also received most, if not all, the marital debts in the judgment of divorce. Accordingly, we are not convinced that the trial court's division of the pension was inequitable, and we therefore affirm the distribution of the marital estate. *Sands, supra; Quade, supra*.

Defendant also contends that the trial court erred in imposing mediation sanctions based on his rejection of the mediation evaluation. Defendant claims that the trial court improperly applied the civil mediation provision, MCR 2.403, and amended and recalculated the value predicted to be awarded to defendant by the panel. We agree that the trial court erred in awarding sanctions pursuant to MCR 2.403.

Defendant did not preserve his argument regarding the application of MCR 2.403 by objecting to the court's application of the rule below.¹ Regardless, we undertake review of this issue because the failure to consider it will result in manifest injustice, *Herald Co, Inc v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998), and the question is one of law and the facts necessary to its resolution are before this Court, *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998); *Providence Hospital v National Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195; 412 NW2d 690 (1987).

The interpretation and application of court rules is a question of law that we review de novo on appeal. *Szymanski v Brown*, 221 Mich App 423, 433; 562 NW2d 212 (1997). When interpreting a court rule, we apply the same basic principles that govern statutory interpretation. *Kitchen v Kitchen*, 231 Mich App 15, 18; 585 NW2d 47 (1998). Our primary goal in interpreting statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998); *Kitchen, supra*. The first criterion in determining intent is the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). "A court rule should be construed in accordance with the ordinary and approved usage of the language in light of the purpose of the court rule." *Szymanski, supra*.

The civil mediation rule, MCR 2.403, provides that mediation of domestic relations actions are to be governed by MCR 3.216. MCR 2.403(A)(1). MCR 3.216(A) states, in part:

A court may submit any pending divorce, separate maintenance, or annulment proceeding, including postjudgment matters, to mediation under this rule for the purpose of attempting to settle contested issues. Nothing in this rule

(3) prohibits the court from ordering, on stipulation of the parties, the use of modified mediation or other settlement procedures.

MCR 3.216 is dependent on the willingness of the parties to participate in a mediation process rather than on court enforcement and sanctions for its effective operation:

There will be no sanctions against either party for accepting or rejecting the mediator's recommendation. The court may not inquire, and neither the parties nor the mediator may inform the court, of the identity of the party or parties who rejected the mediator's recommendation. [MCR 3.216(H)(4).]

We have held that MCR 3.216(A)(3) and its predecessor rule authorize a court to order binding arbitration or binding mediation on agreement of the parties. *Dick v Dick*, 210 Mich App 576, 581-582; 534 NW2d 185 (1995); *Marvin v Marvin*, 203 Mich App 154, 157; 511 NW2d 708 (1993). While we conclude that the trial court in the present case could have ordered the parties to participate in mediation pursuant to MCR 2.403, we find no stipulation to the use of the mediation procedure in the trial record. The trial court's order made mediation under MCR 2.403 mandatory unless a party specifically opted out by requesting mediation under MCR 3.216. Defendant failed to object to mediation under MCR 2.403 as provided by the court order. The trial court's attempt to bind the parties through their inaction does not amount to a binding stipulation. To stipulate is to make an express agreement. See *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 378-379; 521 NW2d 847 (1994). The record presents no express agreement by defendant to the use of MCR 2.403 as is required under MCR 3.216(A)(3). The trial court's use of MCR 2.403 was improper under these circumstances. Furthermore, even had the parties stipulated to mediation under MCR 2.403, the trial court exceeded its authority under MCR 2.403(5)(a) to determine whether an award of equitable relief was less favorable to defendant than the trial judgment by valuing items not mentioned in the mediation evaluation. Accordingly, we reverse the trial court's order for mediation sanctions.

Affirmed in part and reversed in part.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

¹ Instead, defendant objected to the trial court's inference that the mediation panel awarded numerous items of property to him that were not listed in the panel's evaluation.