

STATE OF MICHIGAN
COURT OF APPEALS

DAWNA MARIE BURNSIDE,

Plaintiff-Appellee,

v

RICHARD VERNON BURNSIDE,

Defendant-Appellant.

UNPUBLISHED

May 12, 2000

No. 210912

Tuscola Circuit Court

LC No. 95-014298-DO

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right from the trial court's judgment of separate maintenance. He challenges the trial court's disposition of the marital estate, its award of alimony to plaintiff, its failure to credit certain payments against his pretrial alimony arrearage, and its award of all the pension survivorship benefit to plaintiff when it was determined that she was only entitled to twenty-seven percent of the pension. We affirm the disposition of the marital estate, the awards of alimony, and the pension survivorship benefit to plaintiff. We remand for a determination whether defendant should receive credit against his arrearages for his payments on plaintiff's behalf.

Defendant argues that the trial court erred by making an inequitable division of the parties' assets, by awarding plaintiff all interests in the parties' second home in Unionville, and by focusing entirely on its finding of defendant's fault in the marriage. We disagree. In reviewing a trial court's dispositional ruling in a divorce, we must first review a trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Findings of fact will not be reversed unless clearly erroneous. A finding is clearly erroneous if, after a review of the entire record, we are left with the definite and firm conviction that a mistake has been made. *Beason, supra*; *Draggoo, supra*. If the trial court's findings of fact are upheld, then we must decide whether the dispositional ruling was fair and equitable in light of those facts. The ruling is discretionary and should be affirmed unless we are left with the firm conviction that the division was inequitable. *Sparks, supra* at 151-152; *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999).

The general goal in distributing marital assets in a divorce is an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The division need not be mathematically equal, but a significant departure from congruence should be supported by a clear exposition of the court's rationale. *Id.* at 114-115. To reach an equitable division, the trial court should consider a variety of factors, including the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, earning ability, age, health and needs, fault or past misconduct, and any other equitable circumstance. *Sparks, supra* at 158-160. The trial court must make specific findings regarding the factors it determines to be relevant; the relevant factors will vary with the circumstances and no one factor should be given undue weight. *Id.* at 158-159. "The relative value to be given the fault element. . . and the extent to which particular actions are regarded as fault contributing to the breakdown of a marriage are issues calling for a subjective response; such matters are left to the trial court's discretion subject to the requirement that the distribution not be inequitable." *Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995).

The trial court made numerous findings of fact regarding the duration of the parties' marriages, their cohabitation between marriages, their ages and roles in the marriage, and defendant's abandonment of plaintiff leaving her with debts and no income. The court expressly found defendant's testimony to have been less than credible and that the breakup of the marriage was almost totally the result of his conduct, including his mental and physical abuse of plaintiff. This Court gives deference to the findings of the trial court when they are based on the credibility of witnesses. *Draggoo, supra*. Among the facts found by the trial court that were relevant to the disposition of the parties' assets, we find no clear error. *Sparks, supra* at 151; *Beason, supra*. While the trial court's disposition of the assets was clearly affected by its finding that defendant was at fault for the breakup of the marriage and had conducted himself badly during the marriage, fault was by no means its only consideration. The distribution itself belies defendant's allegation that fault played a disproportionate role. In light of these facts, we are unable to conclude that the division was inequitable. *Sparks, supra* at 151-152; *Quade, supra*.

Next, defendant argues that the trial court erred in its alimony award because the award was premised on an erroneous finding regarding the amount of defendant's monthly pension benefit from Ford Motor Company and because it was unjustifiably large when combined with plaintiff's twenty-seven percent share of the pension awarded to plaintiff as part of the division of the marital assets. We disagree. "An award of alimony is within the trial court's discretion." *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988). The primary purpose of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992). Alimony is to be based on what is "just and reasonable" under the circumstances of the case. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993). Among the factors to be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the parties' present situations, (8) the parties' needs, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) the parties' contributions to the joint

estate, (12) a

party's fault in causing the divorce, and (13) general principles of equity. *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993); *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).

First, we would note that the trial court did not base the alimony award on the Ford Motor Company benefit alone, but on all defendant's post-retirement income. Further, the trial court made findings of fact relevant to numerous alimony factors. *Ianitelli, supra*. We conclude that the trial court's findings were not clearly erroneous, except its finding regarding defendant's total retirement benefit from Ford Motor Company. At a motion hearing, the trial court acknowledged its error regarding the retirement benefit but again determined that the balance that it struck at trial in apportioning the income between the parties was still appropriate. *Ackerman, supra*. We find no abuse of discretion. *Pelton, supra*.

Next, defendant argues that the court should have credited him for the payments he made directly to creditors and to plaintiff after the court ordered him to remit temporary alimony to the friend of the court. Although both parties presented evidence regarding the amounts of these payments, defense counsel did not request a determination of the credit from the trial court. However, defendant did object to the entry of judgment on this ground.

In actions tried without a jury, the trial court must find the facts and state separately its conclusions of law regarding contested matters. MCR 2.517(A)(1), MCR 6.403; *Fletcher v Fletcher*, 447 Mich 871, 883 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). Findings and conclusions concerning contested matters are sufficient if brief, definite, and pertinent, without overelaboration of detail or particularization of facts, MCR 2.517(A)(2); *Fletcher, supra*, and it appears that the trial court was aware of the issues in the case and correctly applied the law. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). We remand for findings of fact and a determination of whether defendant is owed some credit for his payments. If the trial court determines that defendant met his support obligations, the court may cancel his temporary alimony arrearages retroactively. *Ozdaglar v Ozdaglar*, 126 Mich App 468, 473; 337 NW2d 361 (1983).

Finally, defendant argues that the trial court erred by awarding plaintiff all survivorship benefits associated with defendant's Ford Motor Company pension after awarding her only twenty-seven percent of the retirement as part of the property settlement. Defendant argues that the award of full survivorship benefits was excessive or that the trial court should have left the issue open for recalculation if the parties eventually seek a divorce. We disagree that the trial court erred.

Any right to vested pension benefits accrued by a party during the marriage must be considered part of the marital estate that is subject to award upon 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, treatment of pension benefits may vary. Depending on the equities and the circumstances, pensions may be distributed through either the property division or the award of alimony. *Magee v Magee*, 218 Mich App 158, 164-165; 553 NW2d 363 (1996). Methods of valuation and distribution of pension interests may also vary. *Boyd v Boyd*, 116 Mich App 774, 782; 323 NW2d 553 (1982). Pension benefits that

accrued both during and before or after the marriage should be allocated based on the ratio of the years the parties were married while the employed spouse earned the pension to the total years in which the employed spouse worked to accrue the pension. *Vander Veen, supra* at 113. However, we have held that pension benefits accrued before marriage may be the subject of a division of property. *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992). We have noted that QDROs¹ routinely contain provisions designating an ex-spouse as a surviving spouse, entitling the ex-spouse to survivorship rights in a former spouse's pension. *Roth v Roth*, 201 Mich App 563, 566; 506 NW2d 900 (1993). The security of the family is the paramount concern, and a court may use any property of either party to achieve just and reasonable support after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case. MCL 552.23(1); MSA 25.103(1); *Booth, supra* at 290, quoting *Rogner v Rogner*, 179 Mich App 326, 329-330; 445 NW2d 232 (1989).

The concern of the trial court in this case was that if defendant should predecease plaintiff, the alimony, i.e., her support, would stop along with the pension payments. The plaintiff's security was the court's paramount concern. *Booth, supra*. In light of all the facts before the court, the judgment entitling plaintiff to one hundred percent of the survivorship benefit did not result in an unfair or inequitable distribution.

We affirm in part but remand for findings of fact regarding any credit due to defendant against his pretrial alimony arrearage. We also point out that when considering the issue of alimony arrearage, the Court may reconsider the amount of any alimony to be awarded. We do not retain jurisdiction.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

¹ Qualified Domestic Relations Orders.