

STATE OF MICHIGAN
COURT OF APPEALS

KAREN THERESE WALKER,

Plaintiff-Appellant,

v

DWIGHT WALKER,

Defendant-Appellee.

UNPUBLISHED

April 22, 2004

No. 246383

Wayne Circuit Court

LC No. 99-927708-DZ

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals from a judgment of divorce entered on July 19, 2002. We reverse in part and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's sole argument on appeal is that the trial court erred in awarding defendant one hundred percent of his military pension. In support of this argument plaintiff also claims that the trial court made erroneous findings of fact and improperly applied the law. On appeal, this Court must first review the trial court's findings of fact. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003). Findings of fact will not be reversed unless clearly erroneous. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* 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 is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sparks, supra* at 151-152.

The parties were married in Germany on December 17, 1976. Defendant was a member of the United States Army stationed in Germany and plaintiff was a German citizen. In 1996, defendant retired from the military, with full pension benefits. In 1997, defendant moved to the United States. The parties disagree as to who first wanted the divorce. Plaintiff obtained an uncontested German divorce decree in April 1999, and then sought a share of defendant's military pension.

This action was filed in September 1999. Pursuant to a November 22, 2000 order, the trial court granted plaintiff's motion to enter the German divorce judgment to the extent that it sought recognition of the judgment pursuant to the doctrine of comity. It also determined that

defendant's pension was susceptible to division. The parties were then ordered to engage in discovery regarding the potential division of defendant's military pension. Subsequently, the parties submitted a stipulation of facts to the trial court. On April 30, 2002, the trial court denied plaintiff's request to share in defendant's military pension. The court found that the facts and circumstances to be reviewed in determining whether to divide the pension should be those that existed at the time of the German divorce. After considering the factors delineated in *Sparks, supra*, pertaining to the equitable division of assets, the court awarded each party one hundred percent of his or her individual pension.

Plaintiff asserts that in making its determination the court made several erroneous findings of fact; namely, (1) plaintiff's pension was vested; (2) plaintiff's pension was a marital asset; (3) plaintiff was at fault for the divorce; and (4) the earning abilities of the parties were the same.¹ Plaintiff first contends that the trial court erroneously considered the value of her pension in its decision because that benefit was not vested.

According to the parties' stipulation of facts, plaintiff would be entitled to monthly pension benefits of \$416.18 "if she works until the age of sixty-five²." However, according to the certified translation of plaintiff's pension documents, plaintiff's pension is an "old-age pension" and concessions are made for certain circumstances such as unemployment and disability which allow plaintiff to draw on her pension before age sixty-five. Therefore, to the extent that plaintiff is entitled to receive this benefit despite her employment circumstances, this Court considers it vested. Nevertheless, even unvested pensions may be considered by the court where it is just and equitable to do so. *Quade v Quade*, 238 Mich App 222, 225; 604 NW2d 778 (1999).

Plaintiff also asserts that her pension was not a marital asset because only a small portion of the pension accrued during the marriage. But this Court has decided that the trial court may consider the amount of plaintiff's pension regardless of whether the contributions occurred during or after the marriage. *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995). Plaintiff's assertion that she did not have any pension expectancy at the time of the divorce is belied by her admission that defendant would be entitled to the "marital portion" of her current pension. Furthermore, MCL 552.18 provides that vested pensions must be considered as marital assets and unvested pensions may be considered at the discretion of the trial court.

Plaintiff next asserts that the court erroneously concluded that she was at fault for the divorce. The trial court stated that this factor slightly favored defendant because it found that plaintiff "appears to have arbitrarily decided to divorce her husband." We find the trial court's

¹ Defendant argues as an initial point that this Court should not consider three documents presented by plaintiff because they were not part of the lower court record. After reviewing the lower court record, we find no merit to defendant's argument as all three documents were found therein.

² At the time of the court's ruling, plaintiff was fifty years old.

finding clearly erroneous. Plaintiff testified in the German court that defendant “could not understand why I wanted to get a divorce when he went away to the States, he nevertheless never contacted me again, so I assume that he is in agreement.” In the parties’ first stipulation of facts they agreed that after defendant returned to Germany from Saudi Arabia, “the parties concluded that their marriage was irreconcilable and Defendant returned alone to live in the United States” Also, in its first opinion, the trial court stated, “When Defendant returned to Germany in October 1997, Plaintiff and he concluded that their marriage was irreconcilable.” In all of the parties’ other statements on this issue, each blames the other. Based on this evidence, we conclude that the trial court clearly erred in weighing this factor slightly in favor of defendant. The evidence only supports a finding that this factor be weighed equally as to each party.

Plaintiff further contends that the trial court erred in concluding that the earning abilities of the parties were the same. We disagree. The trial court properly looked at defendant’s current income as an indicator of his earning *ability*. The evidence showed that plaintiff’s monthly income was nearly \$1,230 and defendant’s fluctuated between \$1,500 and \$2,000, depending on how many hours a week he worked. Thus, we cannot say that the court clearly erred in concluding that the parties’ earning abilities were *approximately* the same.

Plaintiff argues that, as a result of these alleged erroneous findings of fact, the trial court’s award was not equitable. In reviewing the *Sparks* factors, the majority of the trial court’s findings were not disputed. The court found that the duration of the marriage was substantial; it could not consider the value of the assets retained by plaintiff because no valuation was submitted; and it weighed the remaining factors equally. We have determined that the fault factor should have been weighed equally as well, and the court did not err in weighing equally the parties’ earning abilities. Further, the court did not err in considering the value of plaintiff’s pension in determining an equitable division of the assets.

In determining that each party should retain their individual pension benefits, the court stated:

If the Court looks at the income of the Defendant, \$1,600 a month, and the income of the Plaintiff – about \$1,230 a month. The Court must also look to both pensions. The pension of Plaintiff - \$416 divided in half is \$208 each. So if you add those together, Defendant’s income would be \$1,800, Plaintiff’s income would be \$1,400. And in order to equalize those, and with a long marriage and about equal factors, the Court thinks it would be appropriate to do so. Then approximately \$200 from the military pension going toward the wife would reduce husband’s income to \$1,600, wife income to \$1,[6]00. This is a wash between her pension and his pension.

The critical error in the trial court’s analysis is that while it weighed the parties’ earning abilities equally, it failed to impute a figure to defendant for this factor. His income at the time of the divorce was \$1,616, the amount of his monthly military pension, because defendant was unemployed. His earning ability was at least the same as plaintiff’s, if not a little more as evidenced by his current income. Therefore, if an additional monthly income of \$1,230 is imputed to defendant, defendant’s monthly income is \$2,836. Under this circumstance, a decision to award the parties their individual pension benefits is clearly inequitable.

In light of the trial court's errors, we remand this case in order for the court to readdress the issue of division of defendant's pension. The primary objective of any divorce proceeding is to arrive at a property settlement that is fair and equitable in light of *all* the circumstances. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987). In determining the appropriate division of defendant's pension, the trial court should consider the amount fairly attributable to defendant's earning capacity and should consider the fault factor as weighing equally between the parties. We do not disturb the trial court's ruling awarding one hundred percent of plaintiff's pension to plaintiff.

Reversed in part and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski