# STATE OF MICHIGAN

# COURT OF APPEALS

KEITH M. CAURDY,

Plaintiff-Appellee,

v

CATHY JO CAURDY,

Defendant-Appellant.

UNPUBLISHED
January 30, 2014

No. 312247
Lenawee Circuit Court
Family Division
LC No. 11-036424-DO

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We remand for further proceedings consistent with this opinion.

This appeal arises out of the second marriage between plaintiff and defendant. The parties were first divorced in December 2001, after having been married for 24 years. The 2001 divorce judgment contained a provision awarding defendant a 50 percent share of plaintiff's pension upon his retirement from the Adrian Public School System, to be distributed through an Eligible Domestic Relations Order (EDRO). The parties, however, remarried on November 8, 2004, with the EDRO having never been entered. Plaintiff took an early retirement buyout of $52,000 and retired in December 2004, putting the lump sum buyout into an annuities account with his other pension funds.

Plaintiff filed for divorce in March 2011 and a trial thereafter took place to resolve issues concerning marital assets. Relevant to the instant matter, the trial court awarded defendant $10,000, apparently as her share of plaintiff's retirement annuities. The remaining marital assets were essentially divided equally.

On appeal, defendant first contends that the trial court erred when it failed to make specific findings of fact on the relevant *Sparks*[1] factors in its division of marital property. We agree.

[1] *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992).

This Court's review of the trial court's factual findings in a divorce action is limited to clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). 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 was made. *Johnson v Johnson*, 276 Mich App 1, 10-11; 739 NW2d 877 (2007). 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. *Sparks*, 440 Mich at 151-152. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999).

In *Sparks*, 440 Mich at 159-160, our Supreme Court held that 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.

The determination of relevant factors will vary depending on the facts and circumstances of the case. *Id.* at 160. Our Supreme Court also noted:

> It is not desirable, or feasible, for us to establish a rigid framework for applying the relevant factors. The trial court is given broad discretion in fashioning its rulings and there can be no strict mathematical formulations. But, as we have recognized before, while the division need not be equal, it must be equitable. Just as the final division may not be equal, the factors to be considered will not always be equal. Indeed, there will be many cases where some, or even most, of the factors will be irrelevant. But where any of the factors delineated in this opinion are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors. It is hoped that this requirement will result in greater consistency and provide for more effective and meaningful appellate review. [*Id.* at 158-159 (citations omitted).]

Here, it is difficult to discern which *Sparks* factors were considered in the trial court's findings of fact. In awarding defendant $10,000, the trial court stated:

> What do I do with the disparity? And clearly you allowed this to happen, and I don't know that you intended it to happen, but it has resulted in your having giving up – given up your rights to your pension. You incurred some benefit. I don't agree that it was $800 because there was some cost associated with Option Number 1, and it's gonna [sic] take this Judgment of Divorce to get that out of your pension, your EDRO account. But in addition to the $5,000 of interest that you have accumulated on the money, and that accumulated during the period of your marriage, and with due consideration of your $26,000 that has accumulated, and the best as I can factor in my mind the fairness and equity involved in share – allowing you to share the benefits of this time of your marriage as well as the

> burdens, and without trying to tack either one of you that I find to be honest, good people under other circumstances that aren't in my courtroom for a Complaint for Divorce, I find that Plaintiff should reimburse Defendant, and I'm ordering the sum of $10,000 from Keith to Cathy Jo in full resolution of all these disputes.

A review of the record indicates that the trial court, at most, considered the contributions by the parties to the marital estate and general principles of equity in making its decision. The trial court noted that plaintiff "incurred some benefit" from defendant choosing to abstain from entering the EDRO. The trial court also noted that in making its decision, it took into account the $5,000 increase in the value of plaintiff's annuity over the course of the second marriage, and the $26,000 pension accumulated by defendant. The trial court then found that, "the best as I can factor in my mind the fairness and equity involved in . . . allowing you to share the benefits of this time of your marriage as well as the burdens . . . I find that Plaintiff should reimburse Defendant . . . I'm ordering the sum of $10,000 . . . ." These findings vaguely address the parties' contributions to the marital estate, and did not specifically find what contributions were made. The trial court used the word "reimburse"; however, it made no specific findings regarding what plaintiff was reimbursing defendant for, and how this factor was relevant to the amount of money awarded. Furthermore, absent from the record are any other findings from which this Court can determine what the trial court considered in dividing the marital estate. While there was evidence on the record that plaintiff's annuity increased by $5,000 over the course of the second marriage, the trial court made no specific findings of fact regarding the factors it considered in awarding defendant a total of $10,000. The trial court merely stated that it did so in "fairness and equity." This is not sufficiently specific for this Court to review whether the findings were clearly erroneous.

The trial court made no findings regarding the (1) the duration of the marriage, (2) the age of the parties, (3) the life status of the parties, (4) necessities and circumstances, or (5) the earning abilities of the parties. Although the trial court is not required to make findings of fact on every *Sparks* factor, if any of the factors are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors. *Id.* at 159. Here, evidence was presented that the parties were remarried and defendant agreed to abstain from entering the EDRO from the first judgment of divorce. There was testimony that plaintiff received the early retirement buyout after the beginning of the second marriage, and that he placed it into an annuity. Furthermore, the parties' ages, employment status, and retirement benefits were also discussed in testimony at trial. This evidence became relevant to the distribution of the property and the trial court failed to address the relevant factors it considered in making its determination. Although the trial court is not required to follow a strict mathematical formula in fashioning its ruling, the trial court's distribution plan is not readily apparent and it is unclear what factors the trial court considered in rendering its judgment. *Id.* at 158.

Where there is evidence on the record regarding the *Sparks* factors on which the trial court did not make findings of fact where it should have, or the trial court only makes nonspecific findings of fact, it is appropriate to remand the case to the trial court to make further findings of fact. *McNamara v Horner*, 249 Mich App 177, 186-188; 642 NW2d 385 (2002). The trial court's failure to make specific findings of fact regarding the factors it considered in determining the property distribution makes it difficult to conduct meaningful appellate review

of whether the distribution was equitable. *Sparks*, 440 Mich at 159. Therefore, we remand and direct the trial court to make specific findings of fact regarding which factors it considered in making the division of the marital estate.

Defendant next asserts that plaintiff's $52,000 early retirement buyout was marital property because the parties remarried before the payout occurred, and it only came into existence because of the second marriage. We conclude that the trial court's failure to make relevant findings precludes review of this decision, and we remand to the trial court for further findings.

In dividing marital property between the parties, the trial court must first determine what property is marital and what property is separate. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). "Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage." *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010). Once a court has determined what property is marital then it may apportion the marital estate between the parties in a manner that is equitable in light of all the circumstances. *Id.* As a general principle, when the marital estate is divided, "each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Reeves*, 226 Mich App at 494.

In Michigan, pension benefits may be considered part of the marital estate for purposes of property division. MCL 552.18(1); *Magee v Magee*, 218 Mich App 158, 164; 553 NW2d 363 (1996). In this case, plaintiff worked for 29 ½ years for Adrian Public Schools and received an early retirement buyout offer around September or October of 2004. The parties were then married on November 8, 2004, and plaintiff's last day of teaching was December 31, 2004. Consequently, the parties had been married for only six to seven weeks when plaintiff received the $52,000 early retirement buyout.

Pursuant to MCL 552.18(1):

> Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.

By the plain language of MCL 552.18(1), the portion of the pension that *accrued* during the marriage must be considered part of the marital estate. Here, the early retirement buyout accrued for more than 29 years prior to the second marriage. In effect, the portion of defendant's pension that accrued before the second marriage constituted a separate asset in defendant's separate estate. Thus, defendant's contention that the entire $52,000 buyout is marital property is an incorrect interpretation of the statute.

Defendant also asserts that the trial court should have considered the early retirement buyout as an extension of the marital property from the first marriage. Despite this contention, MCL 552.18(1) specifically states that the marital estate includes any portion of the pension accrued "during marriage." This language could only be interpreted to refer to the current

marriage and not a previous marriage that was already adjudicated. To interpret it otherwise would be to undermine the finality of judgments. This Court has held that the language in MCL 552.18(1) does not expressly restrict the circuit court's jurisdiction to pension contributions made within the confines of the marriage, and in order to ensure that equity can be accomplished, the trial court's discretion should not be limited unduly with regard to the distribution of premarital assets. *McMichael v McMichael*, 217 Mich App 723, 731; 552 NW2d 688 (1996). However, defendant was already entitled to payments from plaintiff's pension pursuant to the first marriage's judgment of divorce. Therefore, the accrual of plaintiff's pension during the first marriage was already adjudicated and defendant is incorrect in her assertion that the early retirement buyout should be treated as an extension of marital property from the first marriage.

Defendant next contends that there was no evidence to support the trial court's findings that the value of his annuity was approximately $99,000 at the time of the divorce trial, and the value of the annuity prior to the second marriage was $42,000. As previously noted, this Court's review of the trial court's factual findings is limited to clear error. *Sparks*, 440 Mich at 151.

Here, plaintiff testified that he had $42,000 remaining in his annuities after defendant received her 50 percent distribution pursuant to the first marriage's judgment of divorce. And, defendant acknowledged that she received her portion of plaintiff's annuities from the first divorce. Furthermore, the parties both testified that plaintiff deposited his $52,000 early retirement buyout into the annuities, which, according to plaintiff, brought the balance up to approximately $94,000. Plaintiff acknowledged that there was a $5,000 increase in the value of the annuity during the course of the marriage. The trial court did not specifically state in its findings that plaintiff's annuity was valued at $99,000 at the time of the divorce trial, or that the value of the annuity prior to the second marriage was $42,000. However, the trial court's findings did consider the $5,000 increase in plaintiff's annuity over the course of the second marriage, which showed that the trial court accepted these valuations set forth by plaintiff's testimony. In viewing the evidence presented, and defendant's failure to provide contradicting evidence or testimony, the trial court did not commit clear error in its findings regarding the value of the annuity.

Defendant next asserts that the trial court erred when it failed to equally divide plaintiff's annuity between the parties. Pursuant to MCL 552.18(1), the portion of the annuity that accrued during the marriage must be considered part of the marital estate. Here, the trial court, in its findings, noted that it took into consideration the $5,000 increase in plaintiff's annuity over the course of the marriage. Because the $5,000 was accrued during the marriage, it was part of the marital estate. MCL 552.18(1). Thus, the trial court properly found that the $5,000 increase in the annuity was marital property. Furthermore, evidence was presented that plaintiff had $42,000 in his annuity after defendant received her 50 percent distribution pursuant to the first marriage's judgment of divorce. Because the accrual of plaintiff's annuities during the first marriage was already adjudicated, the trial court did not err in disregarding this portion of the annuity when determining which portion of this asset was marital property.

The only question left is whether defendant should have received any portion of the $52,000 early retirement buyout that was deposited into the annuity. In reviewing the record, it is difficult to determine whether the court considered this portion of the annuity to be marital property. The court failed to explain its general basis for determining the equitable division of

property. The trial court found that over the course of the second marriage there had been a $5,000 increase in the annuity where the buyout was deposited, but it did not specifically find that any portion of the buyout itself was marital property. The judgment of divorce ordered that plaintiff shall retain as sole and separate property his pension and annuity, and also ordered that defendant shall retain as sole and separate property her 401k plan. However, the trial court, in its findings, merely stated that in fairness and equity, plaintiff should "reimburse" defendant $10,000.00.

The trial court did not specify the purpose of this reimbursement. It may have been for contributions to the marital estate or it may have been a division of the assets the trial court found to be marital property. In any event, clarification on this determination is required in order to properly review whether the trial court erred in its factual findings and whether the property distribution was equitable in light of these findings. *Woodington*, 288 Mich App at 357. Therefore, the trial court's failure to make relevant findings on this matter precludes meaningful review of this issue. *Sparks*, 440 Mich at 159. We remand and direct the trial court to make the required findings of fact essential to determine whether the early retirement buyout was considered marital property.

Defendant next contends that the trial court incorrectly stated that the finalization of the divorce would result in the termination of defendant's survivorship benefit in plaintiff's pension plan. We remand and direct the trial court to clarify the basis for which it decided to exclude the survivorship benefits from the judgment of divorce.

At trial, defendant asked the trial court whether it was going to include defendant's survivorship benefits in the judgment of divorce. The trial judge responded, "I'm not arguing surviving spouse." The trial judge then stated:

> No, I think that . . . with the divorce being final, that is the factor needed in order to take her off as surviving spouse, and [plaintiff] no longer will pay that surcharge.
>
> * * *
>
> But there's no benefit gonna [sic] go to him or her otherwise, and he is gonna [sic] take her off, I'm sure, as a hundred percent. And I don't think he can carry her. She's not his relative once they're divorced. She's no longer his relative, and it's specific for spouses. He can't transfer it to his children. Nope. It's a one person option. Strictly -- You have it at the Post Office as well. You opt to keep him. When you retire, you'll opt to pay your husband, if you have one, otherwise, you just take your full pension and you lose it upon your death.

The trial court apparently held that once the divorce is finalized, defendant is no longer eligible as a survivor beneficiary of plaintiff's pension plan. However, in reviewing the record, it does not appear the trial court had any basis for this finding. Plaintiff's pension plan was not entered into evidence and the trial court does not reference any authority in making its decision. Instead, the trial court apparently assumed that this pension plan would not allow for a survivor beneficiary designation pursuant to a judgment of divorce.

Defendant asserts that the trial court's failure to include this survivorship benefit in the judgment of divorce terminated her contingency right in plaintiff's pension. Plaintiff does not appear to challenge defendant's contention that she is entitled to a survivorship benefit in his pension. In his brief on appeal, plaintiff asserts:

> On Page 31 of the Defendant/Appellant's Trial Brief there is a discussion about the fact that the survivorship benefit of the Defendant/Appellant was somehow eliminated by the Trial Court in this action. This is clearly not true. You will find no place in the Judgment of Divorce that indicates a survivorship benefit was lost or terminated in the second divorce judgment.

Thus, it appears that plaintiff is stating that defendant still has a survivorship interest in his pension.

Defendant is correct in her assertion that the survivorship benefit must be determined in the judgment of divorce. According to MCL 552.101(4):

> (4) Each judgment of divorce or judgment of separate maintenance shall determine all rights, including any contingent rights, of the husband and wife in and to all of the following:
>
> (a) Any vested pension, annuity, or retirement benefits.
>
> (b) Any accumulated contributions in any pension, annuity, or retirement system.

This statute requires that a divorce judgment determine all rights of the husband and wife in "[a]ny pension, annuity, or retirement benefits." *Neville v Neville*, 295 Mich App 460, 467; 812 NW2d 816 (2012). The language of the statutes (specifically, contingent rights) clearly indicates that the judgment of divorce shall determine survivorship benefits in a pension plan.

The judgment of divorce at issue does not reference any survivorship benefit in plaintiff's pension. As it stands, defendant does not have any survivorship benefits in plaintiff's pension plan because the judgment of divorce does not determine such contingent rights.

The trial court was unclear when it stated that it was "not arguing surviving spouse." Further, from reviewing the record, the trial court's conclusion that defendant could not be named as a beneficiary if she was not married to plaintiff did not appear to be based upon the pension plan, itself, or any relevant Michigan authority. We remand and direct the trial court to clarify the basis for which it decided to exclude the survivorship benefits from the judgment of divorce.

We remand to the trial court for further findings regarding its determination of the property division, including whether the early retirement buyout was marital property, and

explain the basis for its decision to exclude survivorship benefits from the judgment of divorce. We retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra

## Court of Appeals, State of Michigan

## ORDER

Keith M Caurdy v Cathy Jo Caurdy

Docket No. 312247

LC No. 11-036424 DO

Deborah A. Servitto
Presiding Judge

Christopher M. Murray

Mark T. Boonstra
Judges

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Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 90 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court shall make findings regarding the property division, including whether the early retirement buyout was marital property, and explain the basis for its decision to exclude survivorship benefits from the judgment of divorce.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JAN 30 2014
Date

Chief Clerk