

STATE OF MICHIGAN
COURT OF APPEALS

HELEN LEVY,

Plaintiff–Appellant,

v

LEWIS Z. LEVY,

Defendant–Appellee.

UNPUBLISHED

November 12, 1996

No. 180486

LC No. 93-449183

Before: McDonald, P.J., and White and P.J. Conlin,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment of divorce entered in this matter. We affirm in part, reverse in part and remand for further proceedings.

Plaintiff filed for divorce in 1993 after almost twenty years of marriage. The parties had two children who were both minors at the time of trial. At the time of trial, plaintiff was forty-eight years old, and unemployed. She had a high school diploma and some work experience. She did not work full-time during the marriage. Defendant was also forty-eight years old. He has an undergraduate degree in mechanical engineering and a masters degree in engineering. He had been employed by General Motors for twenty-nine years as a staff engineer. His base salary was approximately \$87,000 per year.

The marital assets consisted of the following: (1) marital home, (2) contents of marital home, (3) 1992 Buick Regal, (4) 1967 Corvette, (5) savings-stock purchase program (S-SPP), (6) IRA accounts, and (7) pension benefits.

The trial court ordered defendant to pay plaintiff \$300 per week in alimony for five years, and to pay the cost of plaintiff's continued medical insurance under COBRA for one year. It also ordered defendant to pay plaintiff \$300 per week in child support for two children, and, thereafter, \$196 per

* Circuit judge, sitting on the Court of Appeals by assignment.

week for one child, until the children reach the age of eighteen or graduate from high school, whichever last occurs. The court further ordered that the marital property be divided equally.

Plaintiff first argues that the trial court failed to comply with MCR 2.517(A), requiring that the court separately state its findings of fact and conclusions of law. A trial court's findings of fact are sufficient under MCR 2.517(A) if it appears that the trial court was aware of the factual issues and applied the law correctly. *In re Cotton*, 208 Mich App 180, 183; 526 NW2d 601 (1994). In divorce cases, a court's factual findings are sufficient if the parties can determine the approximate respective values of their individual awards by consulting the verdict. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). In this case, the trial court issued a fifteen-page opinion, in which it specifically stated its findings of fact and conclusions of law. Except as relates to matters addressed elsewhere in this opinion, the trial court's opinion complies with MCR 2.517.

We next consider whether the trial court's factual findings or disposition rulings should be disturbed. A trial court's factual findings will be upheld unless they are clearly erroneous. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993). Factual findings are clearly erroneous if this Court is left with a definite and firm conviction that the trial court made a mistake. *Sparks, supra*, 440 Mich 151-152. If the factual findings are not clearly erroneous, the trial court's dispositional rulings will be upheld unless unfair or inequitable in light of the facts. *Id.*

The trial court's factual findings relating to its alimony and COBRA awards were not clearly erroneous since they were supported by uncontradicted testimony at trial. Further, while the alimony and COBRA award might have been more generous, we cannot say that either award is unfair or inequitable given the facts of the case.

We further hold that the trial court's equal division of the marital property was fair and equitable given the facts of the case. However, the trial court's factual findings relating to the value of certain marital assets are clearly erroneous. The trial court improperly discounted the value of defendant's pension benefit, IRA accounts, and S-SPP to account for tax and penalty consequences upon liquidation when the court did not liquidate these assets and there was no evidence on the record that the parties contemplated liquidation.

In valuing defendant's pension benefits, IRA accounts, and S-SPP, the trial court discounted these assets by approximately 50% to account for tax consequences and early withdrawal penalties. Contrary to the trial court's factual findings, the experts that testified at trial did not testify that tax consequences and early withdrawal penalties should be applied to reduce these assets to their present value. Rather, they testified that tax and penalty consequences would be suffered only if the court liquidated these assets, and counseled against the court doing so. The trial court did not liquidate these assets, nor was there evidence that the parties contemplated a liquidation. Thus, trial court erred in discounting the assets for tax consequences. We therefore remand for recomputation of the value of these assets and for redistribution of the property in light of the recomputation. Cf. *Hanaway v Hanaway*, 208 Mich App 278, 300-301; 527 NW2d 792 (1995); *Nalevayko, supra*.

The trial court did not err in applying a coverture factor in determining the value of defendant's pension benefits and S-SPP. This Court has held that a trial court does not have to consider contributions made prior to the marriage in determining the value of a marital asset. See *Boonstra v Boonstra*, 209 Mich App 558, 562; 531 NW2d 777 (1995); *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992). However, on remand the court should apply an exact figure representing a fraction, the numerator of which is the years of marriage during which the plan was in effect, and the denominator of which is the years of the plan.

Additionally, the court shall make a specific finding regarding whether there is a separate Part B primary component to the plan, and if there is such a benefit include it in the valuation.

We conclude the court did not err in using a retirement age of 65. Further, the trial court did not abuse its discretion in not applying a Qualified Domestic Relations Order (QDRO) in distributing the pension, IRA, and S-SPP benefits because it did not divide these assets. However, the trial court should apply a QDRO if these assets are to be divided on remand.

Finally, the trial court's factual findings relating to the valuation of the remaining marital assets were not clearly erroneous, as they were supported by evidence presented at trial.

Lastly, we address whether the trial court erred in failing to award any costs and attorney fees to plaintiff. The trial court ordered that each party would be responsible for their own attorney fees. Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this Court will not reverse the trial court's decision absent an abuse of discretion. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Attorney fees also may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2s 394 (1992). A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Maake, supra* at 189. Here the trial court made no findings regarding plaintiff's ability to pay attorney fees. We therefore remand on this issue as well.

Affirmed in part. Remanded for revaluation of defendant's pension benefits, IRA accounts, and S-SPP, and for reconsideration of the attorney fee issue. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Helene N. White

/s/ Patrick J. Conlin