

STATE OF MICHIGAN
COURT OF APPEALS

RACHELLE ANN BACHRAN,
Plaintiff-Appellee,

UNPUBLISHED
August 21, 2001

v

LANCE WILLIAM BACHRAN,
Defendant-Appellant.

No. 226937
Houghton Circuit Court
LC No. 96-009565-DM

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging the trial court's findings of fact and conclusions of law in support of its distribution of certain assets – namely premarital mutual funds and individual retirement accounts (IRAs) owned by the parties, as well as defendant's pension and survivorship benefits.¹ We affirm in part, reverse in part, and remand in part.

Defendant first argues that the trial court erred in awarding plaintiff one-third of defendant's military pension at the time of his retirement. We disagree. In deciding a divorce action, the trial court must make findings of fact and dispositional rulings. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). 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), which should be upheld unless clearly erroneous. *McDougal, supra* at 87. If the trial court's findings of fact are upheld, this Court must then decide whether the dispositional ruling was fair and equitable in light of those facts. The dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

¹ This case was previously before this Court when defendant appealed the trial court's judgment of divorce, challenging the distribution of his premarital mutual funds and individual retirement accounts (IRAs), his military pension, and the forced sale of the parties' premarital real property. *Bachran v Bachran*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 1999 (Docket No. 211677). After considering defendant's initial appeal, this Court remanded the case to the trial court, without retaining jurisdiction, with instructions to articulate specific findings of fact to support its dispositional rulings. *Id.* at 6, 7.

Vested pension benefits accrued during marriage are considered part of the marital estate and are subject to distribution. MCL 552.18(1), *Vander Veen v Vander Veen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998). Further, pension benefits accrued before or after the marriage *may* be subject to property division. *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995); *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992). Unvested rights in pensions accrued during marriage may also be part of the marital estate and subject to award, but only if the court so finds or the parties agree. MCL 552.18(2); *Quade v Quade*, 238 Mich App 222, 225; 604 NW2d 778 (1999). Pension benefits accrued during, before, or after the marriage should be allocated based upon the ratio of the years the parties were married while the employed spouse earned his pension to the total years in which the employed spouse worked to accrue the pension. *Vander Veen, supra* at 112, 115.²

On defendant's initial appeal, this Court held that the trial court failed to make findings of fact to support plaintiff's award of one-third defendant's pension and noted that under *Vander Veen, supra* at 108, although not binding, plaintiff should have only been awarded one-sixth of defendant's pension benefits – absent specific findings of fact to support the court's one-third award. *Bachran v Bachran*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 1999 (Docket No. 211677), 6-7. We then remanded the case to the trial court to make specific findings of fact to support its decision to award plaintiff one-third of defendant's pension at the time of his retirement *or* redistribute defendant's pension pursuant to *Vander Veen. Id.* at 6.

On remand, the trial court did not redistribute defendant's pension pursuant to *Vander Veen*, but chose to articulate specific findings of fact to support its original one-third distribution. The trial court found that its original award of one-third defendant's pension to plaintiff was justified because plaintiff provided substantial care for defendant's son while defendant was at work, she was unable to establish her Mary Kay business because of defendant's career moves, she had a positive influence on defendant's military advancement, and defendant benefited during the marriage by taking tax deductions for plaintiff's children and losses on her rental property. We cannot say that these findings of fact are clearly erroneous because they are supported by the record. Therefore, we must determine whether the distribution was fair and equitable in light of these findings.

In light of all the circumstances, we find that the distribution of defendant's pension benefits was fair and equitable. Defendant was more financially secure than plaintiff at all times throughout the marriage; plaintiff contributed to defendant's success in the military because she was forced to move various times throughout the parties' marriage to accommodate defendant's career; these repeated moves negatively impacted the establishment of plaintiff's Mary Kay business and the income that she was able to produce there. Additionally, plaintiff attempted to mesh her family with defendant's and provided primary child care for defendant's son. This care allowed defendant to continue his military career, accumulating pension benefits for his retirement. Her personal and financial sacrifices reasonably support the conclusion that

² As we noted in our earlier opinion, *Vander Veen* is not strictly controlling on the trial court because the trial court's ruling came before the *Vander Veen* decision.

awarding one-third of defendant's pension benefits was fair and equitable under the circumstances.

Defendant next argues that the trial court erred by distributing the parties' respective mutual funds and IRAs. We agree. In making its dispositional ruling, the trial court must first determine if the property is marital property or separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The trial court may apportion all marital property – that is, all property that has come to either party by way of the marriage. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). A spouse's separate property may be invaded for distribution only if: (1) after the distribution of the marital property, the distribution is insufficient for the suitable support and maintenance of either party, MCL 552.23(1), or if (2) the trial court finds that the other spouse contributed to the acquisition, improvement, or accumulation of the property. MCL 552.401.

On defendant's initial appeal, this Court remanded the issue to the trial court to make specific findings of fact to support its decision to distribute the premarital mutual funds and IRAs. Specifically, we instructed the trial court to determine if the parties' mutual funds and IRAs were part of the marital estate. *Bachran, supra* at 6. If the trial court was unable to determine if those assets were marital property, it was instructed to determine whether (1) the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party, or (2) the other spouse contributed to the acquisition, improvement, or accumulation of the mutual funds and IRAs. *Id.*

On remand, the trial court did not determine if the parties' mutual funds and IRAs were part of the marital estate and did not explain why it was "unable" to do so. However, the court supported its decision to distribute the parties' mutual funds and IRAs by explaining that if plaintiff did not receive thirty-five percent of the mutual funds and IRAs, the assets awarded to plaintiff would be insufficient for her suitable support and maintenance. In support of its dispositional ruling, the trial court cited the parties' different incomes at the time of trial and in the future, as well as the alleged negative impact defendant's career moves had on plaintiff's business and her ability to accumulate any social security credits toward her retirement.

We find that these findings of fact are clearly erroneous for several reasons. First, plaintiff was awarded forty percent of the parties' premarital real estate and will receive a substantial amount of money after that property is sold and the proceeds distributed. Second, she was awarded limited alimony in the amount of \$300 a month for twenty-four months. Additionally, she was awarded one-third of defendant's military pension at the time of his retirement. Third, plaintiff was aware that defendant would be required to relocate his military position throughout the course of their marriage – after all, it was the premise for their short courtship before marriage. Further, defendant did not prohibit plaintiff from contributing the necessary funds from her Mary Kay earnings to social security or from making other investments for her future. Last, plaintiff has the capability of supporting herself after the divorce because she has a master's degree in health education and could seek employment in that field to maintain an adequate living. Further, now that the parties are divorced, plaintiff can establish her Mary Kay business and receive income from that venture for her support. In fact, plaintiff testified that she was the primary financial supporter for her family before marrying defendant.

On remand, the trial court also found that plaintiff contributed to defendant's ability to "maintain, improve and continue the" accumulation of defendant's mutual funds and IRAs. These findings of fact are clearly erroneous because the record only supports the finding that plaintiff assisted defendant in *maintaining* his mutual funds and IRAs during the marriage. In no way did she contribute to the acquisition, improvement, or accumulation of those assets. There was no dispute that these assets were acquired before the parties were married. Further, no evidence was presented showing that plaintiff contributed financially to the assets or that the assets increased in value from anything plaintiff did – they simply were maintained. Consequently, the trial court erred in distributing defendant's premarital mutual funds and IRAs.

Defendant next argues that the trial court erred in awarding plaintiff survivorship benefits. Generally, any survivorship benefits accompanying a spouse's pension are subject to distribution, *Roth v Roth*, 201 Mich App 563, 566, 568; 506 NW2d 900 (1993), but only those assets set out in the judgment of divorce are part of the court's dispositional ruling. *Quade, supra* at 224.

The judgment of divorce clearly states that plaintiff is entitled to the disputed survivorship benefits if she elects to pay for them. However, defendant objected to the judgment of divorce, arguing that the inclusion of survivorship benefits in the judgment of divorce was inappropriate because the court did not hear any testimony about these benefits during trial. The trial court agreed and instructed plaintiff's attorney to remove the language regarding survivorship benefits from the judgment. However, it is apparent from the judgment of divorce that plaintiff's attorney failed to remove the language, and the judgment was signed some ten months later with the language intact.

A trial court speaks through its written judgments rather than oral statements and opinions. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). However, because there is a blatant discrepancy between the judgment of divorce and the trial court's statements, we remand this issue to the trial court to determine whether the survivorship benefits were to be included in the judgment of divorce. If those benefits were to be included in the judgment of divorce, the trial court is to make specific findings of fact to support that dispositional ruling.

Affirmed in part, reversed in part, and remanded in part. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter