

STATE OF MICHIGAN  
COURT OF APPEALS

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STEPHANIE C. WEBER,

Plaintiff-Appellant,

v

BRIAN H. WEBER,

Defendant-Appellee.

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UNPUBLISHED

September 24, 2002

No. 231113

Wayne Circuit Court

LC No. 99-910756-DO

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. Plaintiff asserts that the trial court committed error requiring reversal in its valuation and distribution of the marital estate. We affirm in part, reverse in part, and remand this case to the trial court for further proceedings consistent with this opinion.

The parties began living together in defendant's Canton home in June 1985 and were married in February 1992. In 1996, the parties moved to a home in Prudenville, which they had purchased in 1991. Plaintiff filed for divorce in April 1999. No children were born of the marriage.

In a divorce action, this Court reviews the circuit court's factual findings for clear error. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). If the findings of fact regarding a division of property in a divorce case are upheld, "the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). Plaintiff first contends that the trial court committed clear error when it applied two different methods for determining the marital share of the parties' retirement plans.

Pensions, annuities, and retirement benefits owned or accumulated by the parties in a divorce proceeding are subject to division by a court in Michigan. MCL 552.18(1). That statute does not, however, determine the method for valuing a pension, annuity, or other retirement benefit. Instead, the method of valuation is left to the trial court, with direction to "reach a fair and equitable division of the property in light of all the circumstances." *Heike v Heike*, 198 Mich App 289, 292; 497 NW2d 220 (1993).

Neither party disputes that in this case plaintiff's retirement plan was properly described as a defined contribution plan while defendant owned a defined benefit plan. Rather, plaintiff's claim on appeal is that despite the differences between these plans, the same factors should be used when determining the marital share of either plan. The distinction between a "defined benefit plan" and a "defined contribution plan" has been described by this Court, in the context of determining the proper method of valuation for an employee stock ownership plan (ESOP) as follows:

An ordinary pension plan may be referred to as a "defined benefit plan." It guarantees upon retirement payment of a certain monthly benefit which generally is independent of the investment performance of the pension fund itself. The benefit is dependent upon factors such as the employee's length of service with the company and salary preceding retirement.

An ESOP, on the other hand, is better categorized as a "defined contribution plan" whereby the employee or employer, or both, put specified amounts into the plan. The plan's trustee credits the contributions to the employee's account. The benefit paid out upon retirement is directly related to the value of the account. That value in turn is directly related to the amount of contributions paid into the plan as well as to the performance of the investments made by the plan. [*Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 75-76; 471 NW2d 631 (1991).]

The distinctions between these two types of retirement plans led the Court in *Burkey* to value the defined contribution plan in a manner different from a defined benefit plan:

[w]hen determining the present value of a pension plan, a number of contingencies must be considered. Among them are the amount of monthly benefit to which the employee will be entitled, the length of time before payment will begin, and the employee's probable life expectancy.

An ESOP is not subject to any such variable. The present value of an ESOP plan can be readily determined at any given time by looking at the value of the stock or other investments made by the plan. All that must be done to determine the present value is to determine the number of shares in the employee's account and multiply that figure by the value of those shares. [*Burkey, supra*, 189 Mich App at 76.]

Likewise, in this case, plaintiff's defined contribution plan is not subject to the same problems of valuation that defendant's defined benefit plan is. The total benefit of plaintiff's plan is equal to the value of the accounts in the plan. The life expectancy and time when payment will begin are immaterial to the value. Therefore, determining the value of plaintiff's plan does not demand the same type of valuation that defendant's plan did. Moreover, plaintiff does not contest the facts on which the court relied when determining the value of her plan. Plaintiff's expert testified that at the time the parties were married, plaintiff's retirement plan had a value of \$72,767. On cross-examination, he agreed that approximately one week before the parties filed for divorce, her plan had a value of \$202,704. The trial court used these figures to value the marital share of plaintiff's plan as \$131,000. Given these facts, admitted through

plaintiff's expert, and given that "[t]he assets earned by a spouse during the marriage are properly considered part of the marital estate," the trial court did not commit clear error when it valued plaintiff's plan. *Vander Veen v Vander Veen*, 229 Mich App 108, 110; 580 NW2d 924 (1998). Further, because the use of two different valuation methods was proper, the fact that the valuation resulted in a larger portion of plaintiff's plan being treated as marital property does not make the distribution inequitable.

Plaintiff is, however, entitled to a valuation and distribution of defendant's IRA account. During trial, neither party disputed the existence of this account, and indeed, a stipulation to the marital share of the account was only retracted after defendant learned that plaintiff intended to argue that the value of her retirement plan should be calculated in a method other than by taking the premarital value and subtracting it from the value at the time of divorce. Nevertheless, the trial court failed to make any disposition of this account in its ruling. Therefore, plaintiff is entitled to the valuation and distribution to her of her share of the account.

Plaintiff next contends that the trial court erred when it distributed the parties' real estate holdings. First, plaintiff asserts that the trial court failed, in its oral ruling following trial, to completely distribute the value of the home. Second, the trial court's comments regarding the real estate being a "wash" and granting defendant the Prudenville home and plaintiff her condominium in the oral ruling, post-trial motion, and judgment of divorce created confusion and inconsistencies in the property distribution that must be clarified by the court.

Review of the oral ruling that immediately followed the bench trial in this matter reveals that the trial court failed to fully distribute the value of the parties' Prudenville home. In fact, the court failed to distribute \$50,000 of appreciation. This discrepancy arose because the trial court, in its ruling, subtracted the amount of the down payment from the *appreciation* of the home instead of simply subtracting that amount attributable to each party from the initial \$115,000 value of the home. Therefore, \$50,000, which should have been distributed equally as part of the appreciation of the home that occurred during the marriage, was left out of the trial court's distribution.

We disagree with plaintiff's accusations that the trial court's statements regarding the disposition of the Prudenville home were wholly inconsistent. The court first allocated the value of the home giving each party its credit for the appreciation, down payment, and monthly payments as well as the balloon payment. However, the court then ruled that because plaintiff had attempted to conceal the fact that she purchased a condominium after separating with defendant, plaintiff was not entitled to the credit for the Prudenville home. Rather than give plaintiff the credit, the trial court ruled that defendant should keep the home and plaintiff should keep the condominium.

Although we do not find this ruling inconsistent, we find the disposition of the property inequitable in this case. While an attempt to conceal assets is relevant when considering the equitable division of assets, it is only one of many factors the court must weigh and does not give rise to an automatic sanction. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). Here, there was no testimony regarding the current value of plaintiff's condominium. While plaintiff failed to disclose the condominium purchase before trial, the alleged \$21,000 value was attained by use of funds that defendant knew of and that plaintiff readily accepted as her responsibility in the property distribution. This was not a situation where plaintiff secreted

funds away from the marriage and then later tried to conceal them. While some sanction may be in order for plaintiff's failure to disclose the condominium purchase before trial, the trial court's division of the property was disproportionately inequitable.

Finally, the trial court's decision regarding any credit owed to defendant for the equity value of the Canton home was inconsistent and needs clarification. Nowhere in the court's oral decision does it appear that the trial court intended to grant defendant a \$92,000 credit for the equity value of this home, which defendant owned before and during the marriage. By defendant's own testimony, the money defendant realized was used to purchase the Ford Explorer, the pontoon boat, and to make the balloon payment of the Prudenville home. See *Byington v Byington*, 224 Mich App 103, 113; 568 NW2d 141 (1997) (the marital estate is "any increase in net worth that may have occurred between the beginning and the end of the marriage").

Because the trial court's distribution of the parties' real estate holdings was inequitable, we remand this case to the trial court for a determination of (1) the actual value of the condominium at the time of the divorce, (2) the proper distribution of the Prudenville home, including consideration of the appreciation, (3) whether sale of the Prudenville home is necessary to provide plaintiff credit for her share of the value of the Prudenville home, and (4) whether plaintiff should be sanctioned for her failure to disclose the purchase of the condominium before trial.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra  
/s/ Hilda R. Gage