

STATE OF MICHIGAN
COURT OF APPEALS

EVERETT PEREZ,

Plaintiff-Appellee,

v

STELLA JEAN PEREZ,

Defendant-Appellant.

UNPUBLISHED

May 18, 1999

No. 201613

Wayne Circuit Court

LC No. 95-531214 DO

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of divorce. We reverse and remand for further proceedings consistent with this opinion.

I

Plaintiff and defendant were married on August 30, 1958, and had four children, none of whom were minors at the time of the divorce. Plaintiff and defendant stipulated that there had been a breakdown in the marriage relationship to the extent the objects of matrimony had been destroyed and there was no reasonable likelihood that the marriage could be preserved. The trial was to determine the property rights of the parties.

The judgment of divorce provided, "the date to be utilized in the division of marital assets would be December 31, 1990," and that "any funds earned or otherwise accumulated by either party subsequent to December 31, 1990 will be deemed to be the property of that individual."

The property division awarded sixty percent of the marital assets to defendant and forty percent to plaintiff because, the trial court stated, plaintiff was primarily to blame for the breakup of the marriage. Regarding the parties' pensions, defendant was awarded sixty percent of the value of each pension as of December 31, 1990, and the parties were to retain one hundred percent of their own pension accumulated after December 31, 1990. Regarding plaintiff's 401K account, defendant was awarded sixty percent of its value as of December 31, 1990, and plaintiff was awarded all of the future increase in the value of the 401K after that date. Defendant was to receive sixty percent of her

PepsiCo share power account as of December 31, 1990, and one hundred percent of the value after that date. The marital home and cottage were to be sold and sixty percent of the proceeds awarded to defendant. The parties were awarded their own vehicles, and defendant was awarded \$6,500 from a joint savings account.

II

On appeal defendant raises several issues related to the disposition of the marital assets stemming from the trial court's use of the December 31, 1990 date. After a careful review of the record before us, we find that the court's ruling that "funds earned or otherwise accumulated by either party" after December 31, 1990 were to be the separate asset of that party and not subject to division in the judgment of divorce amounted to a determination that these assets were not part of the marital estate. This was clear error. *Byington v Byington*, 224 Mich App 103, 113-114; 568 NW2d 141 (1997).

The complaint for divorce was filed on October 23, 1995, and the judgment of divorce was entered on February 21, 1997. All property earned by either spouse before the latter date is marital property and is properly to be considered a part of their marital estate. *Id.* at 110. Therefore, even though the parties experienced marital difficulties over a number of years and lived apart for some time before the divorce, their marital estate includes their assets as valued at the time of the divorce, not some earlier time. A trial court may, however, "properly consider manifestations of intent to lead separate lives when *apportioning* the marital estate." *Id.* at 114 (emphasis in original).

When distributing marital property, the goal of the court should be equitable distribution, taken in light of all the surrounding circumstances, and not merely mathematical equality. *Id.* at 114. An "unequal" or lopsided distribution may be justified by the disparate earning abilities of the parties, by a party's responsibility in breaking up a marriage and the fact that one party is awarded custody of the minor children of the marriage. *Thames v Thames*, 191 Mich App 299, 309; 477 NW2d 496 (1991).

In this case, the unequal division of marital assets is amply supported by uncontested facts in the record. Plaintiff admitted to two extramarital affairs during the course of the marriage, including one with a woman who was a coworker of his wife. Plaintiff testified that after his separation from his wife he spent more than \$15,000 "[g]ambling" and "[t]raveling and drinking." This was at a time when he was not making any payments on the marital home or contributing to the living expenses of anyone living in the marital home. Plaintiff further testified that he would not have made house payments even if his wife had requested that he do so. Plaintiff admitted that he spent four or five nights a week visiting bars after work during the course of the marriage and that he participated very little in the upbringing of the parties' children.

Based on the record before us, we do not find fault with the trial court's determination that "the husband is primarily to blame for the breakup of the marriage." Likewise, the decision to award sixty percent of the marital assets to defendant is supported by the record and we do not disturb it, noting that on appeal plaintiff does not challenge the trial court's decision to award defendant sixty percent of the marital assets. It is the failure to include all the parties' assets in the marital estate that we find

erroneous and this failure resulted in an inequitable distribution of the marital estate. This inequity is particularly apparent with regard to defendant's share of plaintiff's 401K because the judgment as entered effectively freezes the value of her shares in the account as of December 31, 1990. That is, she is awarded shares in the account but is not entitled to the increase in their value over time.

Accordingly, we remand for a proper determination of the assets of the marital estate pursuant to *Byington, supra*, a redistribution of the GASCO savings account,¹ and for the entry of an amended judgment of divorce.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Michael J. Kelly

/s/ Harold Hood

¹ On appeal, plaintiff concedes error in the distribution of his GASCO savings account.