STATE OF MICHIGAN

COURT OF APPEALS

RONALD C. MILLER,

Plaintiff-Appellant,

v

CAROLYN J. MILLER,

Defendant-Appellee.

UNPUBLISHED
February 26, 2002

No. 230562
Delta Circuit Court
LC No. 99-014833-DM

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from a property settlement contained in a judgment of divorce. We affirm.

Plaintiff first argues that the trial court should have awarded him an additional $4,098, representing the value of several land contract payments he was supposed to receive before trial according to an interim order. According to defendant, he did not receive this money because the land contract vendee decided to pay off the land contract in a lump sum, which was placed in an escrow account and eventually awarded to defendant as part of the property settlement. Plaintiff contends that he should have received the $4,098 because he was ordered to make all the house, vehicle, and insurance payments due before the entry of the judgment of divorce and he needed the land contract money to help make these payments.

This Court reviews for clear error the findings of fact in a property distribution. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Dispositional rulings are affirmed unless this Court is left with "the firm conviction that the division was inequitable." *Sparks*, *supra* at 152.

At the divorce trial, the court heard plaintiff's testimony that he had not received the land contract payments in question but declined to revisit his ruling that plaintiff should be responsible for the outstanding, pre-divorce house, vehicle, and insurance payments. Given (1) the parties' disparate earnings, with plaintiff making more money than defendant in the pre-divorce situation and receiving other land contract payments; and (2) the overall fairness of the ultimate property division, we discern no basis for disrupting the trial court's well-reasoned opinion. We are not left with a firm conviction that the division was inequitable. *Id*.

Next, plaintiff argues that the trial court erred in failing to award him a larger portion of the estate, because defendant caused the ultimate breakdown of the marriage by participating in an extramarital affair. We disagree.

The policy underlying the distribution of marital assets in divorce proceedings is to reach an equitable distribution in light of the surrounding circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Here, the trial court held that the parties contributed equally to the acquisition of the joint marital estate but questioned the strength of the parties' marriage, concluding that defendant's conduct "caused the final demise of a troubled yet functioning marriage." The court held that "while fault is factored against the Defendant, it shall only be considered in determining whether to award spousal support."

In *Sparks*, *supra* at 158, the Supreme Court stated, "We recognize that the conduct of the parties during the marriage may be relevant to the distribution of property, but the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." See also *McDougal v McDougal*, 451 Mich 80, 88; 545 NW2d 357 (1996). The Court continued, "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." *Sparks*, *supra* at 159. Essentially, the significance and weight accorded each factor will vary according to the circumstances. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999). In both *Sparks*, *supra*, and *McDougal*, *supra*, reversal was warranted by the excessive weight the trial court gave to its finding of fault in the allocation of marital assets and its failure to arrive at its decision based on the totality of the circumstances. *Sparks*, *supra* at 160, 162-163; *McDougal*, *supra* at 90-91.

Here, in light of the trial court's findings that (1) the marriage lasted eighteen years, (2) neither party had any physical conditions that would impair his or her ability to earn, (3) both parties contributed equally to the acquisition of the assets, (4) the parties' marriage had been troubled, and (5) plaintiff failed to communicate adequately with defendant before the parties' separation, we discern no error in the court's decision to consider fault only with respect to spousal support and not with respect to the property division.[1]

Next, plaintiff argues that the trial court erred by awarding a $68,000 debt to plaintiff as part of the property division because the debt was not collectible and was part of the receivables of a corporation, R & C Miller and Associates. Again, we disagree.

The court heard plaintiff's testimony that the debt was likely to be rendered uncollectible but rejected the testimony, finding that "[i]t is owed by a friend of the family and had been consistently paid until the parties['] marital difficulties." This Court gives special deference to a trial court's findings when based on the credibility of witnesses. *Draggoo*, *supra* at 429. Moreover, the trial court acknowledged that R & C Miller and Associates belonged to the parties and thus awarded it and its assets (e.g., the $68,000 debt) to plaintiff. In light of the

[1] In his appellate brief, plaintiff suggests that the trial court failed to recognize that it *could* consider fault with regard to the property distribution as well as spousal support. This allegation is unfounded. The context makes clear that the trial court recognized his discretion to factor fault into the property division but simply chose not to do so.

circumstances, we discern no clear error or inequity with regard to the trial court's treatment of the debt.

Finally, plaintiff argues that the trial court should have granted his motion for a new trial because of newly discovered evidence that the $68,000 debt was unsecured and due for discharge in bankruptcy.

Under MCR 2.611, a new trial may be granted on some or all of the issues if the substantial rights of a party were materially affected and there was "[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." MCR 2.611(A)(1)(f). To justify a new trial on the basis of newly discovered evidence, the moving party must show that (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *Hoven v Hoven*, 9 Mich App 168, 172-173; 156 NW2d 65 (1967).

After our review of the record, we discern no abuse of discretion with regard to the trial court's denial of plaintiff's motion. See *Meyer v City of Center Line*, 242 Mich App 560, 564; 619 NW2d 182 (2000) (setting forth the standard of review). Indeed, plaintiff substantially failed to meet the burden of proof necessary to gain a new trial. For example, the bankruptcy document filed with the court showed a "consumer debt" (different from the type discussed at trial) in the amount of $8,500 (different from the $68,000 discussed at trial). Under the circumstances, plaintiff failed to show that including the new evidence on retrial would likely produce a different result, and reversal is thus unwarranted.

Affirmed.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter