

STATE OF MICHIGAN
COURT OF APPEALS

MARIE A. KOTULSKI,

Plaintiff-Appellee,

v

CHARLES WILLIAM KOTULSKI,

Defendant-Appellant.

UNPUBLISHED

July 9, 1996

No. 172201

LC No. 93-306391-DO

Before: Murphy, P.J., and Markman and Karl V. Fink,* JJ.

PER CURIAM.

Defendant appeals by right a 1993 order entering a default judgment of divorce. We affirm.

Plaintiff and defendant were married in 1963. Plaintiff filed a divorce complaint in March 1993. None of the three children born of the marriage were minors in 1993. At trial, plaintiff testified that the marriage broke down because of defendant's gambling and infidelity. Defendant testified that the first twenty-five years of the marriage were "very good" but that he then noticed a change and that plaintiff began withholding sex. He conceded that he began an extramarital affair in March 1991. Plaintiff denied having an affair during the marriage.

Defendant testified that he expected to earn \$63,000 in 1993. He was a high school teacher with two master's degrees. Plaintiff testified that she earned \$20,600 a year. She had taken college courses and completed the required course work for a legal assistant diploma but never earned a degree. At the conclusion of the trial, the trial court granted the divorce, finding that defendant's adulterous relationship was "a significant factor in leading to the breakdown of the marriage." The court ordered that the proceeds from the sale of the marital home be divided: 40% to defendant and 60% to plaintiff. This distribution was based on both fault and the relative earning power and need of the parties. The court ordered defendant to pay alimony to plaintiff in the amount of \$15,000 a year.

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

On appeal, defendant first claims that the trial court abused its discretion in failing to conduct an evidentiary hearing or new trial in response to his allegations of fraud. In a motion for new trial, defendant contended that plaintiff had defrauded the court by denying at trial that she had an affair during the marriage. He filed an affidavit in which he contended that she had an affair in 1980 and was having an affair at the time of the divorce. The trial court denied the motion, stating:

I am not persuaded that there was a mistake of law. I am not persuaded that there is newly discovered evidence which with due diligence could not be presented to the court at the time of trial. I am not convinced that there is a fraud which has been worked on the Court. . . .

This Court reviews decisions on motions for new trial for an abuse of discretion. *Isagholian v Transamerica Ins Co*, 208 Mich App 9, 12; 527 NW2d 13 (1994). "[W]here a party alleges that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing into the allegations." *Rapaport v Rapaport*, 185 Mich App 12, 16; 460 NW2d 588 (1990).

Here, defendant was aware of the alleged 1980 affair at the time of trial and questioned plaintiff about it. During the hearing on defendant's motion for new trial, the court stated,

He said she was [having an affair]. She said she wasn't. I made a finding of fact.

Under these circumstances, where the court was aware that the parties disputed this issue and made a factual finding, the court did not abuse its discretion in failing to hold an evidentiary hearing or denying defendant's motion for new trial. Because the plaintiff's other alleged affair began after divorce proceedings were started, it was not an abuse of discretion on the part of the court not to consider the extramarital affair.

Defendant makes several claims of error relating to the award of alimony to plaintiff. In *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992), the Michigan Supreme Court set forth the standard of review for divorce judgments:

The appellate court must first review the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. . . . [T]he ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable.

Defendant claims that the trial court erred in finding that fault on his part was a significant factor in the breakdown of the marriage. At trial, defendant admitted that he had engaged in an extramarital affair and that he was involved in gambling, which was a source of conflict in the marriage. Plaintiff denied having been unfaithful to defendant during the marriage. On the basis of this evidence, the trial

court did not clearly err in its factual determination that fault on defendant's part was a significant factor in the breakdown of the marriage.

Defendant claims that the trial court erred in giving too much weight to fault in the property settlement. The Sparks Court held that fault remains a relevant factor in property settlement but emphasized that it is only one factor. *Id.* at 158. It stated at 159-160:

We hold that the following factors are to be considered wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties (8) past relations and conduct of the parties, and (9) general principles of equity.

Here, with respect to alimony, the trial court stated:

[I]t is because of the substantially different earning power, the length of the marriage of 29 years, the existence of fault in the breakdown of the marriage and the need of the parties that the Court would award alimony. This alimony will be in the amount of \$15,000 annually to be paid in 12 equal payments.

Thus, the trial court did not base the property settlement solely on its determination of fault. Rather, it considered a number of relevant factors, especially the disparity in their incomes, in arriving at a property settlement. The factual determinations underlying these factors were supported by the parties' testimony and not clearly erroneous. In the context of the disparity in income, the court was within its discretion in ordering alimony in the amount of \$15,000 a year. We are not left with the firm conviction that the property settlement was inequitable.

Finally, defendant claims that the trial court erred in basing the alimony award on his 1992 income, which was temporarily inflated because it included back-pay following a strike, part-time income from a teaching assignment contingent on enrollment and gambling winnings. At trial, defendant testified that his 1992 income was \$67,000 but that he expected his 1993 income would be \$63,000. At the hearing on his motion for new trial, the court noted that defendant had testified regarding the "extraordinary distribution" of his 1992 income. The Court was therefore aware of his contention that his 1992 income was inflated by unusual factors. The property settlement ordered by the court appears fair and equitable if one assumes that defendant had an income of \$63,000 in 1993, as defendant testified. If defendant's future income is less than what it was in 1993, his remedy is to seek modification of the alimony award pursuant to MCL 552.28; MSA 25.106. See *Bonfiglio v Pring*, 202 Mich App 61, 63; 507 NW2d 759 (1993).

For these reasons, we affirm the judgment of divorce.

Affirmed.

/s/ William B. Murphy
/s/ Stephen J. Markman
/s/ Karl V. Fink