

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF MARY JESSIE MACLELLAN

Plaintiff-Appellee,

v

ALEXANDER PAUL MACLELLAN,

Defendant-Appellant.

UNPUBLISHED

March 7, 1997

No. 186104

Wayne Circuit Court

LC No. 93-330739

Before: Gribbs, P.J., and Holbrook, Jr. and J. L. Martlew,* JJ.

PER CURIAM.

Defendant appeals by right the property division which followed this action for separate maintenance. We affirm.

Defendant argues that the trial court abused its discretion when it divided the parties' marital estate 58% to plaintiff and 42% to defendant. We disagree.

An appellate court may modify a marital property division even though there was evidence to support the trial court's decision. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). The appellate standard of review is not limited to clear error or abuse of discretion. *Id.* The appellate court must first review the trial court's findings of fact to determine whether the findings were clearly erroneous. *Id.* A finding clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable. *Sparks, supra*, 440 Mich 151-152. The dispositive ruling of the trial court should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable. *Id.* at 152.

The trial court found as fact that the Maclellans were married on September 12, 1953, and have resided in their marital home since 1959. The court further found that the parties have six adult children,

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

two of whom resided in the marital home at the time of trial. Additionally, the court found: that plaintiff was 74 years old at the time of trial; eight years older than defendant, that plaintiff suffered from severe emphysema while defendant was in good health, that the parties' respective needs were similar, and that defendant earned approximately \$66,000 per year while plaintiff had no earning capacity. Finally, the court found that there had been a breakdown in the parties' marital relationship and that defendant was at fault in causing the breakdown. Specifically, the court found that defendant was cruel to plaintiff and that there was evidence that defendant was engaged in an extra-marital affair.

Defendant challenges the trial court's finding that defendant was at fault in causing the marital breakdown. Defendant argues that the court's finding of fault was clearly erroneous. We disagree. We are not left with a definite and firm conviction that the trial court was mistaken when it found that defendant was the cause of the breakdown of the parties' marital relationship. *Beason, supra*, 435 Mich 805. There was evidence that defendant would take vacations, yet leave plaintiff at home. Plaintiff testified that defendant treated her poorly, failed to listen to her, and failed to treat her with respect. In addition, there was evidence that defendant had been taking another woman to Canada. Plaintiff testified that she found another woman's clothing and jewelry inside the parties' marital automobile, and that defendant had lost two wedding bands and failed to wear a third that plaintiff had purchased for him. Based upon this evidence, the trial court's finding that defendant was at fault in causing the marital breakdown was not clearly erroneous.

Defendant next argues that the trial court's property division was inequitable. Again we disagree. Pursuant to MCL 552.19; MSA 25.99 and MCL 552.23; MSA 25.103, following an order of separate maintenance, the trial court may award to either party to the action, marital property and/or personal property of the other, including alimony, for the recipient's support. The court may award the property as it considers just and reasonable, after considering the ability of either party to pay, the character and situation of the parties, and all other circumstances. MCL 552.23(1); MSA 25.103(1).

In *Sparks, supra*, 440 Mich 141, the Michigan Supreme Court refined the factors to be considered in deciding how to equitably divide marital assets. The Court held that, where relevant, the following factors should be considered: (1) the duration of the marriage; (2) the contributions of the parties to the marital estate; (3) the age of the parties; (4) the health of the parties; (5) the respective life status of the parties; (6) the necessities and circumstances of the parties; (7) the earning abilities of the respective parties; (8) the parties' past relations and conduct; and, (9) general principles of equity, or additional relevant factors. *Sparks, supra*, 440 Mich 159-160.

We are not left with the firm conviction that the property division in the instant case was inequitable. *Sparks, supra*, 440 Mich 152. The trial court divided the marital property 58% to plaintiff and 42% to defendant after finding that several of the *Sparks* factors weighed in favor of awarding a larger portion of the marital estate to plaintiff than defendant. Specifically, the trial court found that plaintiff should receive a larger percentage because she was older than defendant, she was in poor health, plaintiff was unable to work, defendant possessed greater earning potential, and finally, defendant was at fault. We reject defendant's argument that a trial court may not consider the parties' respective earning potentials in dividing a marital estate where the parties' incomes were equalized by an

award of alimony. See *Wilkins v Wilkins*, 149 Mich App 779, 784-785, 788-789; 386 NW2d 677 (1986), where the trial court awarded the plaintiff alimony and properly considered the parties' respective earning potentials. However, even if the parties' earning potentials were ignored, several other factors weighed in favor of awarding plaintiff a larger percentage. The property division was fair and equitable.

Affirmed.

/s/ Roman S. Gibbs

/s/ Donald E. Holbrook, Jr.

/s/ Jeffrey L. Martlew