

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA R. KNOX

Plaintiff-Appellee,

v

JOHN H. KNOX,

Defendant-Appellant.

UNPUBLISHED

September 20, 1996

No. 175435

LC No. 92-75098-DO

Before: White, P.J., and Sawyer, and R.M. Pajtas,* JJ.

PER CURIAM.

Defendant appeals provisions of a judgment of divorce, entered following a bench trial, granting plaintiff alimony and one-half of defendant's post-retirement profit sharing benefit.

Defendant had a sexual relationship with plaintiff's sister in the late 1970s. The trial court found that this was the major factor in the breakup of the marriage and took it into consideration when determining alimony and the marital asset distribution. The court awarded plaintiff alimony of \$250 a week for four years, with a review at that time, and one-half of defendant's employment benefits, including his post-retirement profit sharing benefit. On appeal, defendant challenges the finding that his relationship with plaintiff's sister, which took place seventeen years prior to the breakup, was the major contributing factor in the breakup of the parties, and the inclusion of his post-retirement profit-sharing benefit as a marital asset for distribution. We affirm in part and remand with instructions.

I

The parties were married on February 20, 1965. At the time of trial, plaintiff was forty-eight years old and defendant was forty-nine. Three daughter were born into the marriage, Megan, Misty and Millicent, all adults at the time of the breakup. The youngest daughter, Millicent, was killed by a drunk driver while this divorce was pending. The oldest daughter, Megan, moved back in with plaintiff following the death of her sister, and she continued to live with plaintiff through the time of the trial.

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

Plaintiff's sister had been a problem child. In 1976, when plaintiff's sister was fifteen years old, plaintiff became her guardian, and plaintiff's sister moved in with plaintiff and defendant. In 1977, when plaintiff's sister was sixteen years old, plaintiff found evidence that defendant and her sister had been intimate. When plaintiff confronted her sister, she admitted that she had had a sexual relationship with defendant. Plaintiff sent her sister back home to live with their parents. Plaintiff testified that she confronted defendant and he claimed that plaintiff's sister had been the instigator of the relationship, which plaintiff believed because she had known her sister had been sexually active. Plaintiff testified that she did not talk to her sister again until 1990.

Both parties testified that the breakdown of the marriage began around 1987 or 1988. Plaintiff testified that there was no longer communication between the parties. Further, plaintiff testified that she was verbally abused by defendant. Additionally, plaintiff testified that there were instances of physical abuse such as pushing, shoving, and hair pulling. Defendant testified that the parties began to fight about everything. Both parties testified that the couple had sex only once since 1987.

Plaintiff testified that she gave up entirely on the marriage in 1990, after receiving a call from her sister, who was in a mental institution in California. Plaintiff testified that it was during this phone call that she first learned the details of defendant's affair with her sister. Plaintiff testified that her sister told her that her affair with defendant was not an isolated incident, rather it took place over a number of years, and that defendant first made sexual advances towards her when she was only five years old.

Plaintiff moved out of the marital home in August, 1991, and filed for divorce on March 3, 1992.

The trial court found that defendant's affair with plaintiff's sister was the main factor in the breakdown of the marriage. The court stated:

Fault is an issue in this case.

And as in most marriages, there is a certain amount of fault going each way certainly. In this case I would attribute more fault to Mr. Knox than Mrs. And the main factor is involvement with Mrs. Knox's sister.

Although there were other problems in the marriage that typically arise, and allegations of emotional abuse going both directions, his involvement with her sister is a major contributing factor here to the break up of the marriage. So I am taking that into consideration in the property distribution here.

II

Defendant states his first issue on appeal as follows:

I. DID THE TRIAL COURT ERR IN ASSESSING THE MAJORITY OF FAULT AGAINST THE DEFENDANT-APPELLANT AND CONSIDERING

THIS IN DETERMINING THE PROPERTY SETTLEMENT AND ALIMONY AWARDED TO THE PLAINTIFF-APPELLEE, BECAUSE OF AN ADMITTED ISOLATED EXTRA-MARTIAL AFFAIR THAT OCCURRED SEVENTEEN YEARS BEFORE THE PLAINTIFF-APPELLEE FILED HER COMPLAINT FOR DIVORCE?

Defendant argues that because plaintiff remained married to him for seventeen years after she learned of the affair with her sister, under the doctrine of condonation, defendant was forgiven for the offense, and plaintiff may not argue that it caused the breakup so many years later.

We conclude that in framing the issue, defendant seeks to place his preferred gloss on the evidence. While defendant may view the issue as one involving an ancient and isolated affair for which he was forgiven, there was evidence that he was “forgiven” for what plaintiff believed was a transgression of a particular nature and duration, and that when plaintiff later learned otherwise, the ancient wrong resurfaced and became a source of marital tension.

The trial court’s determination of fault is a finding of fact and will not be reversed unless clearly erroneous. *Beason v Beason*, 435 Mich 805; 460 NW2d 207 (1990). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.* Here, the court’s decision was adequately supported by the record.

Further, we conclude that the trial court did not abuse its discretion in awarding alimony. The factors a trial court is to consider with regard to alimony were explained by this Court in *Thames v Thames*, 191 Mich App 299; 477 NW2d 496 (1991):

Factors to be considered are (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties’ ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties’ health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. In addition, the court may consider a party’s fault in causing the divorce. [*Id.* at 308, citations omitted.]

The trial court found that defendant’s affair with plaintiff’s sister was the main factor causing the breakup of the marriage. It was proper for the trial court to consider who was at fault when determining alimony. *Id.* at 308. The remaining factors support the court’s award of alimony as well. The marriage was a long-term one. Defendant’s income was considerably higher than plaintiff’s. Plaintiff will need to continue her education to increase her income, which will still be less than defendant’s. Plaintiff established a need for alimony and defendant has the ability pay.

III

Defendant next argues that the trial court erred in awarding plaintiff one-half of his post-retirement profit-sharing benefit. Defendant argues that the benefit does not have a reasonably ascertainable value and that because defendant must work an additional ten years to be eligible for this benefit, it is not based on service credits earned during the course of the marriage and it is not a marital asset.

Defendant testified that he had been employed by Westfield Insurance Company for about twenty-four years at the time of trial, and that if he were to remain with Westfield for an additional ten years, i.e., until retirement, he would be entitled to continued benefits under Westfield's profit-sharing plan after his retirement, at fifty percent of what an active employee would receive. Further, defendant testified that the benefits under the plan fluctuate with Westfield's profits; therefore, some years the benefit would be more than others, and there were some years when the company made no profit at all.

Defendant first argues that because the benefit does not have a reasonably ascertainable value, it cannot be distributed. We disagree. While the exact value of defendant's post-retirement profit-sharing benefit is not ascertainable, it is nevertheless clearly an asset of value, the entitlement to which appears to have been partially earned during the marriage. The uncertainty as to the value stems from the fact that the benefit is paid as a percentage of the company's yearly profits. In order to determine the precise value of the post-retirement profit-sharing benefit, one must determine what Westfield's future profits will be. Because this cannot be done with any reasonable accuracy, the trial court correctly determined that plaintiff should be awarded her share as a percentage of defendant's benefit. The court was not obliged to conclude that because the actual amounts to be received in the future are uncertain, the benefit itself is uncertain and is not a marital asset.

Defendant next argues that his post-retirement profit-sharing benefit is not based on service credits that accrued during the marriage and that the benefit is therefore not a marital asset. Defendant asserts that the benefit is available to him simply because he is an employee of the company, and not because of the number of years worked. While this is accurate, it is also undisputed that the amount of the benefit is based on the employee's salary level as well as the company's profits. In defendant's case, his salary level is a function of his position with the company, which is a function of his past efforts with the company during his long-term marriage. Thus, the trial court did not abuse its discretion in declining to exclude the benefit from the marital estate.

We are somewhat hampered in our review of this issue by the lack of findings of fact regarding this particular benefit. We understand the profit sharing benefit to operate as follows: An employee is entitled to a percentage of profits; the benefit amount is based on the company's profit for the year and the employee's salary as a percentage of all salaries; the benefit amount is fixed for the year, but is paid out in five payments over four years; the future payments for a given profit year are vested benefits and are held in an account in trust; each year, the employee receives a payment that is made up of percentage payments based on the last four years' profit; upon retirement, the profit-sharing benefit

continues at the rate of 50% of what the employee would have received if active; apparently, the benefit continues until death.¹

Thus, according to the judgment of divorce, plaintiff will receive one-half of the profit-sharing benefits that accrued through the date of the separation, regardless of when paid, no portion of the profit-sharing benefit for the years between separation and defendant's retirement; and one-half of the benefit after defendant's retirement.²

This is an unusual benefit. The court did not abuse its discretion in concluding that under the circumstances presented here, it should not be excluded from the marital estate simply because it is not based on years of service. The court impliedly concluded that although not based on years of services, the benefit should be viewed as having accrued over the years because it is based on salary level. This approach was fair and reasonable under the circumstances. Nevertheless, having taken this approach, the court should also have taken into account that, if the benefit is actually paid, defendant will have worked for Westfield for an additional period of time after the divorce, and some portion of the post-retirement benefit should be attributed to that employment. We therefore remand to the trial court to apply a coverture factor to the benefit, and to amend the judgment of divorce accordingly.³ Plaintiff is only entitled to receive one-half of the benefit that can reasonably be said to have accrued during the marriage.

Affirmed in part and remanded in part. We do not retain jurisdiction.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard M. Pajtas

¹ Thus, it appears from the record that the benefit payments made after retirement are not simply payments of the accrued benefit due on the profit from the last years the employee worked, but which benefit has not yet been paid, but is actually a benefit paid based on post-retirement profits of the company.

² Defendant has a separate pension. Plaintiff was awarded one-half of the value accrued at the time of separation.

³ Our disposition is based on our understanding of the profit-sharing benefit (see page 7, *supra*). If our understanding is incorrect, the trial court shall clearly state how the plan operates and explain its reasons for the manner in which the benefit is divided. If, in fact, the post-retirement benefit is merely a payout of amounts accrued based on the profit earned in the last four years of employment, plaintiff is entitled to no share of the benefit.