

STATE OF MICHIGAN
COURT OF APPEALS

BLAISE A. REPASKY,

Plaintiff-Appellee,

v

VALERIE J. REPASKY,

Defendant-Appellant.

UNPUBLISHED

September 12, 2000

No. 212859

Wayne Circuit Court

LC No. 97-715243-DM

Before: Griffin, P.J., and Holbrook, Jr., and J.B. Sullivan*, JJ.

SULLIVAN, J. (Concurring in part and dissenting in part).

I agree with the majority on all issues except the property division which I believe was inequitable.

In *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996), the Court reiterated the standard of review in divorce actions:

In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings. On appeal, the factual findings are to be upheld unless they are clearly erroneous. A dispositional ruling, however, “should be affirmed unless the appellate court is left with the firm conviction that [it] was inequitable” (citations omitted).

The goal of the court when apportioning a marital estate is to reach an equitable division in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Each spouse need not receive a mathematically equal share, but significant departures from congruence must be explained clearly by the court. *Id.*, at 114-115. Among the factors to be considered are the source of the property; the parties’ contributions toward its acquisition and to the general marital estate; the duration of the marriage; the parties’ needs and circumstances; the parties’ ages, health, life status and earning abilities; the cause of the divorce as well as past relations and conduct between the parties; interruption of the career or education of either party; and general principles of equity. *Sparks v*

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

Sparks, 440 Mich 141, 159-160; 485 NW2d 893 (1992); *Hanaway v Hanaway*, 208 Mich App 278, 292-293; 527 NW2d 792 (1995). The

determination of relevant factors will vary depending on the facts and circumstances of the case. *Sparks, supra*, at 160. It is error for the trial court to place excessive weight on the factor of fault because a judge's role is to achieve equity, not to punish one of the parties. *McDougal, supra*, at 89-90. It is also error for the trial court to find causation from consequence. *Knowles v Knowles*, 185 Mich App 497, 499; 462 NW2d 777 (1990).

In *Sparks, supra*, the parties had been married for twenty-six years, were in their mid-forties, had one child, and had been regularly employed throughout the marriage. However, while the defendant husband earned his college degree during the marriage, the plaintiff wife ceased her education at age sixteen when she married the defendant husband. The trial court found that the plaintiff wife's sexual infidelity and desire to get out of the marriage caused the breakdown of the marriage, and awarded no alimony and a 75/25 split of marital property. This Court reversed on the issue of alimony but affirmed the division of property. The Supreme Court, in reversing the division of property, noted that, in Michigan, the element of fault survived the no-fault divorce act at least as to the division of property, *id.*, at 157-158, but stated that the trial court "must . . . not assign disproportionate weight to any one circumstance." *Id.*, at 158. Finding that the trial court assigned disproportionate weight to the element of fault, the Court reversed stating that "[m]arital misconduct is only one factor among many and should not be dispositive." *Id.*, at 163.

Similarly, in *Sands v Sands*, 442 Mich 30; 497 NW2d 493 (1993), the parties had been married twenty-three years when the plaintiff wife filed for divorce. The trial court divided the assets equally but directed the defendant husband to pay seventy percent of the wife's attorney fees because the husband had attempted to conceal assets. This Court found that the division of assets was inequitable and determined that the defendant must forfeit his interest in all assets which he attempted to hide. In affirming, the Supreme Court held that there is no automatic rule of forfeiture, and stated that a party's attempt to conceal assets is only one of many factors the court must weigh. The Court added, "a judge's role is to achieve equity, not to 'punish' one of the parties." *Id.*, at 37.

More recently, in *McDougal, supra*, the parties were married eight years, the third marriage for each, the plaintiff wife had a Ph.D. in education and was earning \$46,000 yearly, and the defendant husband was a retired engineer who worked as a private inventor. The trial court found that the defendant husband caused the breakdown of the marriage because he broke his promise that the couple would try to have children, made a unilateral determination that the parties would file separate tax returns, assaulted his wife and tried unsuccessfully to divert to his daughter some patent-related earnings which were received after the complaint was filed. The court awarded substantial assets to the wife, including patent rights and patent royalties, and this Court affirmed. In reversing, the Supreme Court referred to its prior opinions in both *Sands* and *Sparks*, again reiterating that "fault is an element in the search for an *equitable* division - - it is not a punitive basis for an inequitable division." *McDougal, supra*, at 90 (emphasis in the original). The Court's review of the factors led it to conclude that the trial court's division was inequitable. *Id.*, at 90-91.

In the instant case, the trial court found that this was a marriage of 26 years which produced two children, the first of which was born eleven years into the marriage; that plaintiff went to law school early in the marriage, and that both parties worked during the entire marriage except for five years when

both agreed defendant should be at home with the first of the two children. The court then noted that the parties last had sexual relations in 1994, and gave a detailed summary of the testimony regarding problems during the final three months of the marriage and particularly the final six days before the filing of the complaint. The court then stated it “ha[d] to determine what was the breakdown of the marriage and if there was a breakdown in the marriage, who was the fault attributal [sic] to, and that is going to help the Court decide on making the property division also, and also [sic] in determining alimony.” The court found that plaintiff was at fault for refusing to have sex with defendant during the last three years of the marriage, for refusing to discuss the problem with defendant and for refusing to go to counseling. However, the court found defendant’s internet involvement with another man, which began approximately three months prior to the filing of the complaint for divorce and included an actual meeting with the other man approximately one month prior to the filing of the complaint, along with her “aloof demeanor,” instance of throwing water at plaintiff, smashing a plate and slamming his hand in a door (an instance vigorously denied by defendant) was “more egregious.”

The court concluded, “the Court also finds that *all factors being somewhat equal*, a finding of fault justifies an unequal distribution of the marital property” (emphasis added), which the court determined to be a 45/55 split of assets and a 55/45 split of liabilities (for a net split of 43/57) in favor of plaintiff. Only then, did the court note that, while defendant had an associate degree and was pursuing a bachelor’s degree, she had worked primarily at secretarial jobs, whereas plaintiff, as an attorney in private practice “exhibited a far stronger ability of the parties to work.” (Indeed, there was undisputed testimony that defendant had averaged \$90,000 per year over the five years preceding his filing of the complaint for divorce.) The court’s finding that “all factors are somewhat equal” immediately followed by its finding of substantial inequality in earning power of the parties is contradictory at best.

The trial court did not find credible plaintiff’s unsupported claims that defendant abandoned the children, absconded with a substantial amount of money, or his claim that the last sexual relations between the two was in 1996 as opposed to 1994. Of more concern, however, the court chose to disregard evidence that plaintiff, a practicing matrimonial lawyer who filed his complaint in pro per, stated in his complaint that the “gross amount” of the second mortgage he obtained six days before the filing of his complaint was \$117,000, but then testified that it was actually \$170,000; that, while \$100,000 of that amount, according to plaintiff, was allegedly spent on *unspecified* corporate and personal debt, there remained enough corporate debt so that the law practice, which went to plaintiff in its entirety, ended up being valued at \$805, and there remained 1996 personal taxes of approximately \$7,000 still owing. The court chose also to disregard the fact that, in his verified statement for the Friend of the Court, plaintiff listed his weekly net income as \$700, but then testified that it was actually twice that amount due to bonuses.

On the other hand, the court believed plaintiff’s testimony about defendant’s alleged violence in the marriage, notwithstanding plaintiff’s allegations in ¶11 and ¶12 of his complaint that both plaintiff and defendant were proper and fit parents, that he was willing to pay child support if physical custody of the minor children went solely to defendant, and that, indeed, custody was not even an issue in the case.

The court either did not grasp the obvious contradiction in plaintiff's position on this issue or chose to ignore it.

The court disregarded defendant's testimony that the only reason plaintiff took the 1994 trip at all (on which occurred the last intimacy of the marriage) was because she told him that she would go with a girlfriend if he refused to go with her. The court gave little weight to defendant's testimony that she begged plaintiff to go to counseling but his response was that the counselors had more problems than anyone, and to her testimony that, when she asked him in regard to his refusal to have sexual relations with her if there was a gender problem, if he was gay, if he had been abused as a child or if he simply found her no longer attractive, he refused to discuss the situation with her.

In short, the court disregarded significant evidence negative to plaintiff, focused heavily on defendant's conduct at the very end of the marriage, and determined that defendant's fault was the greater cause for the breakdown of the marriage. Based on a careful review of the record, it appears that defendant's internet involvement with another man at the end of this twenty-six year marriage was less a *cause* than a *result* of the breakdown of the marriage, a breakdown which began years earlier when plaintiff, for an unknown (except to him) reason, stopped having sexual relations with his wife. See *Knowles, supra*, at 499. But the very limited review of the court's factual findings precludes disturbing the finding of fault. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990) ("if the trial court's view of the evidence is plausible, the reviewing court may not reverse").¹

However, I cannot agree that the element of fault in this case supports the financial penalties imposed on defendant by the trial court. The court's undue emphasis on the element of fault in the disposition of the marital assets leads me to the firm conviction that the disposition is inequitable, and that the trial court erroneously used the disposition of assets to punish defendant. *McDougal, supra*, at 87. Our Supreme Court has repeatedly stated that fault is only one factor to be considered in the disposition of marital assets. *McDougal, supra; Sparks, supra; Sands, supra*. Looking to the other factors, this was a marriage of 26 years, during the first eleven of which defendant, a high school graduate at the time, worked at secretarial jobs while plaintiff went to law school and established himself in a successful private practice. Even if defendant completes the bachelor's degree in teaching which she is currently pursuing and is able to get a job in that field, the economic reality is that she will be entering the job market at the age of 50, at the bottom of the pay scale, with far fewer years in which to build either her salary or a meaningful pension because the years are simply gone. See, *Zecchin v Zecchin*, 149 Mich App 723, 734; 386 NW2d 652 (1986), wherein Judge Shepherd wrote of a 27-year marriage:

The economic reality which cannot be ignored is that it is highly unlikely that [defendant wife] will have near the earning capacity that plaintiff [husband] has even if [defendant wife] gets the computer training she feels she needs.

¹ The Supreme Court remanded to this Court "for consideration of the meaning of the term 'reside' in the parties' divorce judgment, *Beason, supra*, 806, and then peremptorily reversed after remand. *Beason v Beason (Aft Rem)*, 204 Mich App 178; 514 NW2d 231 (1994), rev'd 447 Mich 1023; 527 NW2d 425 (1994).

In contrast, in addition to 57% of the marital assets, plaintiff walks away from the marriage with the single biggest asset in the marriage, the ability to earn \$90,000 or more annually, as well as the established law practice. As the court recognized, defendant's contributions to the marriage are fully equal to those of plaintiff, there being little dispute that defendant took care of the home, paid bills and was the primary child care-giver of the two children of the marriage, in addition to working at low-paying jobs outside the home for 21 of the 26 years of the marriage. I conclude, contrary to the trial court, that the element of fault is relatively insignificant in light of the above, that the trial court erroneously focused on that one factor and on events which occurred in the dying few weeks of a 26-year marriage, and that an equitable division of assets requires that defendant, as opposed to plaintiff, receive the larger of the 43/57 split. *Zecchin, supra*.

I would reverse the property division.

/s/ Joseph B. Sullivan