

STATE OF MICHIGAN
COURT OF APPEALS

WILLIE KIMBROUGH,

Plaintiff/Counterdefendant-
Appellant,

v

FRANCES SMITH KIMBROUGH,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED
October 30, 2003

No. 239268
Wayne Circuit Court
LC No. 00-031505-DO

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff/counterdefendant Willie Kimbrough appeals as of right from a judgment of divorce from defendant/counterplaintiff Frances Kimbrough. We reverse and remand.

I. Basic Facts And Procedural History

On November 19, 2001, after conducting a bench trial, the trial court entered a judgment of divorce, including a property settlement. The trial court awarded Frances Kimbrough \$3,423, representing an unpaid debt Willie Kimbrough owed her and \$4,000, representing damages she suffered as a result of an assault and battery Willie Kimbrough committed upon her. In addition, the trial court ordered that each party would retain his or her pension free of any right, claim, or interest of the other party.

Following entry of the divorce judgment, Willie Kimbrough moved for a new trial and/or set-off based on an alleged error of law. He argued that the divorce judgment, as it pertained to his pension, could not be effectuated due to his election that Frances Kimbrough would receive surviving spouse benefits from his pension. He further claimed that, because he retired on the same day he married Frances Kimbrough, her rights to surviving spouse benefits had fully vested and could not be altered, even by court order or an agreement between the parties.

During the hearing on Willie Kimbrough's motion for a new trial or set-off, the trial court admitted that it misinterpreted the terms of his pension plan. The trial court indicated that, when fashioning the terms of the divorce judgment, it was under the misunderstanding that Frances Kimbrough would only be entitled to surviving spouse benefits that accrued during the time she was married to Willie Kimbrough. However, the evidence showed that the terms of Willie

Kimbrough's pension plan also entitled Frances Kimbrough to surviving spouse benefits that accrued for the time she was not married to Willie Kimbrough. The trial court stated:

It wasn't known to me. The concern I have is that I heard a trial. I made a property settlement based on the assumption that the surviving spouse benefits that Ms. Kimbrough would realize as it relates to this pension would be limited to the marital time period, and that assumption is incorrect. As a legal matter, I can't do that. So, my property settlement is not—my property settlement can't be effectuated. What I ordered to happen can't happen.

The trial court stated that, in ordering that each party would retain his or her pension free of any claim by the other party, its intention was that Frances Kimbrough would get surviving spouse benefits only for the years that the parties were married. Consequently, the trial court stated that because Frances Kimbrough would be entitled to surviving spouse benefits for the time that the parties were not married, the trial court would have to do something to effectuate its intent.

After the trial court expressed its willingness to amend or alter the divorce judgment as it pertains to Willie Kimbrough's pension, Frances Kimbrough informed the trial court that she had been caring for a child, determined to be Willie Kimbrough's son with another woman by DNA analysis, and that she had applied for a foster care license. According to Frances Kimbrough, Willie Kimbrough's son was sixteen and she wanted the trial court, when considering Willie Kimbrough's motion, to consider the fact that she would be caring for the child. Frances Kimbrough urged the trial court not to grant Willie Kimbrough's request for set-off because she had expended large sums of money to care for his son.

Willie Kimbrough argued that the trial court should not consider the fact that Frances Kimbrough was caring for his son because this fact and his paternity did not come to light until after the divorce judgment had been entered. The trial court responded that it would consider this issue in deciding his motion for a new trial or set off, but not as an issue pertinent to the divorce judgment. Ultimately, the trial court denied Willie Kimbrough's motion for a new trial or set off. The trial court ruled that Willie Kimbrough had not presented a sufficient reason for the trial court to alter the property settlement in the divorce judgment. The trial court reasoned that:

In addition, the allocation of the property settlement between the parties, in my judgment, recognized the very severe nature of the assault and the very, very unfair consequences of Ms. Kimbrough's income tax returns being intercepted by the Friend of the Court to pay for arrearages in Mr. Kimbrough's child support obligations for children that were not Ms. Kimbrough's.

I remain of the belief that those two overriding facts; that is, that Ms. Kimbrough did sustain a very serious domestic assault and did very, very unfairly have her money intercepted by virtue of her marital status to Mr. Kimbrough, allows her to recover the \$7,243 as awarded in the judgment of divorce. . . .

I'm not inclined to change the property settlement just because the pension was other than the Court understood. It could be divided, and again, the fact that

Ms. Kimbrough may realize additional pension benefits is not a reason the Court is going to allow the offset.

II. Errors Of Law

A. Standard Of Review

Willie Kimbrough argues that the trial court erred in denying his motion for a new trial under MCR 2.611(A) or set-off due to an alleged error of law committed by the trial court. Whether to grant a new trial is within the trial court's discretion and we review the trial court's decision for an abuse of discretion.¹

B. The Trial Court's Reasoning

The trial court admitted that it committed an error of law in interpreting Willie Kimbrough's pension plan. Yet the trial court denied his motion for a new trial or set-off. In denying this motion, the trial court relied on evidence that the trial court had already considered and incorporated into the original divorce judgment, that is, that Frances Kimbrough had one of her tax returns intercepted by the Friend of the Court to satisfy Willie Kimbrough's past due child support payments and that Willie Kimbrough assaulted and battered defendant. When a trial court commits an error of law, a new trial is appropriate.² We hold that the trial court, in recognizing that it had committed an error of law, yet doing nothing to rectify the error, abused its discretion.

We reverse the order of the trial court and remand the case to the trial court to fashion an appropriate property settlement in light of this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Jane E. Markey

¹ *Settingington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

² *Schellenberg v Rochester Elks*, 228 Mich App 20, 28; 577 NW2d 163 (1998).