

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 5, 2008 Session

SCARLETT RENEE CALDWELL v. KENNETH RAY CALDWELL.

**Appeal from the Circuit Court for Grundy County
No. 7098 Buddy D. Perry, Judge**

No. M2007-01205-COA-R3-CV - Filed October 13, 2008

In this divorce action, Husband appeals the Trial Court's division of marital assets and the allocation of Wife's retirement account to the Wife, in lieu of alimony. Finding no error, we affirm the judgment of the Trial Court.

Tenn R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. and ANDY D. BENNETT, J., joined.

Keith H. Grant, Dunlap, Tennessee, for the appellant, Kenneth Ray Caldwell.

Randall W. Morrison, Tullahoma, Tennessee, for the appellee, Scarlett Renee Caldwell.

OPINION

I.

Scarlett Renee Caldwell ("Wife") and Kenneth Ray Caldwell ("Husband") were married on November 9, 1981, in Grundy County, Tennessee. After twenty-two years of marriage, Wife filed a Complaint for Divorce on September 29, 2004, in the Circuit Court for Grundy County, requesting a divorce on the grounds of inappropriate marital conduct and irreconcilable differences. Wife's complaint identified the parties' property and assets and requested a division of these items, specifically requesting that each party retain their individual retirement/IRA/401k plan as their own. Wife also filed a Proposed Permanent Parenting Plan regarding the parties' daughter, who was then 16 years old.¹

¹ Two children were born of the marriage, both of whom had reached the age of majority at the time of trial.

On November 29, 2004, Husband, through counsel, filed an Answer and Counter-Complaint admitting the statistical information and that the parties had suffered irreconcilable differences, but denying that he had engaged in inappropriate marital conduct. Husband's Counter-Complaint alleged inappropriate marital conduct on the part of Wife and requested an equitable division of marital assets, including the retirement accounts.

Trial was held on January 16, 2007.² On January 12, Wife submitted a Statement of Issues, Assets, and Debts, listing approximately \$166,110 in assets and approximately \$64,000 in debts; no value was assigned to her retirement account. On the day of trial, Wife filed a motion to amend her complaint to include a request for alimony.³ She also filed two Amended Statements of Issues, Assets, and Debts. The first amended statement added retroactive child support as an issue for trial and specified that Husband owned one piece of real property "with a third party." The second amended statement reduced the value of the mobile home and 115.75 acres in Palmer, Tennessee, from \$100,000 to \$52,000; raised the value of the mobile home and .41 acres in Gruetli-Laager, Tennessee, from \$3,000 to \$6,700;⁴ and increased the value of a mobile home and one acre lot in Gruetli-Laager from \$3,025 to \$12,000.

The case proceeded to trial on January 16, 2007, at which time both parties testified; Husband was not represented by counsel.⁵ On February 5, 2007, the Circuit Court issued a Final Decree of Divorce granting Wife a divorce on the grounds of inappropriate marital conduct and dividing the marital property and debts; in lieu of alimony, Wife was awarded her retirement account.

Husband appeals the trial court's division of marital property and award of Wife's retirement account in lieu of alimony.

II.

STANDARD OF REVIEW

Our review of the trial court's findings of fact is *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of evidence is otherwise. Tenn. R. App. P. 13(d). The trial court's decision must be affirmed as long as the evidence does not preponderate against the findings and there is no error of law. *Cox v. Cox*, 2004 WL 1562516 at *2 (Tenn. Ct.

² There is no transcript of the trial; however, the parties have filed a statement of the evidence.

³ The record does not show that a separate order granting this motion was entered; however, inasmuch as the Final Decree addressed alimony, it is apparent that the matter was considered by the trial court. In any event, Husband does not assign error based on the lack of an order granting the amendment.

⁴ This is the property Husband owned with a third party.

⁵ Husband's original counsel had been allowed to withdraw two months prior to trial. The trial court offered to continue the case for Husband to secure counsel, but Husband declined.

App. May 5, 2004). Questions of law are reviewed *de novo* with no presumption of correctness. *Id.* The Trial Court’s distribution of property is presumed to be correct, unless the evidence preponderates against the Court’s ruling. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449-450 (Tenn. Ct. App. 1991).

III.

DISCUSSION

A. Valuation of Marital Property

Husband first argues that the trial court did not assign values to the divided property or otherwise have enough information to make an equitable distribution of the marital property. Specifically, he asserts that no evidence was presented as to the value of Wife’s retirement account; that there were discrepancies in the values of property awarded and lack of substantiation of the values; and that there was a “lack of evidence” regarding marital debt. As a consequence, Husband contends that the trial court “simply did not have enough information to make an equitable distribution of the marital property.”

As reflected in the technical record, Wife submitted three statements of value of marital property; the statement of the evidence confirms that she testified to values consistent with those listed in the Statement of Issues, Assets and Debts, as amended, and testified as to the approximate balance in the retirement account. Neither the technical record nor the statement of the evidence show any objection by Husband to the values assigned by Wife; neither do they show that Husband filed a statement of assets or otherwise assigned any value to the marital property. Husband’s motion for new trial does not include as a ground a complaint relative to the valuation of marital property but, rather, seeks to have the court “more freely distribute” the marital property.⁶

Values assigned to marital property are questions of fact and are made considering all relevant evidence of value; the trial court has discretion to assign a value to marital property that is within the range of evidence of value submitted. *Wallace v. Wallace*, 733 S.W.2d 102, 106 (Tenn. Ct. App. 1987). It is the responsibility of the parties, not the court, to propose values to marital property. *Id.* To the extent Husband had any concern relative to the evidence of value, it was incumbent upon him to object to the evidence at the time it was proffered or introduce other evidence; he did neither. The values and debts reflected in the statement of evidence, along with the testimony of Wife, are sufficient evidence of the value of the marital property upon which the trial court could base the division of property and debts. Husband has neither proposed any values of the marital property nor given a factual basis for the trial court or this court to disregard the values assigned by Wife. Indeed, Husband admitted that Wife had given an accurate summary of marital property and values.

⁶ The motion also requests that the final decree be set aside and the matter reopened “for further hearing,” but does not specify the purpose of such hearing.

B. Division of Marital Property

Husband complains that the division of property was not equitable.⁷ The court awarded Wife the trailer and lot located in Palmer; three vehicles; all nursery stock; the livestock and cattle trailer; and her retirement account.⁸ Husband was awarded the two trailers and lots in Gruetli-Laager; five vehicles; the sawmill and his business.

Division of marital property is governed by Tenn. Code Ann. § 36-4-121, under which all real and personal property acquired by either party during the course of the marriage and owned by either or both spouses is classified as marital property, which the court is obliged to equitably divide. Trial courts also have “wide latitude in fashioning an equitable division of marital property,” and their decisions will be given great weight by the Court of Appeals. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App.1996). The Court of Appeals will not overturn a trial court’s division of marital property in absence of evidence that the distribution “lacks proper evidentiary support or results from some error of law or misapplication of statutory requirements and procedures.” *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App.1996) (citing *Wade v. Wade*, 897 S.W.2d 702, 715 (Tenn. Ct. App.1994)).

In making an equitable division of property, the court is to consider the factors enumerated at Tenn. Code Ann. § 36-4-121(c):

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time of the division of property to become effective;

⁷ Having determined that the valuations reflected in the statement of the evidence are sufficient evidence of value, we use those figures in discussing this issue.

⁸ The trial court’s award of the retirement account will be discussed separately.

- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

The trial court is not obliged to make an equal division of marital property. As noted by the court in *Barnhill v. Barnhill*, 826 S.W.2d 443 (Tenn. Ct. App. 1991):

An equitable division, however, is not necessarily an equal one. Trial courts are afforded wide discretion in dividing the interest of parties in jointly-owned property. *Harrington v. Harrington*, 798 S.W.2d 244 (Tenn. Ct. App. 1990); *Fisher v. Fisher*, 648 S.W.2d 244 (Tenn. 1983). Accordingly, the trial court's distribution will be given great weight on appeal, *Edwards v. Edwards*, 501 S.W.2d 283, 288 (Tenn. Ct. App. 1973), and will be presumed to be correct unless we find the preponderance of the evidence is otherwise. *Lancaster v. Lancaster*, 601 S.W.2d 501, 502 (Tenn. Ct. App. 1984).

826 S.W.2d at 449-450.

At trial Wife testified to the following marital property and values: a mobile home and approximately 115 acres of land in Palmer valued at \$52,000; a mobile home and .43 acres in Gruetli-Laager valued at \$6,700; a mobile home and one acre in Gruetli-Laager valued at \$12,000; business equipment and inventory of Husband's business valued at \$8,000; a sawmill and equipment valued at \$4,000; a cattle trailer valued at \$1,500; cattle valued at \$15,000; household goods and furnishings valued at \$7,620; and vehicles valued at approximately \$24,000.

In addition, Wife testified that the parties had accumulated approximately \$64,000 in marital debt; that she had paid an "extraordinary" amount of medical expenses incurred as a result of the parties' son's automobile accident; and that, since their separation approximately two years earlier, Husband had paid none of the marital debt. Husband acknowledged that he had not supported the family financially since his separation from Wife; and did not dispute the amount of marital debt. Husband acknowledged that he had established a relationship with another woman, with whom he had fathered a child.

The court also heard testimony and found that Husband had failed to support Wife and the minor child during the period of the parties' separation; that Husband established a separate household and was supporting another woman and their child; that he used drugs throughout the marriage and was currently facing indictment for alleged manufacture and possession of methamphetamine; and that Husband had kept income from the parties' rental property for his own since the separation.

As acknowledged by the parties, the trial court's division of property and allocation of marital debt resulted in Wife receiving a net of \$28,558.34 (without consideration of the retirement fund); Husband received a net of \$34,580.00. Much of Husband's complaint that the division was inequitable is based upon his contention that his separate debt was not considered; however, he failed to introduce proof of any such debt. The proof at trial was that substantial marital debt had accumulated as a result of Husband's failure to contribute financial support to the household, medical expenses incurred as a result of the son's automobile accident and Husband's taking of income from the parties' rental property for his separate use. Consideration of the fact that Wife was burdened with all marital debt was not improper in dividing the marital property, *see* Tenn. Code Ann. § 36-4-121(c)(2), and, as shown, Husband's net was greater than Wife's.

Although the record of proof introduced in the trial of this case is limited, the court also had before it proof that, throughout the marriage, Husband used drugs and, at the time of trial, was facing criminal charges relating to the manufacture and sale of methamphetamine; that he frequently had "unexplained absences from the marital home;" and that, at the time of trial, he was residing with his paramour and their child. From this proof, it is reasonable to conclude that Wife contributed more to the acquisition, preservation and appreciation of the marital property than did Husband and that her contribution to the marriage as homemaker, wage earner and parent exceeded his. By the same token, Husband's conduct through the marriage was such as would more likely result in the dissipation of marital property, *see* *Clement v. Clement*, No. W2003-02388-COA-R3-CV, 2004 WL 3396472 (Tenn. Ct. App. Dec. 30, 2004), and the court was entitled to consider his conduct *vis-a-vis* the marital property in making an equitable distribution of the property. *Flannary v. Flannary*, 121 S.W.3d. 647, 651 (Tenn. 2003). In short, it is clear that responsibility for the maintenance of the household and marital property was assumed by Wife, and Husband's contribution was minimal, at best. *See* Tenn. Code Ann. § 36-4-121(c)(5), (11).

The economic circumstances of the parties at the time of the division of property likewise support the trial court's property division. Tenn. Code Ann. § 36-4-121(c)(8). Wife, an employee of the postal service, was continuing to pay on the marital debt and was solely supporting the children's college education. Husband, on the other hand, was self-employed doing "pretty good" business and had established a new family. Clearly, he had abandoned the marital home and his responsibilities, leaving Wife in substantial economic distress.

Considering all of the testimony, we cannot say that the trial court's distribution of the marital property was not supported by the evidence or that the court abused its discretion. Husband is correct that fault is not to be considered in property division, *see* *Wilder v. Wilder*, 863 S.W.2d 707 (Tenn. Ct. App. 1992); however, there is no indication in this record that the trial court based its distribution on anything other than the applicable statute, case law and facts.

III.

WIFE'S RETIREMENT ACCOUNT

Husband contends that the trial court's award to Wife of her retirement account in lieu of alimony was inappropriate, arguing that there was no proof that Wife needed alimony or that Husband had the ability to pay. Husband also raises a concern that "[i]f the retirement fund was awarded as part of the division of the marital estate, no value was provided to the Trial Court and thus any division of such would be inappropriate. . . . should this Honorable Court interpret the final decree as granting the fund as alimony, such an award was inappropriate." The trial court determined that an award of alimony was appropriate, but did not expressly specify its nature. Our review of the record, however, supports a determination that an award in the nature of transitional alimony was appropriate and that, because of Husband's irresponsibility, the trial court's award of alimony *in solido* was proper.

We review an award of alimony under the abuse of discretion standard. *Herrera v. Herrera*, 944 S.W.2d 379, 388 (Tenn. Ct. App. 1966). Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). If a discretionary decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *Clement, supra*; *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

When determining whether an award of alimony is appropriate, courts must consider the statutory factors in Tenn. Code Ann. § 36-5-121(i) of which we consider the need of the spouse seeking support and the ability of the other spouse to provide such support to be the most important. *Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App. 2007). Alimony decisions require a careful consideration of the relevant factors in Tenn. Code Ann. § 36-5-121(i) and typically hinge on the unique facts and circumstances of the case. *Oakes*, 235 S.W.3d at 160; *see also Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1998).

The relevant factors to be considered under Tenn. Code Ann. § 36-5-121(i) when determining whether to award alimony include:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;

- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i)

While a trial court should consider all the relevant factors under the circumstances, the two most important factors to be considered are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007) (citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Bogan v. Bogan*, 60 S.W. 3d 721, 730 (Tenn. 2001); *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002)). When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Id.* (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). Once the trial court has determined that alimony is appropriate, it must determine the nature, amount, and period of time of the award. The court may award "rehabilitative alimony, alimony in futuro, also known as periodic alimony, transitional alimony, or alimony *in solido*, also known as lump sum alimony or a combination of these . . ." Tenn. Code Ann. § 36-5-121(d)(1). The trial court has authority to award alimony *in solido* in lieu of transitional alimony. *See* Tenn. Code Ann. § 36-5-121(d)(5) ("Alimony *in solido* may be awarded in lieu of . . . any other alimony award . . . where appropriate"). Alimony *in solido* consists of a definite sum of money that can be paid in a lump sum. *Broadbent v. Broadbent*, 211 S.W.3d 216, 222 (Tenn. 2006); *Burlew v. Burlew*, 40 S.W.3d. 465, 471 (Tenn. 2001).

The primary factor placing Wife at economic disadvantage, thus justifying the award of alimony to her, was the assignment of all marital debt, in the approximate amount of \$64,000.00, to her. In addition, Wife was bearing the financial responsibility of the parties' children's college

education.⁹ At the time of the trial, the parties had been married for twenty-six years and raised two children; they had acquired several pieces of rental property along with livestock and a sawmill. Wife's testimony was that, through earnings from her employment, she was shouldering the entire financial burden of the household, much of which had accumulated since Husband's departure and as a direct consequence thereof. In this regard, we note also that the court found no fault for dissolution of the marriage on the part of Wife. *See* Tenn. Code Ann. § 36-5-121(i)(11). There is nothing in the record to indicate that Wife needed rehabilitative alimony; however, the substantial financial burden placed upon Wife resulted in economic disadvantage to her and supports an award of transitional alimony in accordance with Tenn. Code Ann. § 36-5-121(d)(4); *see also* Tenn. Code Ann. § 36-5-121(g)(1). Husband was self-employed, earning \$400-\$500 per week and there is nothing in the record to indicate that he was not able to pay alimony; indeed, the record reflects that Husband bragged to Wife about his earnings in his business.

The value of the retirement account, accumulated during the marriage from Wife's employment, was determined to be approximately \$60,000.00. The court's division of marital property (exclusive of the retirement account) gave Husband 55% of marital assets.¹⁰ A similar percentage applied to the retirement account would result in \$33,000.00.

Having determined that the division of marital property (exclusive of the retirement account) was proper and that an award of alimony to Wife was appropriate, the remaining question is whether it was an abuse of discretion for the court to order that Husband's marital interest in the retirement account stand for his alimony obligation. We hold that, under the unique facts and circumstances of this case, it was not. In light of Husband's irresponsibility and the uncertainty relative to the disposition of charges for which he was under indictment, the trial court was justified, in accordance with Tenn. Code Ann. § 36-5-102, in decreeing that Husband's marital interest in the retirement account to Wife as alimony *in solido*.

V.

CONCLUSION

For reasons listed above, we find no error with the trial court's and, consequently, affirm same. Costs of this appeal are assessed against Appellant.

RICHARD H. DINKINS, JUDGE

⁹ We have no doubt that the desire of the children to attend college was a product of their upbringing and was consistent with the lifestyle that the family enjoyed.

¹⁰ $\$28,558$ (Wife's net) + $\$34,580$ (Husband's net) = $\$63,138$ net marital assets.
 $\$34,580/\$63,138 = 55\%$