

**IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE**

FILED February 28, 2000 Cecil Crowson, Jr. Appellate Court Clerk
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JAMES ARLOND HANCOCK,)	E1999-01033-COA-R3-CV
)	
Plaintiff/Appellant)	
)	
vs.)	Appeal As Of Right From The
)	HAMILTON CO. CIRCUIT COURT
BONNIE LOUISE POPE)	
HANCOCK,)	HON. ROBERT M. SUMMITT
)	JUDGE
Defendant/Appellee)	

For the Appellant:
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For the Appellee:
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AFFIRMED

Swiney, J.

OPINION

In this divorce case, James Arlond Hancock (“Husband”) appeals the Trial Court’s valuation and division of marital property. Husband also contends that the Trial Court should have awarded rehabilitative alimony rather than alimony in futuro, and that the amount of periodic alimony awarded is excessive. He also complains about the award of Wife’s attorney’s fees. For the reasons herein stated, we affirm the judgment of the Trial Court.

BACKGROUND

_____ James A. Hancock is 47 years old and has a two-year college degree in Business Administration Management. He has worked for Eureka Foundry in Chattanooga since 1980 and is now a supervisor with a salary of approximately \$49,000 per year. He had a massive heart attack in 1994 followed by three hospitalizations, but he was able to return to the same work.

Bonnie L. Hancock [“Wife”] is 46 years old and has a tenth grade education. She has work experience as a sewer in the textile industry, a job she testified that she can no longer do because of medically documented osteoporosis. Her doctor did not know whether she was permanently disabled. She currently works as a janitor with Bi Lo Supermarkets, earning \$7.50 per hour or \$1,100 net per month.

In 1994, the parties filed Chapter 13 bankruptcy because they owed in excess of \$90,000 and were in danger of losing their home. Husband made payments of \$345 per week for five years under the Chapter 13 plan and finished paying off the debts in June 1999, except for the \$50,000 mortgage on the family home, which was reaffirmed.

The parties had been married for 23 years and had raised four children to adulthood when Husband filed this Complaint for divorce on July 24, 1998. When the matter came to trial, they had been separated three times, and had not lived together for over three years. At trial, Husband admitted that the reasons for the divorce were that he lost about \$30 a day gambling, that he accumulated about \$5,000 in gambling debt over the last five years of the marriage and that he is “a heavy drinker.” Wife testified that an additional reason was her discovery that Husband had been involved with other women during their separations. On August 3, 1999, after a bench trial, Wife was granted a divorce on grounds of Husband’s inappropriate marital conduct.

Wife was awarded the parties’ residence and assumed the mortgage thereon, with monthly payments of \$611. She was also awarded her 1989 Chevrolet Beretta automobile and all items of personal property in her possession. Husband’s 401(K) Profit Sharing Plan from his employment was divided equally between the parties, with each party’s share being \$3,321. Husband was awarded all items of personal property in his possession. Each party was ordered to

pay the debts legally incurred in their own names and the other party was held harmless thereon. Husband was ordered to pay Wife \$850.00 per month as alimony in futuro “until further order of the Court.” Husband was also ordered to pay Wife’s attorney fees in the amount of \$3,450.96.

DISCUSSION

_____Our review is *de novo* upon the record, accompanied by a presumption of the correctness of the findings of fact of the Trial Court, unless the preponderance of the evidence is otherwise. Rule 13(d), T.R.A.P.; *Davis v. Inman*, 974 S.W.2d 689, 692 (Tenn. 1998). A Trial Court’s conclusions of law are subject to a *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997).

_____In this appeal, Husband raises the issues that (1) the Trial Court erred in its valuation and division of marital property, (2) the Trial Court erred in awarding periodic alimony to Mrs. Hancock, and (3) the Trial Court erred in awarding Wife her attorney fees. Husband did not complain at trial, nor does he in this appeal, about any specific item of property that was improperly awarded to Wife. In fact, we find no dispute in the record about the division of marital property except as to the Court’s valuation of the marital home and the value of the personal items awarded to Wife. However, Husband argues that the Court erred in its award of \$850 monthly as periodic alimony *because Wife retained most of the marital assets*. We reproduce the argument Husband made at trial concerning his position on the relationship between the marital property and the alimony:

Mr. Hancock has paid approximately \$40,000 in marital debt during the past two or three years and has made payments on the mortgage which has increased the amount of equity available there should the Court award the house and the equity to Mrs. Hancock. She would then be left with 90 percent of the property that should be divided equitably between these parties.

And we think the Court ought to take that fact into consideration when it considers what otherwise might be an appropriate alimony award if you were dividing the property equally. *I don’t think it would be fair to anybody in this situation that the house be sold and equity divided and alimony paid*. That’s not good for Mrs. Hancock and not necessarily good for Mr. Hancock.

But if she is awarded the house which has equity in it and Mr. Hancock is awarded [sic-ordered] as alimony to make the mortgage payment, then she is going to be deriving an economic benefit in an asset which should appreciate over time. *And we think that the proper award in this circumstance that would keep her where she was during the course of this marriage and keep her in the home would be an award of approximately \$600 a month that would cover the mortgage payment*

* * *

I don't know what the future holds, but at the present time it would not be in our opinion inequitable to divide the property in the manner I have proposed, *allowing her to keep all that personal property, keep the house*, let Mr. Hancock make that mortgage payment for, say, a period of five years to enable her to get on with her life and at the same time have the comfort that her needs are going to be met in the same manner they were met before.

The evidence concerning the value of the marital home was presented by way of the testimony of the parties as to their opinions and the tax appraisal. In her statement of assets and liabilities, Wife listed the value of the house as \$68,700. At trial, however, she testified that the tax appraisal on the house was \$62,000, but that she did not think it would sell for that much. In fact, she did not think it would sell at all, except "as is," until some work was done. She said the exterior wall had rotted on the outside from rain, and the floor where the foundation meets that wall is rotten.¹

Husband testified that the house was worth \$65,000 and that his opinion was based on, "I just looked at it as the number of years I paid on it and said, 'Well, surely it's worth, well, at least this amount.' But I had no basis of judging it." The Trial Court opined:

Generally, we don't accept the tax assessor's estimation of the value, but in this case, it seems like it was admitted and seems like it's probably as good as anyone's. So I would feel that the property might be worth \$62,000. And I figured that if they sold it, there would be about \$3,720 worth of expenses or more which might leave a value of 57 or \$58,000 with a \$50,000 mortgage.

Our Supreme Court has held, in a divorce case involving the valuation and distribution of retirement benefits, that "[t]he choice of valuation method remains within the sound discretion of the Trial Court to determine after consideration of all relevant factors and

¹Wife wanted to continue to live in the house, make repairs and refinance it for a lower mortgage payment. Husband testified that he was living temporarily with a girlfriend and sharing expenses.

circumstances. *Cohen v. Cohen*, 937 S.W.2d 823, 831 (Tenn. 1996). In this case, the Trial Court considered the three alternative valuations presented at trial (Husband's guess, Wife's guess, the tax appraisal), and chose to accept the tax valuation. Either party was free to present an expert appraisal, but neither did so. Under these circumstances, we find the Trial Court did not abuse its discretion in valuing the marital home according to the tax appraisal.

The parties' other marital assets were meager. The Trial Court awarded Wife her 1989 Chevrolet and Husband his 1986 Chevrolet and S-10 Chevy truck. The Court split Husband's 401(K) retirement fund equally between the parties, with each party receiving a \$3,321 share. As to the rest of the personal property, the Court stated:

Now in regard to the personal property, I always feel like that there's some personal item that he would like to have or a few items that he would like to have that he should - - that should be considered. I don't know that he needs any of it if he's set up somewhere already. But if he had some personal items or if they had two TVs and he wanted one and little things like that, while you can't get much money out of used property like this, it does mean something to the people who use it and maybe they can come in and use it.

So my suggestion was if he had some items that he might want, that he should have that consideration. If not, then leave it with her. I'm sure she'll keep it there for the kids to come home if they want to and have sort of a hangout so to speak if they want to come there.

Husband contends that the value of the personal property and furnishings left in the home for Wife is about \$10,000 and the value of the personal property he received is zero. On appeal, he complains:

Although an absolutely equal division of marital property may not have been appropriate in this case, the great disparity in the property awarded to each party cannot be considered an equitable distribution. Furthermore, the Court awarded Mrs. Hancock periodic alimony of \$850 per month. Under these circumstances, the Court abused its discretion in its division of the marital property.

Taking Husband's argument about the home, the personal property and the alimony *at trial* together with the above-quoted argument he makes *on appeal*, we observe that his actual complaint appears to be that the amount of periodic alimony awarded should have been \$600 per month rather than \$850 per month because Wife received most of the marital property.

Nevertheless, we shall consider the division of marital property *de novo* with a presumption of the correctness of the Trial Court's findings of fact. T.R.A.P. Rule 13(d); *Dunlap v. Dunlap*, 996 S.W.2d 803, 814 (Tenn. Ct. App. 1998).

Wife received the marital home, valued at \$58,000, together with its \$50,000 mortgage, which amounts to an award of \$8,000 of marital property. She received an automobile which the parties agreed is worth \$2,000. Husband received his truck and auto, which he says are worth \$4,000 together. The remaining personal property was divided between the parties before trial, with both parties apparently being satisfied with their division when it occurred. Wife's "Statement of Assets and Liabilities" contains an itemized list of furniture she kept, which she assigned a total estimated value of \$805. Husband provided a similar statement which stated only that Wife was in possession of "Personal Property and household furnishings - Est. \$8,000 - \$10,000" and that he was in possession of no personal property or furniture. We have reviewed the itemized list of personal property and find the preponderance of the evidence supports the Trial Court's finding that the personal property was of little value and the parties had already divided it equitably before trial. Accordingly, we must determine whether the division of the other marital assets, i.e., the house, vehicles and 401(K), was equitable.

The net result of the division of the house, vehicles and 401(K) is that Wife received assets worth \$13,321 (home equity - \$8,000; auto - \$2,000; 401(K) - \$3,321), while Husband received assets worth \$7,321 (truck and auto - \$4,000; 401(k) - \$3,321). Each party retained his own debts, about which there is no issue on appeal.

Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in T.C.A. § 36-4-121(c). *Kinard v. Kinard*, 986 S.W.2d 220, 230 (Tenn. Ct. App. 1998). T.C.A. § 36-4-121(c) provides:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

- (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 or dissipation of the marital or separate property, including the contribution of a party to the marriage as a 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 the division of property is to become effective;

(9) The tax consequences to each party; and

(10) Such other factors are necessary to consider the equities between the parties.

In this case, wife has a tenth grade education and testified that she can no longer work at her former job as a textile factory sewer due to osteoarthritis. She is now working as a janitor and earning \$15,000 per year. Husband has a two-year college degree and earns \$49,000 per year. Although he has heart problems, he testified that those problems did not prohibit him from continuing his job. There is no proof in the record that Wife will be able to acquire capital assets or increase her income in the future. She contributed to the marriage as homemaker and parent of four children while Husband contributed as the primary wage earner. When the division of the marital property was made, Wife testified that she hoped to be financially able to just get by from day to day. Husband had a much higher income and a live-in companion with whom he shared expenses. We have applied the statutory factors set out in T.C.A. § 36-4-121 to the facts in this case, and hold that the Trial Court did not err in its division of marital assets.

Husband next contends that the Trial Court erred because, “[a]lthough Mrs. Hancock

was entitled to alimony due to her earning capacity, contributions to the marriage, and the parties' standard of living during the marriage, the Court should have awarded rehabilitative rather than periodic alimony." He argues that Wife's earning potential could be increased by obtaining her GED and training, and that Wife's doctor testified that he was not able to determine whether Wife was permanently disabled from osteoarthritis. Wife argues that the Trial Court correctly found her to be entitled to periodic alimony under the statutory factors in T.C.A. § 36-5-101.

T.C.A. § 36-5-101(d)(1) provides:

It is the intent of the general assembly that a spouse who is economically disadvantaged, relative to the other spouse, be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance. Where there is such relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors, including those set out in this subsection, then the court may grant an order for payment of support and maintenance on a long-term basis or until the death or remarriage of the recipient except as otherwise provided in subdivision (a)(3). Rehabilitative support and maintenance is a separate class of spousal support as distinguished from alimony in solido and periodic alimony. In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:

- (A) 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;
- (B) 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 earning capacity to a reasonable level;
- (C) The duration of the marriage;
- (D) The age and mental condition of each party;
- (E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (F) 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;

- (G) The separate assets of each party, both real and personal, tangible and intangible;
- (H) The provisions made with regard to the marital property as defined in § 36-4-121;
- (I) The standard of living of the parties established during the marriage;
- (J) The extent to which each party has made tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so, and
- (L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

In this case, Wife works full-time but earns less than one-third of the income Husband earns. She has a tenth grade education, while he has a two-year college degree. There is no proof in the record that she has the opportunity or ability to further her education. She testified that she hopes to make it from day to day. The parties were married for 23 years. While both Husband and Wife have medical problems, Wife testified that her osteoporosis prevents her from continuing her work as a textile factory worker, while Husband testified that his heart disease does not prevent him from continuing his long-term employment as a foundry supervisor. Although Wife received a greater share of the marital assets than Husband, she also assumed a burdensome mortgage which will consume more than half of her net monthly income. Finally, Wife was awarded the divorce on grounds of Husband's inappropriate marital conduct. Applying the factors set forth in T.C.A. § 36-5-101(d), we hold that the Trial Court did not err in its award of alimony in futuro to Wife.

Husband next argues that the amount of alimony awarded is excessive, and cites several cases in which the amount awarded was smaller. Our Supreme Court has held that Trial Courts have broad discretion in determining whether to award alimony and in determining the

amount and duration of alimony. *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995). The need of the spouse to whom alimony is awarded and the ability of the other to pay are two dominant factors to consider when deciding a proper award of alimony. *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995). Moreover, a wife whose marriage has been shattered by her husband's misconduct should not be left in a financial condition inferior to her economic situation prior to the parties' divorce. *Aaron*, 909 S.W.2d at 410, 411.

In this case, the award of \$850 per month in alimony results in Wife's having a net income of \$1,970. Her monthly expenses amount to \$1,724.18, including the \$611 mortgage she must assume under the Trial Court's order. Husband's net income, after deducting \$850 for alimony, is \$1,952.11.² His monthly expenses, not including the \$850 alimony, amount to \$1,331. We find the Trial Court did not err in determining that Wife had the need and Husband had the ability to pay \$850 per month alimony in futuro.

Finally, Husband argues that the Trial Court erred in ordering him to pay Wife's attorney fees of \$3,450.96. The award of attorneys' fees by a Trial Court will be reversed by this court only upon a clear showing that the Trial Court abused its discretion. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995). An award of attorney's fees is appropriate only when the spouse seeking them lacks sufficient funds to pay for his or her legal expenses or would be required to deplete his or her resources in order to pay these expenses. *Brown v. Brown*, 913 S.W.2d 163, 170 (Tenn. Ct. App. 1994). In this case, Husband argued that "neither party had liquid assets upon the divorce, although Mrs. Hancock received a much greater share of the marital assets." That "greater share", however, was the equity in the parties' marital home where Wife continued to live. Wife argued that she does not have assets from which to pay attorney's fees and that Husband has income

²Husband's Income and Expense Statement is misleading, probably unintentionally so. At the time the Statement was prepared, he had \$345 per week withheld from his wages to pay the Chapter 13 bankruptcy plan. However, he completed those payments the month before the divorce complaint was filed. His gross weekly wages are \$867. He has regular deductions for federal income tax (\$125.44), social security tax (\$66.32), Uniform expense (\$4.85), United Way donation (\$10), Flower Fund (\$0.75), and "CPTR" (\$13.00). This results in a net weekly income of \$646.64, which annualizes to \$33,625.28, or a net monthly income of \$2,802.11. After deducting the \$850 monthly alimony payment, he retains net monthly income of \$1,952.11.

from which he can pay those fees. The Trial Court so held, and we agree.

CONCLUSION

The judgment of the Trial Court is affirmed and this cause remanded to the Trial Court for such further proceedings, if any, as may be required, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellant, James Arlond Hancock.

D. MICHAEL SWINEY, J.

CONCUR:

HERSCHEL P. FRANKS, J.

CHARLES D. SUSANO, JR., J.