

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

CECIL F. AYERS v. MINDA ELIZABETH AYERS

**Direct Appeal from the Circuit Court for Shelby County
No. 160283 R.D. F. Lloyd Tatum, Judge, by special assignment**

No. W1999-01261-COA-R3-CV - Decided June 6, 2000

This is a divorce case. The wife was awarded the marital residence, and the husband was awarded his house painting business. Sole custody of the parties' two minor children was awarded to the wife, and the husband was awarded supervised visitation. The trial court denied the husband's request for an award representing the value of personal property the wife allegedly sold or gave away. The wife was awarded her attorney's fees. The husband appeals the trial court's valuation of his business, the denial of his request for the value of his alleged missing personal property, the order mandating that his visitation with the children be supervised and the award of wife's attorney's fees. We affirm, finding substantial evidence in the record to support the trial court's decision.

Tenn. R. App. P. 3; Judgment of the trial court is affirmed.

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S. AND ALAN E. HIGHERS, J., joined.

Eugene G. Douglass, Jr., Bartlett, Tennessee, for the Appellant, Cecil F. Ayers.

Clifford M. Cole, Memphis, Tennessee, for the Appellee, Minda Elizabeth Ayers.

OPINION

The parties in this divorce, Cecil F. Ayers ("Husband") and Minda Elizabeth Ayers ("Wife") married on July 31, 1990.¹ It was Husband's first marriage, and Wife's third. Wife had three children, two daughters and a son, from her previous marriages. Husband and Wife had two children together, Elizabeth Ayers, born March 8, 1991, and Linda Ayers, born April 24, 1993. During the marriage, all five children resided with Husband and Wife. Husband owned and operated a painting business. For the last several years of the approximately eight year marriage, Wife was

¹Wife's answer to Husband's complaint asserts that the parties were married on July 31, 1991, but her brief submitted to this Court gives the year of the parties' marriage as 1990.

a full-time college student.

During the marriage, Husband developed a cocaine habit, which led to problems in the marriage. The parties separated in July of 1998. Husband filed for divorce on September 3, 1998, citing irreconcilable differences, and alleging that Wife was guilty of inappropriate marital conduct. Wife filed an answer and counterclaim for divorce on September 9, 1998, alleging irreconcilable differences and asserting that Husband engaged in inappropriate marital conduct. Wife later filed an amended answer and counterclaim, alleging that Husband had sexually molested her fourteen and eleven-year-old daughters, and that he was under criminal indictment for felony sexual abuse. Wife sought sole custody of the parties' minor children, and asked that Husband be enjoined from committing any acts of violence or abuse upon her or the parties' children. Wife also sought attorney's fees.

The case was tried on April 26, 1999. Husband presented expert testimony on the valuation of his painting business, a certified public accountant, Wendy Ingalls ("Ingalls"). Ingalls testified that she had evaluated Husband's business using three different methods, the asset approach, the income approach, and the market approach. Under the asset approach, she opined that the business' value was \$4,200. Utilizing the income approach, she valued the business at \$11,577. Under the market approach, she testified that the business would be valued at \$25,611. Ingalls stated that she believed the income approach to be the most appropriate method by which to value the business. Consequently, in her calculations, she weighed the value under the income method the heaviest. Her final determination of the business' value was \$15,000. Ingalls acknowledged that she had not conducted any independent examination or audit of the business' equipment, but instead, relied on information provided by Husband.

Husband testified that he and Wife separated on July 11, 1998, after an argument at a party when Wife refused to come home with him, and he realized that she was involved with another man. Husband admitted that he had used cocaine on three different occasions during the marriage, and that his cocaine use had caused problems in the marriage. Husband also admitted that Wife had accused him of sexually molesting her two eldest daughters. Husband refused to answer questions regarding the alleged molestation, citing his upcoming criminal trial and his rights under the Fifth amendment of the United States Constitution to be free from self-incrimination.

Husband also testified regarding personal property he had left at the marital residence. Husband claimed that he had left clothing, a personal computer, work tools, a grill, and a washer and dryer, with a total value of \$3,695. Husband asserted that Wife had not returned these items to him, but rather had sold them or given them away.

Wife's mother testified on Wife's behalf. She stated that Husband and Wife had visited her home during March 1998, prior to their separation. During that visit, both Husband and Wife told her that Husband had a "terrible problem with drug addiction." Wife's mother said that Husband told her that he was abusing cocaine and that she had recommended that he seek professional help. He subsequently received both outpatient and inpatient treatment at Memphis Recovery Center, ("the Center"), a Memphis drug treatment facility.

Wife testified that Husband had first received outpatient treatment at the Center, experienced a relapse, and then was admitted to the Center on an inpatient basis. Husband spent two or three weeks as an inpatient at the Center. After Husband completed his inpatient treatment, the parties separated.

Wife stated that after Husband moved out, she placed all of his clothing and tools in plastic bags, set them out in front of the house, and called Husband to come get them. She testified that Husband came to the home in a van with a friend, rummaged through the bags, took approximately half the items, and left the rest on the street. She sold the grill in a garage sale. Wife testified that Husband bought her the computer when she started school. She said she forfeited it to a man who had performed repairs on it, because she could not afford to pay the \$400 repair bill. Wife testified that the washer and dryer were purchased jointly over eight years before, and that she still had them.

Wife testified about how she learned of Husband's sexual abuse of her then thirteen-year-old daughter, Sarah. Wife made a trip to Jackson, Mississippi on March 28, 1998, to visit a friend. Because of Husband's drug problem, Wife had arranged for all five children to stay with various friends or relatives. That evening she talked to Husband on the phone, and from his voice suspected that he was once again using cocaine. The next morning she received a distraught message on her cellular phone from Sarah, so she cut her trip short and returned to Memphis. Before leaving on her trip, Wife had arranged for Sarah to stay with a friend. When Wife arrived back home, Sarah told Wife that, the previous evening, Husband had called her home from her friend's house. While Sarah was alone in the home with Husband, she said that Husband asked her to come into the bathroom; when she did, she found that he was naked.

Wife said that she confronted Husband about what Sarah told her. She said that he could not remember what had happened, but speculated that he had probably had a blackout from cocaine use. She said that he told her that he remembered getting out of the bathtub naked, and that he had probably asked Sarah into the room and "forgot to put a towel on." Wife said that Husband told her that he had been so "coked up" that night that he "probably could have done anything."

Wife stated that she learned of the incident with her eleven-year-old daughter, Brooke, in August 1998, after the parties separated. Wife spent the day in August with Husband and the children on a picnic, and she and Husband had discussed reconciliation. That evening Brooke and Sarah came into Wife's bedroom. Wife testified that Brooke tearfully told her that Husband had placed his penis on her vagina. Sarah then picked up the phone and told her mother that if Wife did not call the police, then Sarah would.

Wife confronted Husband about Brooke's allegations of molestation. She testified that Husband refused to discuss it, and left. Husband then filed for divorce. Wife testified that she was afraid of Husband, and feared to leave any of her children alone with him.

At the conclusion of the trial, the trial court granted Wife the divorce on the grounds of Husband's inappropriate marital conduct. The trial court found Husband's painting business to be marital property. It was valued at \$25,000 and awarded to Husband. The marital home, valued at

\$117,000, was awarded to Wife, subject to a mortgage of \$68,551.13. The furniture and other personal property in the home were awarded to Wife. Wife was also awarded \$2,500 in attorney's fees. The trial court awarded sole custody of the parties' two children to Wife, and granted Husband supervised visitation. The trial court's final decree states:

The plaintiff has a history of cocaine usage and of sexually molesting two daughters of the Defendant by a previous marriage. The Court finds that it would serve the best interests of the parties' two minor children, for the Plaintiff to have supervised visitation with the parties' two children. The plaintiff is presently indicted for sexually abusing said children of the defendant (not the two children of the marriage). After trial or other disposition of this criminal case, the Husband/Plaintiff may petition the Court for unsupervised visitation with the parties' two minor children. The plaintiff must prove to the court that he is not addicted to any drug and that the visitations may safely be had without supervision and at other periods of time.

From this order, Husband now appeals.

On appeal, Husband argues that the trial court erred in its valuation of his business, in awarding Wife \$2,500 in attorney's fees, in denying Husband's request for \$3,695 for his alleged missing personal property, and in ordering that Husband's visitation with the children be supervised.

Since this case was tried by the trial court sitting without a jury, our review is governed by Tennessee Rule of Appellate Procedure 13 (d), which provides for *de novo* review upon the record with a presumption of correctness of the trial court's findings of fact. Unless the evidence preponderates against the trial court's findings, we must affirm, absent error of law. Tenn. R. App. P. 13 (d).

Husband first argues that the trial court erred in valuing his business at \$25,000. Husband contends that there was no factual basis for the trial court's valuation of the business at \$25,000, and asserts that his expert's testimony, establishing the business value at \$15,000, was undisputed.

The trial court's valuation of a marital asset is a finding of fact, presumed to be correct unless the preponderance of the evidence is otherwise. *Brock v. Brock*, 941 S.W.2d 896, 902 (Tenn. Ct. App. 1996); Tenn. R. App. P. 13 (d). Husband's expert testified that the business' value, based on the market approach, was \$25,611. The trial court assigned a value of \$25,000. It is within the trial court's discretion to assign a value that is within the range of values presented at trial. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997)(citations omitted). Under these circumstances, the evidence does not preponderate against the trial court's valuation. The trial court's decision on this issue is affirmed.

Husband next argues that the trial court erred in not mentioning Husband's personal property in the judgment, and in denying Husband's request for a monetary award for the value of the personal property.

At trial, Wife testified that she had placed Husband's clothing, work tools, and other personal property in plastic bags on the street, and that Husband took what he wanted and left the rest. She testified that the computer had been a gift to her from Husband, and that the washer and dryer were marital property. Husband denied receiving his clothing or work tools, and claimed that the computer and washer and dryer were his personal property. This issue turns on the credibility of the witnesses. The trial court obviously credited Wife's testimony. The trial court is in the best position to evaluate the credibility of witnesses, and its findings of credibility must be accorded great weight. *Wright-Miller v. Miller*, 984 S.W.2d 936, 942 (Tenn. Ct. App. 1998)(quoting *Tenn-Tex Properties v. Brownell Electro.*, 778 S.W.2d 423, 426 (Tenn. 1989)). With due deference to the trial court's determinations of credibility, we find that the evidence does not preponderate against the trial court's decision. The trial court is affirmed on this issue.

Husband next argues that the trial court erred in awarding Wife \$2,500 in attorney's fees. Husband contends that because Wife has the ability to pay her own attorney's fees, and was partially at fault in the marriage, the trial court's award of attorney's fees was in error.

An award of attorney's fees in a divorce is considered to be an award of alimony. *Long v. Long*, 957 S.W.2d 825, 829 (Tenn. Ct. App. 1997). As with alimony, the trial court has broad discretion regarding the award or denial of attorney's fees, and its decision will not be disturbed absent a clear showing that it abused that discretion. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995)(citing *Storey v. Storey*, 835 S.W.2d. 593, 597 (Tenn. Ct. App. 1992) and *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964)). We find no abuse of discretion by the trial court on this issue, and the award of attorney's fees is affirmed.

Finally, Husband argues that the trial court erred in ordering that his visitation with the parties' children be supervised. Husband contends that there was no support for the trial court's finding that Husband had a "history of cocaine usage and of sexually molesting two daughters of the Defendant by a previous marriage." Husband points out that he admitted using cocaine only three times during the marriage, and denies that he ever molested Wife's children. Moreover, the accusations of molestation do not concern the parties' children, who are the subject of the order of supervised visitation. Husband asserts that he has never been accused of engaging in inappropriate conduct with the parties' children, that he has been drug-free for over a year, that he cared for the children many times during the marriage, and that Wife allowed him to care for the children even after she learned of the alleged incident with Sarah. Husband contends that the order of supervised visitation is too harsh, given the circumstances, and asks that he be allowed unsupervised visitation with the children every other weekend.

The trial court is accorded broad discretion in deciding issues of child custody and visitation, and appellate courts will not interfere with the trial court's decisions absent a showing that the trial court abused its discretion. *Whitaker v. Whitaker*, 957 S.W.2d 834, 838 (Tenn. Ct. App. 1997); *Brumit v. Brumit*, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997).

In the trial below, substantial testimony was presented that Husband had a drug problem. Husband admitted use of cocaine, and that he had undergone both outpatient and inpatient drug

treatment at Memphis Recovery Center. Although Husband claims to have been drug free for over a year, the evidence at trial showed that Husband had suffered at least one relapse in the past. Wife testified that Husband had engaged in inappropriate sexual conduct with both Sarah and Brooke. At trial, Husband acknowledged that he was under criminal indictment on charges of sexually abusing Sarah and Brooke and refused to answer questions about the alleged sexual abuse.

The welfare of the child is always the paramount concern in any determination of child custody or visitation. *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988). In this case we cannot find that the trial court abused its discretion in ordering supervised visitation with the parties' children. As the trial court's order makes clear, once the outcome of his criminal case is settled, Husband is free to petition the court for unsupervised visitation. The trial court's order of supervised visitation is affirmed.

The decision of the trial court is affirmed on all issues. Costs on appeal are taxed against the Appellant, Cecil F. Ayers, for which execution may issue, if necessary.

HOLLY KIRBY LILLARD, J.
W. FRANK CRAWFORD, P. J., W.S.
ALAN E. HIGHERS, J.