IN THE COURT OF APPEALS OF TENNESSEE

FILED

November 20, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

ADEL N. SHENOUDA,	)	C/A NO. 03A01-9505-CV-00151
	)	HAMILTON COUNTY CIRCUIT COURT
Plaintiff-Appellant,	)	
	)	
	)	
	)	
	)	
v.	)	
	)	HONORABLE ROBERT M. SUMMITT,
	)	JUDGE
	)	
	)	
	)	
CECILE S. SHENOUDA,	)	
	)	
Defendant-Appellee.	)	AFFIRMED AND REMANDED

H. WAYNE GRANT and TONYA KENNEDY McINTOSH of GRANT, KONVALINKA & HARRISON, P.C., Chattanooga, for Appellant

MARVIN BERKE of BERKE, BERKE & BERKE, Chattanooga, for Appellee

O P I N I O N

Susano, J.

This is a divorce case. Following a non-jury hearing, the trial judge declared the parties divorced pursuant to their T.C.A. § 36-4-129 stipulation that each was entitled to a divorce; granted Cecile S. Shenouda (wife) custody of their 17 year-old daughter; awarded wife $1,440 per month in child support[1] and $6,000 per month in periodic alimony *in futuro*; directed Dr. Adel N. Shenouda (husband) to maintain wife as the beneficiary of $350,000 of insurance on his life "to guarantee her alimony"; classified and divided the parties' property; and decreed other related relief, none of which is relevant on this appeal.

Husband appeals, raising three issues which present the following questions for our review:

> 1. Is the $350,000 of life insurance, of which wife is to be the designated beneficiary, an asset of an irrevocable trust and hence not subject to the decree of the trial court?
>
> 2. Does the evidence preponderate against the trial court's implicit determination that wife could not be rehabilitated by the payment of alimony for a definite period?
>
> 3. If alimony *in futuro* is appropriate, did the trial court abuse its discretion in setting the amount at $6,000 per month?

Wife also raises issues which pose these questions:

> 1. Does the evidence preponderate against the trial court's determination that

[1]Husband was also ordered to pay the minor child's private high school tuition and her reasonable school expenses.

the condominium unit at 703 Continental Apartments, Chattanooga, was husband's separate property?

2. Did the trial court err in failing to classify as marital property other condominium units purchased by husband and placed in the children's trust, all without the knowledge of wife?

3. Is the division of marital property equitable?

I

The parties were married in their native Egypt on July 21, 1968. He was then 27 and she was 23. Each is a college graduate. He is a medical doctor and she is a civil engineer. In March, 1969, the parties moved to England so husband could pursue further medical education. In order to accommodate this first move, wife left a government job as a civil engineer. While in England, the parties' first child was born. Wife worked there until she later suffered a miscarriage.

In 1971, the parties moved to the United States, settling in Chattanooga. Wife did not work during the parties' first stay in that city. Their second child was born in Chattanooga on April 28, 1972. In 1973, the parties moved to Memphis where husband completed a nephrology fellowship. While in Memphis, wife returned to full-time employment as an engineer.

The parties returned to Chattanooga in 1975. Their third child was born there on September 11, 1975. Their youngest child followed in June 8, 1977. Wife was not employed again until November, 1991, when she took a position with Hamilton

County. From 1975 to 1991, wife was primarily involved in raising the parties' four children and performing the typical duties of a wife and mother. The record does not disclose any criticism of her performance of these various functions.

Husband has had a successful nephrology practice in Chattanooga for the past 20 years. He is a partner in Nephrology Associates.

Wife was initially employed by Hamilton County as an Engineer I. In 1993, her gross salary was $28,575, including deferred income of $6,576.92. On December 27, 1993, she resigned her employment rather than accept a demotion to a technician's position with an annual salary of $20,488. The planned demotion was prompted by her supervisor's determination that her education, training and experience did not enable her to do the work expected of an employee classified as an Engineer I. The supervisor said that wife attempted to do her work, but was simply not qualified for her position.

Husband filed for divorce on April 16, 1993. Following two days of trial, the court orally announced its decision from the bench. The final judgment was entered February 23, 1995. Husband was then 54 years of age and wife was a month and a half shy of her 50th birthday.

II

Husband's first issue and wife's second issue cause us to focus on an irrevocable trust memorialized by a written trust instrument executed by husband on December 31, 1985. The trust was established for the benefit of the parties' four children, each of whom was designated as the beneficiary of a separate trust. The trustee was husband. He was directed to "apply for the sole benefit of [the children] so much or all of the income and principal of the trust, at such times and in such amounts and manner as the trustee, in his sole discretion, deems reasonable or necessary for [their] proper care, support, maintenance or education." The general thrust of the trust agreement called for the termination of an individual child's trust when that child reached the age of 21. The initial property transferred to the trust was four condominium units in Riviera Villas Condominium. One unit was placed in each of the four trusts. Wife was aware of the trust. She executed a quit claim deed to facilitate transfer of the Riviera Villas condominiums to the trust.

Husband challenges the trial court's decree directing him to maintain wife as the beneficiary of $350,000 of $750,000 of insurance on his life so long as he had an alimony obligation. He takes the position that the $750,000 of life insurance is an asset of the irrevocable trust and not subject to the decree of the trial court.

The simple answer to husband's position is that there is no evidence in the record before us that ownership of the $750,000 policy was ever transferred to the trust. It appears that husband has designated his children and his mother as the

beneficiaries of the subject policy; but there is nothing in the record to indicate that this was in any way an irrevocable beneficiary designation. The trial court acted within its authority in ordering husband to maintain wife as the beneficiary of $350,000 of his life insurance. T.C.A. § 36-5-101(g); *see also* ***Prince v. Prince***, 572 S.W.2d 908, 908-09 (Tenn. 1978). Husband's first issue is found to be without merit.

Wife, by her second issue, finds fault with the failure of the trial court to include four units in the Continental Condominium complex in Chattanooga as a part of the marital estate. These units were transferred by husband to the irrevocable trust in 1988. The preponderance of the evidence is that husband utilized marital funds in purchasing these units. The evidence also preponderates in favor of a finding that wife was not aware of this 1988 transfer.

The evidence is clear that during the parties' marriage husband handled the parties' financial matters. While there is a dispute in the record as to why wife was not involved in these decisions, it seems clear that she passively acquiesced in husband making the decisions regarding investments and the like. The record is also clear that these condominium units were transferred into the trust and under the aegis of the trust document. The trust was used to partially fund the children's education at expensive private schools in the northeast, i.e., Columbia, Swarthmore, Harvard. When a child reaches the age of 21, the trust set up for that child is to be terminated and the assets in the trust transferred to that child.

There is nothing in the record to indicate that the transfer of the Continental condominium units was for other than a legitimate purpose--the education and possible later benefit of the parties' children. There is no proof that husband made the transfer of the units in an attempt to defraud wife out of a share of the marital estate. The four units in question were not owned by the parties at the time of the divorce. The trial court was correct in not considering them as a part of the marital estate. Wife's second issue is without merit.

III

Husband's second and third issues address the trial court's award to wife of $6,000 per month periodic alimony *in futuro*[2]. He takes the position that wife should have been awarded rehabilitative alimony and that, in any event, $6,000 per month is too much. We disagree on both points.

The general assembly has expressed its intent "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." T.C.A. § 36-5-101(d). In this case, it is clear beyond any doubt that wife is economically disadvantaged vis-a-vis husband. In 1993, the last full year of this marriage, wife's gross salary from Hamilton County, including deferred income, was $28,575; husband's gross earnings from his medical

[2]This alimony is payable "until the death of [husband] and/or [wife] or until [wife] remarries or until terminated by law."

practice were $354,018. Having found that wife is economically disadvantaged relative to husband, our next inquiry is whether she can be rehabilitated.

We do not believe she can be rehabilitated, as that term is used in the statute. Rehabilitation is not a concept to be contemplated in a vacuum; it is obviously related to the parties' circumstances as they existed during their marriage and at the time of the divorce. Here the parties enjoyed a high standard of living, one that included frequent vacations and trips, both in this country and abroad. Their children were educated at some of the finest and most expensive private universities in this country. The trial court found their residence to be worth $290,000. We agree with the trial court's implicit determination that wife cannot be rehabilitated to a status anywhere close to her standard of living at the time of the parties' separation. *Cf.* ***Aaron v. Aaron***, No. 02S01-9406-CH-00027, 1995 WL 535087 at *6, Supreme Court at Jackson (September 11, 1995).

In this case, wife presented an affidavit fixing her needs at $8,573 per month. This affidavit included her needs a well as those of the parties' minor child. The trial court fixed child support at $1,440 and that determination is not challenged on this appeal. When the $6,000 alimony award is coupled with the child support award, the trial court has provided a total monthly payment of $7,440 to fund wife's claimed needs of $8,573.

Husband has a substantial income from his medical practice, as evidenced from the following information taken from his two most recent tax returns:

	1993	1992
Gross income from medical practice	$354,018	$339,788
Business expenses	<20,203>	< 10,978>
	$333,815	$328,810
Federal taxes (excluding taxes withheld from wife's wages)	<105,342>	<92,283>
	$228,473	$236,527

Wife had a demonstrated need for support and husband had the ability to meet that need. Wife was unemployed at the time of trial. The evidence does not preponderate against a finding that her education, training, work experience, and general circumstances will not presently produce an income in excess of a gross wage in the range of $20,000 per year. Even assuming she earns at that level of gross wages, she still needs substantial support from husband for "closing in" money so she can "more closely approach her former economic position." ***Aaron***, 1995 WL 535087 at *7.

"The amount of alimony to be allowed in any case is a matter for the discretion of the trial court in view of the particular circumstances." ***Ingram v. Ingram***, 721 S.W.2d 262, 264 (Tenn.App. 1986) (citing ***Newberry v. Newberry***, 493 S.W.2d 99 (Tenn.App. 1973)).

Husband argues that the division of property in this case provides wife with sufficient monies to support herself. We disagree.

The trial court awarded wife half of the equity in the parties' residence, and the parties agreed to a division of their personal property. We do not believe that any of this property is available to wife for her monthly support. When the parties' residence is sold, wife will be without a place to live. Her share of the proceeds from the sale of the house will have to be used to secure new habitation. It is not apt to secure a residence approximating the type of residence to which wife was accustomed during this marriage. In any event, those funds are not available for her support needs.

The remaining marital assets were divided by the court as follows:

	Dr. Shenouda	Mrs. Shenouda
Cash-after payment of debts	$ 11,635	$ 11,635
Mutual funds	22,507	52,574
Limited partnerships	12,500	12,500
Annuities	66,724	29,557
Retirement funds, IRAs	487,783	487,783
Automobile		7,100
Interest in Nephrology Associates (husband's medical practice)	61,186	
	$662,335	$601,149
Debts	<5,270>	<3,185>
	$657,065	$597,964

As can be seen, wife is receiving cash and mutual funds of $34,142. The other assets awarded to wife are either not liquid (e.g., the limited partnerships, her automobile) or are funds set aside for retirement. Wife was not awarded a large lump sum of cash or similar after-tax liquid asset which could be invested to fund her current living expenses. Wife should not be expected to

invade funds (on which income tax has not been paid) set aside for retirement in order to fund her current needs; there is certainly no reason to believe that husband will be required to use his share of the retirement assets for his present living expenses. These funds were designed for the parties' retirement. There is no reason or need in this case to change these plans formulated by husband during the parties' marriage.

We find no abuse of the trial court's discretion in its setting of the alimony *in futuro* award at $6,000 per month.

IV

Wife takes the position that the trial court erred in finding that the condominium unit at 703 Continental Apartments was the husband's separate property. We cannot agree.

Husband testified that unit 703, in which he was living at the time of the divorce, was purchased with funds that he inherited from his family. Wife argues that there are no documents to substantiate his inheritance and that his testimony on this subject was contradictory. Be that as it may, we cannot say that the evidence preponderates against the trial court's determination that this unit was husband's separate property. *See* T.R.A.P. 13(d). Wife's first issue is found to be without merit.

V

Finally, wife argues that the division of property was not equitable. The primary thrust of this argument is directed at the failure of the trial court to factor in the four Continental condominiums in the division of property. We have already addressed that separate but related issue in Section II of this opinion. To the extent that wife's argument also attacks the division of the property found to be marital property, we do not agree with her assertion. She received half of the net proceeds from the sale of the house, half (as agreed to by the parties) of the personal property, and 47.6% of the remaining marital property. She is entitled to an equitable--not necessarily equal--share of the marital property. ***Batson v. Batson***, 769 S.W.2d 849, 859 (Tenn.App. 1988). As Judge Koch of this court opined in the case of ***Thompson v. Thompson***, 797 S.W.2d 599 (Tenn.App. 1990):

> Trial courts have broad discretion in dividing marital estates. ***Fisher v. Fisher***, 648 S.W.2d 244, 246 (Tenn. 1983). We customarily give their decisions great weight, ***Edwards v. Edwards***, 501 S.W.2d 283, 288 (Tenn. Ct. App. 1973), and are generally disinclined to disturb them unless the distribution lacks proper evidentiary support or results from an error of law or a misapplication of statutory requirements and procedures.

Id. at 604.

We do not find an abuse of discretion or any other basis for disturbing the trial court's division of property. Wife's third issue is likewise found to be without merit.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded for the collection of costs assessed below and such other proceedings, if any, as may be necessary, consistent with this opinion.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.