

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

April 25, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

SHIRLEY IRENE BRAY COX,) C/ A NO. 03A01-9511-GS-00394
)
Appellant,) ROANE GENERAL SESSIONS
)
v.) HON. THOMAS A. AUSTIN,
) JUDGE
TOM ED COX, JR.,)
) AFFIRMED AS MODIFIED
Appellee.) AND REMANDED

HAROLD D. BALCOM, JR., Kingston, for Appellant.

J. POLK COOLEY, COOLEY, COOLEY & AGEE, Rockwood, for Appellee.

O P I N I O N

Franks. J.

In this divorce action, the wife appeals the findings by the Trial Court relative to the property distribution, and the husband argues the Court erred in admitting an exhibit.

The parties were married for twenty-five years and the wife disputes the Trial Court's valuation of the marital

home at \$130,000.00 and a lot bordering the marital home at \$4,000.00.

Our review of the case is *de novo* upon the record with a presumption of correctness of the findings of the trial court. T. R. A. P. 13(d); *Hazard v. Hazard*, 833 S.W2d 911 (Tenn. App. 1991).

The value of a marital asset is determined by considering all relevant evidence regarding value, with the burden on the parties to produce competent evidence of value. *Wallace v. Wallace*, 733 S.W2d 102 (Tenn. App. 1987). The trial court is free to value a marital asset within the range of competent evidence of value. *Id.*; *Koch v. Koch*, 874 S.W2d 571 (Tenn. App. 1993).

The husband testified the home was worth \$130,000.00. The husband's expert real estate appraiser testified the value was \$130,000.00, and husband had valued the homestead at \$130,000.00 in loan papers. Insurance coverage for the house was in the amount of \$150,000.00, and the wife testified she thought the home was worth \$200,000.00. Given the range of estimates and the real estate appraiser's assessment of the condition of the house, the evidence does not preponderate against the Trial Court's finding that the house had a value of \$130,000.00. Rule 13(d) T. R. A. P.

The lot next to the home was valued by the wife at \$30,000.00. The husband valued it at \$2,000.00. Given the small size and undeveloped state of the lot, and the fact that access to the property is only available by the driveway of the marital home, the evidence does not preponderate against the trial court's setting the value at \$4,000.00.

Next, the wife raises the issue of whether the Trial Court erred in not awarding her the cash value of Shop at Home, Inc. Stocks. Testimony differed over whether husband still owned any of the shares. He claimed he had sold all of that stock and the wife introduced records purporting to show that he remained a stockholder.

The Trial Judge did not make a finding on the issue of ownership. The Trial Court's opinion does state "all other capital stock owned by either party, which is not otherwise expressly disposed of herein, shall be divided in equal shares between the parties." If the husband owned title to Shop at Home stock, the decree would require him to give one-half of their worth to the wife, but on this record as hereinafter explained there is no evidence of stock ownership at the time of the divorce.

Next, she charges the Trial Court erred in determining the proceeds from the sale of real property, in Oneida, Tennessee, were separate property.

Tennessee defines separate property as "all real and personal property owned by a spouse before marriage; property acquired in exchange for property acquired before the marriage. . . ." T. C. A. §36-4-121(b)(2).

The Trial Court determined that two investment accounts of husband, totaling \$108,105.73, had been purchased with the proceeds of separate property owned before the marriage and had remained separate property throughout the marriage. The wife was awarded \$1,894.27 from these funds.

Husband testified that he owned the property before the 1969 marriage, the deeds were in his name, and proceeds

from the 1981 and 1986 sale of the properties were kept in his name. They were lent to a friend for several years and then deposited in Dean Witter and Prudential investment accounts in the name of the husband.

The wife contends, however, that the property was not separate because the deeds that conveyed the separate properties were in the name of both Tom and Shirley Cox. In addition, evidence at trial showed that \$13,400.00 was transferred from the parties joint bank account into the separate Dean Witter account. The use of both names in the deed and the apparent co-mingling of monies in the joint savings account establishes that some of the property was transmuted into marital property. *Batson v. Batson*, 769 S.W2d 849, 858 (Tenn. App. 1988); *Barnhill v. Barnhill*, 826 S.W2d 443 (Tenn. App. 1991).

The evidence preponderates against the Trial Court's finding in part and we find \$13,400.00 of that fund to be marital property. We conclude it would be equitable for the wife to receive one-half of that amount from the husband over and above the Trial Court's award.

Finally, the husband argues that the Trial Court erred in admitting an Exhibit into evidence, purporting to show Shop at Home stock purchases and sales. The authenticity of a private writing must be established before it may be admitted into evidence. *Haury and Smith Realty Co. V. Piccadilly Partners I*, 802 S.W2d 612 (Tenn. App. 1990). Tennessee Rules of Evidence provide that an item may be identified or authenticated by the testimony of a witness with personal knowledge that the matter is what it is claimed

to be. The husband's testimony does not appear to meet the 901(a) standard that the document is authenticated if there is evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.? The husband testified repeatedly that he was not familiar with the document and his only clue as to its origin were the assertions of his cross-examiner, and the words "Shop at Home" across the top of the document. The Trial Court's decision to admit the exhibit, based upon an assertion by the attorney and the uncertain responses of the husband, was improper, *Haury*. Compare *Martin v. Martin*, 755 S.W2d 793 (Tenn. App. 1988), holding there was no abuse of discretion in admitting business records where present custodian of the records testified that to the best of her knowledge the records were authentic.

The judgment of the Trial Court is affirmed, as modified, and the cause remanded for the entry of a modified judgment in accordance with this opinion.

The cost of the appeal is assessed one-half to each party.

Herschel P. Franks, J.

CONCUR:

Don T. Mc Murray, J.

Charles D. Susano, Jr., J.