

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

August 19, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

FRANCES TREW CAMPBELL)
) M E M M O R I S S I M M O N COUNTY
) 03A01-9509-CH-00325
Plaintiff - Appellant)
)
)
v.)
) HON. JOHN B. HAGLER, JR.
) JUDGE
) (Sitting by Interchange)
MORTIMER LAWRENCE TREW)
MORTIMER E. TREW and)
ONETA C. TREW)
)
) AFFIRMED AS MODIFIED
Defendants - Appellees) and REMANDED

W L E E M A D D U X and R O N A L D D. G O R S L I N E O F C H A T T A N O O G A F O R A P P E L L A N T

W I L L I A M P. B I D D L E, I I I, and J E F F R E Y L. C U N N I N G H A M O F A T H E N S F O R
A P P E L L E E S

O P I N I O N

Goddard, P. J.

This is a family dispute wherein Frances Trew Campbell
sues her brother, Mortimer Lawrence Trew, and her parents,
Mortimer E. Trew and Oneta C. Trew, seeking to recover an
interest in certain real and personal property, as well as an

accounting from them as to the rents and profits from the real property and a general store in which she claims to be a partner.

Her father, Mortimer E. Trew, died during the pendency of this appeal, and the suit was revived in the name of his personal representative by order entered May 21, 1996.

The case has previously been before this Court and was remanded by an opinion filed on August 13, 1993, directing that the Trial Court make certain findings of fact. This has been done and the case again appealed by Ms. Campbell, wherein she raises a number of issues. (See Appendix A.)

The Trial Judge entered a judgment which was in part adverse to Ms. Campbell. His action is accurately summarized in Ms. Campbell's brief as follows:

1. Ms. Campbell's claims against properties owned by Mr. and Mrs. Trew, Sr. are dismissed with full prejudice;¹
2. Ms. Campbell owns a 35% interest in the real property described in that Quitclaim Deed From Mortimer E. Trew and Oneta C. Trew to Mortimer Lawrence Trew of record in Deed Book 11-G, Page(s) 114, Register's office of McMinn County, Tennessee (the Partnership Property);
3. Mr. and Mrs. Trew, Sr. shall return Ms. Campbell's personal property listed on Exhibit 58, an IRA account, and McKery Round Hay Baler;
4. The Coghill property shall be partitioned into substantially equal tracts;

¹ This includes her claim of a partnership in the general store.

Our review of the record and the detailed and comprehensive opinion of the Trial Court persuades us that-- because the Trial Court's findings of fact comes to us with a presumption of correctness unless the evidence preponderates otherwise, Rule 13, Tennessee Rules of Appellate Procedure, and it is incumbent upon appellate courts to defer to the judgment of trial courts as to credibility of witnesses, Gilliam v. Gilliam, 776 S. W 2d 81 Tenn. App. 1988); Sisk v. Valley Forge Ins. Co., 640 S. W 2d 844 (Tenn. App. 1982)-- this is an appropriate case for affirmance under Rule 10(a) of this Court as to all issues raised, save one.

As to the issue of Ms. Campbell's interest in the general store partnership, the record discloses the following. Originally, the property and general store, which are in dispute, along with various other business enterprises which have been sold, were owned by Mortimer E.'s² father and Ms. Campbell's grandfather, J. W. Trew, who by will left, among other assets, the various disputed properties to five of his sons and three of his daughters. According to the testimony of Mortimer L., the properties, except the general store partnership, eventually became to be owned in the following percentages: Mortimer E. - 60 percent; Oneta, Mortimer E.'s wife - 5 percent; Ms. Campbell - 35 percent (See Appendix B.)

² Our use of the first names of the parties should not be construed as any disrespect, but rather is for ease of reference.

Mrs. Campbell acquired her interest, if any, in the general store partnership, by virtue of transactions occurring in February 1975. It appears that her father and his brother, Albert, were having difficulties as partners and Mortimer E. solicited Mrs. Campbell to join with him in purchasing Albert's interest. Because it was feared that Albert would increase the price of his interest in the partnership should he learn of Mrs. Campbell's involvement, it was determined that, notwithstanding that she was supplying--according to her testimony which is disputed--\$7000 of the total purchase price of \$8000, the bill of sale should be made to Mortimer E. and his wife, Oneta, and his two sisters, Mary Magnolia Trew (also known as Nola) and Myrtle M Trew.

The transaction was completed in two steps. First, by bill of sale dated February 18, 1975, (see Appendix C), Mortimer E.'s brother, Albert R. Trew, and his wife, Willie Trew, sold to Mortimer E. and his wife, Oneta Trew, and Mr. Trew's sisters, Mary Magnolia Trew and Myrtle M Trew, "the business known and operated as Trew Brothers and including the good will, all stock of merchandise, all accounts receivable, all fixtures and equipment, including the gas pumps and tanks and air compressor."

Second, by bill of sale dated February 25, 1975 (see Appendix D), Mary Magnolia Trew and Myrtle M Trew transferred the exact same property, except for the air compressor, to Frances Trew Campbell and Mortimer E. Trew.

Sofar as we can ascertain from the record, the only written instrument by which Mortimer E. acquired Albert's interest in the general store partnership was by the bill of sale dated February 18, 1975, and the only written instrument by which Mortimer E. could have acquired the interest of his sister, Mary Magnolia,³ was by the instrument dated February 25, 1975. In light of this we believe it must follow that the instrument of February 25 likewise conveyed to Ms. Campbell the sisters' interest in the general store partnership. To put it another way, it is difficult to understand how Mortimer E. can insist that he acquired an interest in the partnership by the February 25th instrument, but that Ms. Campbell did not. Moreover, it will be noted that the bill of sale speaks of "the good will, all stock of merchandise, all accounts receivable, all fixtures and equipment." This language, in our view, clearly is referring to the general store partnership.

Our conviction in this regard is buttressed by the fact that after the May 25th transfer by the sisters, Ms. Campbell was granted signature authority to a partnership bank account and, according to James D. Maulten, a certified public accountant, Ms. Campbell was shown as a partner with a capital account during the period that he did the partnership tax returns--1975 through 1984. Additionally, at one point in his

³ Myrtle M. named Mortimer E. residuary legatee in her will.

testimony Mortimer E. himself tended to give credence to Ms. Campbell insistence:

Q Mr. Trew, isn't it true -- isn't it correct that your daughter has a partnership interest because of this bill of sale?

A Well that might be, I don't know about that.

We accordingly find that the evidence preponderates against the Trial Court's finding that Ms. Campbell acquired no interest in the general store partnership and, instead, find that by virtue of the instrument of February 25, 1975, she acquired an interest of 35 percent.

In reaching the foregoing conclusion we are not unmindful of T. C. A. 61-1-117(7), which provides that "no party can become a member of a partnership without the consent of all the partners." In our view, because of the understanding between Mortimer E. and Ms. Campbell relative to purchasing Albert's interest and the fact that Mortimer E. was also a grantee in the instruments conveying the property to Ms. Campbell, consent of the partners may be inferred.

Before concluding, we note parenthetically that even if Ms. Campbell did not acquire a partnership interest, she did acquire, along with her father, the interest of the sisters. Consequently, under T. C. A. 61-1-126, she was entitled "to receive, . . . the profits to which the assigning partner would

otherwise be entitled." This envisions, if not otherwise resolved, an accounting.

Finally, we point out that we have not overlooked Mrs. Campbell's assertion that she furnished funds in excess of the percentage of the property she will be receiving under our determination as to her interest in the partnership and the Trial Court's determination as to her interest in the other property. We are, like the Trial Court, however, disinclined in light of the previous close relationship among the family members and their casual attitude toward borrowing, lending, giving and receiving money and property, to grant her an interest in excess of that provided for in the written instruments.

For the foregoing reasons the judgment of the Trial Court, as modified, is affirmed and the cause remanded to the Chancery Court for McMinn County for further proceedings not inconsistent with this opinion. Costs of appeal are adjudged one-half against Mrs. Campbell and one-half against the Defendants.

Houston M Goddard, P. J.

CONCUR:

Herschel P. Franks, J.

William H. Inman, Sr. J.