IN THE COURT OF APPEALS OF TENNESSEE

GORDON D. CORBETT, JR.,	)	BRADLEY COUNTY CHANCERY COURT
	)	
Plaintiff-Appellee.	)	
	)	
	)	
	)	
v.	)	HONORABLE EARL H. HENLEY,
	)	CHANCELLOR
	)	
	)	
	)	
	)	
CARLA SUE GODFREY CORBETT,	)	
	)	
Defendant-Appellant.	)	C/A NO. 03A01-9601-CH-00008

For Appellant

GRACE E. DANIELL
Starr & Daniell
Chattanooga, Tennessee

For Appellee

ROGER E. JENNE
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Cleveland, Tennessee

O P I N I O N

VACATED IN PART
AFFIRMED IN PART
REMANDED WITH INSTRUCTIONS

Susano, J.

This is a divorce case. At the time of the hearing, the parties had been married 20 years. Their union produced two children, Heath Corbett (DOB: April 24, 1980) and Crystal Corbett (DOB: May 11, 1984). The trial court awarded the plaintiff Gordon D. Corbett, Jr. (Husband) a divorce; granted custody of the parties' children to the defendant Carla Sue Godfrey Corbett (Wife); divided the parties' assets and liabilities; set child support at $125 per week; and denied Wife's request for alimony. Wife appeals, raising issues that present the following questions:

> 1. Is the defense of condonation a bar to Husband's complaint for divorce on the ground of inappropriate marital conduct?
>
> 2. Does the evidence preponderate against the judgment of the trial court awarding Husband a divorce?
>
> 3. Did the trial court abuse its discretion in dividing the parties' property?
>
> 4. Did the trial court abuse its discretion when it denied Wife's request for alimony?
>
> 5. Was $125 per week the appropriate amount of child support under the Child Support Guidelines?
>
> 6. Did the trial court abuse its discretion in failing to grant Wife a new trial because of newly discovered evidence?

I. *Applicable General Principles*

Since this is a non-jury case, our review is "*de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the [trial court's] finding[s], unless the preponderance of the evidence is otherwise." Rule 13(d),

T.R.A.P. No presumption of correctness attaches to the trial court's conclusions of law. ***Adams v. Dean Roofing Co., Inc.***, 715 S.W.2d 341, 343 (Tenn. App. 1986).

On a *de novo* review, we are "called . . . to pass upon the correctness of the result reached in the Trial Court, not necessarily the reasoning employed to reach the result." ***Shelter Ins. Companies v. Hann***, 921 S.W.2d 194, 202 (Tenn. App. 1995). *See also* ***Kelly v. Kelly***, 679 S.W.2d 458, 460 (Tenn. App. 1984).

In reviewing the judgment in this case, we are mindful of the fact that a trial court is vested with "wide discretion" in matters pertaining to divorce, alimony, and division of property, three of the concepts addressed by the issues on this appeal. ***Marmino v. Marmino***, 238 S.W.2d 105, 107 (Tenn. App. 1950); ***Batson v. Batson***, 769 S.W.2d 849, 859 (Tenn. App. 1988). On these subjects, an appellate court "will not interfere except upon a clear showing of an abuse of that discretion." ***Marmino***, 238 S.W.2d at 107.

II. *Divorce*

The trial court awarded Husband a divorce on the ground of inappropriate marital conduct, the only fault ground alleged in the original complaint. At the same time, it dismissed Wife's counterclaim for divorce which also sought a divorce on the ground of inappropriate marital conduct.

Wife argues that Husband condoned the adulterous relationship acknowledged by her and that, in any event, the evidence preponderates against the trial court's decision to grant Husband, and not Wife, the divorce. We disagree on both points.

Condonation is an absolute defense to a complaint for divorce based on the ground of adultery, T.C.A. § 36-4-112[1]; but the divorce here was not granted, nor was it sought, on the ground of adultery. Husband contended that Wife was guilty of inappropriate marital conduct and that is what the trial court found. It is clear that proof of an adulterous relationship will support a divorce on the ground of inappropriate marital conduct, also referred to in the statute, T.C.A. § 36-4-102(a)(1), as cruel and inhuman treatment:

> Cruel and inhuman treatment has been defined in various ways and in numerous cases. Further definition is unnecessary. Suffice it to say we cannot conceive of any stronger case of cruel and inhuman treatment than a persistent pattern of adulterous conduct. Nor may it be excused on the basis of a spouse not having contemporaneous knowledge of its occurrence. The hurt, the humiliation, the shame, the wounded pride, the rejection are the same whether the knowledge comes before, during or after the fact. Adultery is rarely perpetrated openly and in the daylight. By

[1]T.C.A. § 36-4-112 provides, in pertinent part, as follows:

> If the cause assigned for the divorce is adultery, it is a good defense and perpetual bar to the same if the defendant alleges and proves that:
>
> * * *
>
> (2) The complainant has admitted the defendant into conjugal society and embraces after knowledge of the criminal act;

> its very nature its commission is normally not discovered until the act has been consummated. No man, set upon a pattern of adulterous conduct, willingly furnishes proof of his own turpitude.
>
> We hold that there was ample evidence of cruel and inhuman treatment in this case. We further hold that proof of adultery is admissible in a divorce action charging cruel and inhuman treatment and may form the basis for a decree resting upon cruel and inhuman treatment.
>
> * * *
>
> We find nothing in reason, logic or precedent which would, or should, preclude a trial judge from granting a divorce on the grounds of cruel and inhuman treatment when the evidence establishes adultery, so long as the parties are fully apprised in advance of the nature of the proof. Indeed, a decent regard for posterity suggests that divorces, except as a last resort, should not be bottomed on adultery.

Farrar v. Farrar, 553 S.W.2d 741, 744 (Tenn. 1977) (Henry, J.). In the instant case, Wife admitted an adulterous relationship that lasted from June, 1992, to October, 1993.

Wife cannot rely on the T.C.A. § 36-4-112 defense of condonation. Assuming, without deciding, that Husband's conduct makes out the defense of condonation, that defense is not available where the ground charged is inappropriate marital conduct. T.C.A. § 36-4-112 does not extend the condonation defense to the ground of inappropriate marital conduct, and it is clear that "grounds for divorce and defenses against divorce actions are statutory." ***Chastain v. Chastain***, 559 S.W.2d 933, 934 (Tenn. 1977), "[T]here is no common law of divorce." *Id*.

It has been expressly held in this state that "condonation is not a defense to the ground of cruel and inhuman treatment." ***Howell v. Howell***, No. 80-250-II, 6 TAM 18-9 (Tenn. App. at Nashville, March 13, 1981), citing the earlier Tennessee cases of ***McLanahan v. McLanahan***, 104 Tenn. 217, 56 S.W. 858 (1900); ***Murrell v. Murrell***, 45 Tenn. App. 309, 323 S.W.2d 15 (1958). Wife's argument as to condonation is found to be without merit.

The defendant also argues that the evidence preponderates in favor of an award of divorce to her. We disagree. The parties each had a theory as to what caused the breakup of this marriage. Each presented evidence to support his/her theory. As in most divorce cases, the credibility of the parties and their witnesses was the critical determination facing the trial court on the issue of divorce. It found the proof "overwhelming[ly]" in favor of Husband on the issue of divorce. In one of his two memorandum opinions, the trial judge said that the "facts preponderate *heavily* in favor of Mr. Corbett" on the issue of divorce. (Emphasis added).

"A Chancellor, on an issue which hinges on witness credibility, will not be reversed unless, other than the oral testimony of the witnesses, there is found in the record clear, concrete and convincing evidence to the contrary." ***Tennessee Valley Kaolin Corp. v. Perry***, 526 S.W.2d 488, 490 (Tenn. App. 1974). The Chancellor chose to believe Husband and those witnesses who supported his theory that Wife's adulterous relationship was the "precipitating factor to the breakup of this

marriage." *See* ***Wilder v. Wilder***, 863 S.W.2d 707, 713 (Tenn. App. 1992). In this case, we are not in a position to second-guess the Chancellor's "call" as to the credibility of the witnesses. He saw the witnesses; we did not.

We do not find that the evidence preponderates against the trial court's judgment awarding Husband a divorce on the ground of inappropriate marital conduct.

III. *Division of Property*

The record reflects that the parties have the following marital assets and debts, excluding Husband's vested retirement benefits with his employer, Bowater, Incorporated:

Marital residence--equity	$15,078
1978 Chevrolet Suburban	1,700
1989 Ford Bronco	7,500
Household goods and furnishings	19,761

(Continued on next page)

Silverline boat	2,000
Bowater profit sharing	660
1980 Jeep	600
	$47,299
Less: Debts[2]	8,718
	$38,581

These assets and debts were divided[3] by the trial court as follows:

To Wife

Marital Residence--half of equity	$ 7,539
1989 Ford Bronco	7,500
Household goods and furnishings	13,266
	$28,305

To Husband

Marital residence--half of equity	$ 7,539
1978 Chevrolet Suburban	1,700
Household goods and furnishings	6,495
Silverline boat	2,000
Bowater profit sharing	660
1980 Jeep	600
	$18,994
Less: Debts	8,718
	$10,276

Recapitulation

To Wife	$28,305
To Husband	10,276
	$38,581

As previously noted, the above analysis does not take into account Husband's vested retirement with his employer, all of

[2]Wife argues that we should not consider some of these debts because they were incurred after the parties' separation. We disagree. They were incurred *during* the marriage. We cannot say in this case that the trial court abused its discretion in treating these post-separation debts as marital debts. *See* ***Mondelli v. Howard***, 780 S.W.2d 769, 773 (Tenn. App. 1989).

[3]While the court did not specifically address the Silverline boat and 1980 Jeep, both are apparently in Husband's possession. We have treated them as a part of his division of the net assets in this case.

which was earned during the parties' marriage. That asset is, without question, a marital asset. *See* T.C.A. § 36-4-121(b)(1)(B). *See also* ***Kendrick v. Kendrick***, 902 S.W.2d 918, 922 (Tenn. App. 1994). There is credible, undisputed evidence in the record that as of July, 1994, Husband was entitled to receive a monthly pension of $649.83 when he retires.[4] The trial court awarded all of Husband's vested pension to him. What we must decide is whether that allocation causes the overall division to be inequitable.

At the outset, we would observe that our inquiry is hampered by the failure of the parties to offer any proof of the present cash value of Husband's pension. Wife assumes that it has substantial value. She points out that if he receives his pension for 16.72[5] years he will receive over $132,000 in benefits as a result of his vested entitlement as of July, 1994. She then attempts to reduce this amount to its present value. While the record does not reflect the appropriate mathematical formula that should be used in this case, we seriously doubt that the formula suggested by Wife is the correct one. It seems to ignore the effect that compound interest will have on the money set aside now--the present cash value--to fund Husband's retirement. It also ignores that the fund of money available when Husband retires will continue to earn interest over the life of the retirement benefits.

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[4]The record is not clear as to whether Husband's first retirement eligibility date is at age 59, 59 ½ or 65. What is clear is that when he reaches the appropriate age, he is eligible to receive $649.83 per month, computed as of July, 1994.

[5]This figure is the life expectancy of a white male, age 59, as set forth in the United States Life Table found at page 1029 of Volume 13 of the Tennessee Code Annotated.

While we do not know the precise mathematical formula that should be utilized in this case, we do know, in general terms, that the present cash value of Husband's pension is the fixed dollar amount that would have to be invested now at an assumed interest rate so as to permit equal payments of $649.83 per month starting when Husband can retire and continuing over his life expectancy, with the amount invested and all interest earned being exhausted at the end of Husband's life expectancy.

As previously indicated, there is no expert testimony in the record regarding the present cash value of Husband's Bowater retirement benefits. Such testimony was necessary in this case. While a court can take judicial notice of a mathematical computation that is understandable to a layman, Rule 201(b), Tenn. R. Evid., it cannot judicially notice a complex mathematical formula such as the present cash value in this particular case, at least in the absence of "sources whose accuracy cannot reasonably be questioned." *Id*. It also cannot judicially notice a concept such as the appropriate interest rate to "plug into" the present cash value formula. These are matters that must be addressed by individuals from the appropriate disciplines.

Since we do not know the present cash value of Husband's retirement benefits, we cannot say that the trial court's award of those benefits to Husband renders the overall division of property inequitable. We would note, however, that regardless of the interest rate that should be assumed, there are

at least 20 years[6] to "grow" Husband's retirement--by compound interest--before it is disturbed by his monthly withdrawals.[7] Therefore, we doubt that its present value is large enough to justify interference by us in the trial court's division of the parties' marital property. We hasten to add that had Husband been on the brink of retirement and the facts had otherwise suggested an inequitable division, we would not have hesitated to remand this case so the trial court could hold a hearing to determine the present value of his pension. *See* T.C.A. § 27-3-128. This may well be appropriate in a future case. It is not necessary here.

We do not find that the evidence preponderates against the trial court's division of the parties' marital property.

IV. *Alimony*

The trial court denied Wife's request for alimony. We find no error in this aspect of the trial court's judgment.

Under the provisions of T.C.A. § 36-5-101(d), a court, "[i]n determining whether the granting of an order for payment of support and maintenance to a party is appropriate," can consider "[t]he relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so." *See* T.C.A. § 36-

[6]Husband is now 39 years old. If he cannot retire until age 65, the money to fund his retirement benefits will draw interest for a longer period of time and his life expectancy will be less. All of this would have a downward effect on present value.

[7]Once Husband starts receiving his pension, the money to fund it will be increased each month by interest and decreased monthly by Husband's withdrawal. Obviously the formula to compute all of this is beyond the knowledge of a layman.

5-101(d)(10). It has been said that need, ability to pay, and relative fault are the most important factors in the alimony determination. ***Bull v. Bull***, 729 S.W.2d 673, 675 (Tenn. App. 1987). Our courts have specifically approved the reduction of alimony because of misconduct. ***Duncan v. Duncan***, 686 S.W.2d 568, 571 (Tenn. App. 1984).

In this case, it is clear, as previously indicated, that the trial court found that Wife's long-standing adulterous relationship was the cause of the breakup of this marriage. The court was certainly within its discretion to consider this conduct, along with any other fault shown to the trial court's satisfaction, in determining whether the wronged spouse should be required to contribute, post-divorce, to the support of the party who caused the breakup of the marriage. While there are no specific findings as to why the trial judge did not award any alimony, his decree refusing such an award is supported, in law, by evidence found by him to be credible. Further justification for his "no alimony" decree is found in our decision to increase Husband's child support obligation as set forth in the next section of this opinion. When this increased obligation is coupled with his obligation to pay half of the mortgage payment[8], his ability to pay alimony, and still pay his own personal expenses and the debts allocated to him by the trial court, is subject to serious doubt.[9]

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[8]The total mortgage payment is approximately $433 per month.

[9]Husband testified to average monthly expenses of $2,132.08. While his net take home pay on a $4,000 monthly gross is not reflected in the record, we do note that the Child Support Guidelines assume a net pay of $2,924.46 on a monthly gross at that level.

We do not find that the trial court abused its discretion in refusing to award Wife alimony.

V. *Child Support*

The trial court awarded Wife $125 per week as child support. This extrapolates to $541.66 per month.[10] We find that this is not in compliance with the Child Support Guidelines (Guidelines) promulgated by the Department of Human Services pursuant to the authority of T.C.A. § 36-5-101(e)(2).

The record establishes that Husband earns, on the average, gross wages of at least $4,000 per month. The Guidelines provide that one earning at this rate should pay $936 per month for two children. This figures out to $216 per week.[11] Since the trial court gave no reason for deviating from the Guidelines, it erred in failing to award the support dictated by them. T.C.A. § 36-5-101(e)(1) clearly requires a specific finding that it would be "unjust or appropriate" to apply the Guidelines before a court is authorized to deviate from them. In the absence of such a finding, the Guidelines are mandatory. ***Nash v. Mulle***, 846 S.W.2d 803, 804 (Tenn. 1993). ("Hence, the purposes, premises, guidelines for compliance, and criteria for deviation from the guidelines carry what amounts to a legislative mandate.")

[10]$125 per week times 52 weeks, divided by 12 months.

[11]$936 per month times 12 months, divided by 52 weeks.

The appellee would argue that we should consider the fact that he is making half of the mortgage payment and treat that as a part of his child support. This we cannot do. The Guidelines clearly provide that all support based on net income up to $6,250 "*must* be paid to the custodial parent." Tenn.Comp.R. & Regs., ch. 1240-2-4-.04(3). (Emphasis added). Therefore, we cannot consider a payment made by Husband directly to the mortgage holder.

There is another reason why we should not consider Husband's payment of half of the mortgage as a part of his child support obligation. When the house is sold, he will receive half of the net proceeds. Since the mortgage payment reduces the debt, it correspondingly increases the parties' equity. Therefore, he can expect to recoup some of his outlay on the mortgage when the property is sold. He will also benefit--again to the extent of fifty percent--in any increase in the equity occasioned by inflation.

Having determined that the trial court's decree does not comply with Guidelines, we are faced with two possible remedies. On the one hand, we could remand this case to the trial court to give that court an opportunity to state its reasons for deviating from the Guidelines; or we could remand this case for the trial court to enter an order setting child support at the Guidelines-mandated amount of $216. We elect to do the latter because we do not believe there is any testimony or other evidence in the record, which, if believed, would legally support a deviation.

VI. *Newly Discovered Evidence*

Wife argues that she is entitled to a new trial based upon her affidavit regarding Husband's relationship with Linda Ford, one of the witnesses called by Husband at the trial. She contends that after the trial she discovered that Husband was romantically involved with Ms. Ford before the hearing. She correctly points out that Ms. Ford gave damaging evidence regarding Wife's allegedly inappropriate conduct while at a restaurant/bar with friends.

Wife's motion addressed itself to the sound discretion of the trial court. ***Leeper v. Cook***, 688 S.W.2d 94, 96 (Tenn. App. 1985). "The motion should only be granted when it is evident an injustice has been done and a new trial will change the result." *Id*.

We find no abuse of the trial court's discretion. Even before Wife filed her affidavit, the trial court had indicated that it did not put a lot of stock in Ms. Ford's testimony. Furthermore, the affidavit does not clearly establish that there was a romantic relationship *before* trial or, if it did exist, why it could not have been discovered by diligent efforts before trial.

Wife's final issue is found adverse to her.

VII. *Conclusion*

So much of the trial court's judgment as sets child support at $125 per week is hereby vacated. This cause is remanded to the trial court to enter an order setting Husband's child support at $216 per week effective August 24, 1994. Except as vacated herein, the judgment of the trial court is affirmed. Costs on appeal are taxed half to each party.

_____
Charles D. Susano, Jr., J.

CONCUR:

_____
Houston M. Goddard, P.J.

_____
Don T. McMurray, J.

IN THE COURT OF APPEALS OF TENNESSEE

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	)	CHANCELLOR
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	)	
	)	
CARLA SUE GODFREY CORBETT,	)	
	)	
Defendant-Appellant.	)	

PARTIAL DISSENT

McMurray J.

I fully concur with all of the majority opinion except as to that part directing the trial court, on remand, to enter an order setting child support at $216.00 per week, effective August 24, 1994. While without question, the trial court did deviate from the guidelines, he failed to give written reasons therefor as required by T.C.A. § 36-5-101(e)(1).

I would remand the case to the trial court with instructions to enter an order establishing child support at $216.00 per week or alternatively, to enter an order stating his reasons for deviation in writing as required – the procedure employed by the Supreme Court in Jones v. Jones, 870 S.W.2d 281 (Tenn. 1994).

T.C.A. § 36-5-101(e)(1) establishes only a rebuttable presumption and the child support guidelines do not conclusively establish the amount of child support. The presumption may be overcome by evidence that is sufficient to rebut this presumption.

I am cognizant of Rule 36, T.R.A.P. whereby we are authorized to enter a judgment "on the law and facts to which the party is entitled...; provided, however, relief may not be granted in contravention of the province of the trier of fact." I believe that the majority opinion infringes upon the province of the trier of fact.

Whether the evidence is sufficient to rebut the presumption is a matter that must address itself to the trial court since we cannot second-guess the trial court's assessment of the credibility of the witnesses. Credibility of the witnesses is of particularly importance in weighing the evidence to determine whether the presumption of the guidelines has been overcome.

In all other respects, I concur with the majority opinion.

_____
Don T. McMurray, J.