LINDA PATRICIA SHERWOOD EVANS,	)	
	)	
Plaintiff/Appellee,	)	
	)	Appeal No.
	)	01-A-01-9602-CV-00078
VS.	)	
	)	Williamson Circuit
	)	No. 94044
DAVID WALLING EVANS,	)	
	)	
Defendant/Appellant.	)	

FILED

September 11, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

THE HONORABLE DONALD P. HARRIS, JUDGE

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AFFIRMED AS MODIFIED
AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
LEWIS, J.
KOCH, J.

O P I N I O N

The husband has appealed the trial court's judgment awarding the wife a divorce on the ground of inappropriate marital conduct, awarding her permanent alimony, and awarding her $5,000 out of a 1982 gift from her mother as her separate property. We modify the judgment as to the gift and the alimony.

I.

Linda and David Evans married on August 12, 1972. They were both employed and both were college graduates. Five years later their first son was born. Mrs. Evans gave up her employment outside the home, and until the parties separated, worked for pay only sporadically. A second son was born five years after the first.

Mr. Evans continued to work for the Franklin Special School District and earned two post-graduate degrees. At the time of the trial, his salary was $64,000 per year and he had $40,000 in a pension plan, which he could not draw until he reached the age of sixty-five.

In 1982, Mrs. Evans' mother gave her a gift of $10,000 in cash. With one-half of the gift, the parties made a down payment on a home that was purchased in their joint names. They spent the other $5,000 for miscellaneous family expenses.

In December of 1992, both of their sons died in an automobile accident. The parties attempted to cope with their grief in different ways. Mrs. Evans sought professional counseling, and asked Mr. Evans to attend the counseling sessions with her. Mr. Evans chose to deal with his grief alone, by losing himself in his work, and

by withdrawing from social or sexual intercourse with Mrs. Evans. He frequently became angry, and directed that anger toward Mrs. Evans. Ultimately, Mr. Evans told Mrs. Evans that they no longer had anything in common, and that they should sell the house and go their separate ways.

Mrs. Evans sued for divorce, and Mr. Evans filed a counter-claim. Both alleged inappropriate marital conduct. The trial judge granted the divorce to Mrs. Evans, and held that Mrs. Evans was entitled to recover $5,000 from the sale of the marital home as her separate property. In addition, the court ordered Mr. Evans to pay $1,000 per month as alimony until Mrs. Evans' death or remarriage, or until Mr. Evans reached sixty-five years of age. When Mr. Evans reaches sixty-five the alimony payment will be reduced to $500 per month and will continue (or resume) even if Mrs. Evans remarries. The $500 per month payment was ordered to give Mrs. Evans a share in Mr. Evans' pension.

II.

The authorization for granting a divorce for inappropriate marital conduct is found in Tenn. Code Ann. § 36-4-102(a)(1) which provides that a court may in its discretion, grant a divorce from bed and board or from the bonds of matrimony if:

> (1) the husband or wife is guilty of such cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper which may also be referred to in pleadings as inappropriate marital conduct;

Neither party cited the statute in its pleadings, nor referred to it in its brief. Neither party cited any authority for what it takes to establish this ground for divorce, or whether it is different in any way from cruel and inhuman treatment.

Perhaps we protest too much, for even if inappropriate marital conduct is the same as cruel and inhuman treatment, we think the record sustains the trial

judge's finding that Mr. Evans was guilty of it. The parties had been through a numbing tragedy. But, Mr. Evans' reaction was to withdraw from any meaningful contact with Mrs. Evans. He rejected her suggestions that they deal with their grief together. While his anger was completely normal and understandable, to turn it on Mrs. Evans heaped misery upon misery. Telling her that they no longer had anything in common and that they should go their separate ways essentially severed the marital relationship and ended any chance that they might aid each other in dealing with the pain caused by the death of their children.

Cruel and inhuman treatment is not confined to acts of physical violence. *Meeks v. Meeks*, 27 Tenn. App. 279, 179 S.W.2d 189 (1943). It may be shown by the willful, persistent causing of unnecessary suffering in such a way as to render cohabitation unendurable. *Russell v. Russell*, 3 Tenn. App. 232 (1926). It occurs in subtle ways, and the trial judge's decision should not be overturned unless there is a clear preponderance of evidence to the contrary. *Newberry v. Newberry*, 493 S.W.2d 99 (Tenn. App. 1973). We are satisfied that the trial judge did not err in granting the divorce to Mrs. Evans.

III.

Gifts to one of the parties in a marriage are the separate property of that party. Tenn. Code Ann. § 36-4-121 (b)(2). But separate property may become marital property when the owner treats it in such a way as to give evidence that he or she intends it to become marital property. The change in status is called transmutation. *Batson v. Batson*, 769 S.W.2d 849 (Tenn. App. 1988).

Where property is acquired in the joint names of the parties -- even though purchased with the separate property of one of the parties -- a rebuttable presumption arises that the party whose funds were used in the purchase made a gift

to the marital estate. *Barnhill v. Barnhill*, 826 S.W.2d 443 (Tenn. App. 1991). Mrs. Evans does not cite any evidence in her brief to overcome the presumption, and we fail to find any such evidence in the record. Therefore, the money derived from the sale of the marital home should be evenly divided.

IV.

a. Alimony

Mr. Evans argues that the trial court erred in awarding Mrs. Evans long term alimony. We note that the alimony award was in two parts. Mr. Evans was ordered to pay Mrs. Evans $1,000 per month until her death or remarriage -- or until Mr. Evans reaches the age of sixty-five. At that point Mr. Evans' obligation would be reduced to $500 per month. The $500 payments were characterized by the trial judge as a division of Mr. Evans' retirement account, which the court had not previously divided. (We note also that the final decree provides that in the event of Mr. Evans' death, Mrs. Evans will receive one-half of the lump sum in Mr. Evans' account.)

The legislature has made it clear that if possible the dependency of one spouse on the other be eliminated and both parties be relieved of the impediments incident to the dissolved marriage. See Tenn. Code Ann. § 36-5-101(d); *Self v. Self*, 861 S.W.2d 360 (Tenn. 1993). "Long-term support and maintenance is appropriate only where there is relative economic disadvantage and rehabilitation of the disadvantaged party is not feasible." *Id.* 861 S.W.2d at 361.

In this case the trial judge did not make a finding that Mrs. Evans could not be rehabilitated. *See Aaron v. Aaron*, 909 S.W.2d 408 (Tenn. 1995). We think the record preponderates in favor of a finding that rehabilitation is feasible. Mrs. Evans has a college degree and was gainfully employed until the birth of her children. She plans to continue her education. She is now employed. Therefore, we think the

alimony award should be modified to provide that Mr. Evans pay Mrs. Evans $1,000 per month for a period of five years, or until her death or remarriage.

b. The Retirement Account

The trial judge chose to deal with Mr. Evans' retirement account by making it a part of the alimony award. The final decree provided that Mrs. Evans be paid $500 per month when the funds become available to Mr. Evans (when Mr. Evans reaches age sixty-five), provided Mrs. Evans is still living. If Mr. Evans dies before reaching age sixty-five, Mrs. Evans will be entitled to one-half of the funds in the account.

The present value of a vested retirement account is clearly marital property. See Tenn. Code Ann. § 36-4-121(b)(1). *Batson v. Batson*, 769 S.W.2d 849 (Tenn. App. 1988), *Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993). But pension rights must be valued as of a date as near as possible to the divorce. *Kendrick v. Kendrick*, 902 S.W.2d 918 (Tenn. App. 1994).

We think the trial judge's order is defective for three reasons. First, Mrs. Evans' enjoyment of the benefits from the retirement account is made contingent on her surviving until Mr. Evans' sixty-fifth birthday and beyond. (Also, the amount of the benefit to her may be affected by how long Mr. Evans lives. What would happen to her benefits if Mr. Evans died one month after beginning to draw his pension?) Second, the order gives Mrs. Evans the benefit of contributions made by Mr. Evans after the divorce. If Mr. Evans died one month before he was set to retire, Mrs. Evans would receive one-half of the retirement account, including the contributions made by Mr. Evans in the nearly two decades after the marriage ended.

Third, we cannot tell from the record whether Mr. Evans' retirement benefits were vested or non-vested. In *Kendrick v. Kendrick*, 902 S.W.2d 918 (Tenn. App. 1994), this court discussed two ways to handle pension interests. One is the present value method, and the other is the retained jurisdiction/deferred distribution method. In *Kendrick* we chose the latter because the military pension was non-vested. But the propriety of including non-vested pension interests in the marital estate remains the subject of some doubt because the Supreme Court granted permission to appeal in *Cohen v. Cohen*, No. 01-A-01-9410-CV-00464 (Tenn. Ct. App. May 10, 1995) solely to address this question.

In this case it seems to us that even if the pension is non-vested, the present value method is preferable because it will give Mrs. Evans the benefit of the asset immediately, while freeing Mr. Evans' pension from any encumbrances, and both parties from further entanglements with each other.

Our disposition of this issue requires that the case be remanded to the trial court for a determination of whether Mr. Evans' pension is vested or non-vested. Then, the court should find the value of Mr. Evans' retirement account as of the date of the divorce (taking into account that the benefits may not vest until a later date and will not be available until he reaches age sixty-five). Then one-half of that value can be awarded to Mrs. Evans. The court's division of the other marital property provides Mr. Evans with the funds to pay Mrs. Evans, or the court may allow him to pay in installments. Once Mrs. Evans has been fully compensated, she will no longer have any interest in Mr. Evans' pension.

The judgment of the trial court is modified to provide that the alimony will be paid for a definite term of five years and that Mr. Evans' pension will be divided as

provided herein. The cause is remanded to the Circuit Court of Williamson County for further proceedings in accordance with this opinion. Tax the costs on appeal to the parties equally.

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BEN H. CANTRELL, JUDGE

CONCUR:

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SAMUEL L. LEWIS, JUDGE

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WILLIAM C. KOCH, JR., JUDGE