

IN THE COURT OF APPEALS OF TENNESSEE

**FILED**  
**August 27, 1996**  
**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

JUDY DEMOS SIEVERS, ) C/A NO. 03A01-9603-CV-00082  
 )  
 Plaintiff-Appellant, )  
 )  
 )  
 v. )  
 ) HONORABLE L. MARIE WILLIAMS,  
 ) JUDGE  
 )  
 )  
 JAMES FREDERICK SIEVERS, )  
 )  
 Defendant-Appellee. ) HAMILTON COUNTY CIRCUIT COURT

For Appellant

For Appellee

GLENN M. RAMER  
Chattanooga, Tennessee

WILLIAM H. HORTON  
Horton, Maddox & Anderson, PLLC  
Chattanooga, Tennessee

OPINION

AFFIRMED AND REMANDED

Susano, J.

In this divorce case, the trial court awarded the counter-plaintiff James Frederick Sievers (Husband) a divorce from the original plaintiff Judy Demos Sievers (Wife) on the ground of inappropriate marital conduct. Wife appeals, raising issues that present the following questions for our review:

1. Did the trial court abuse its discretion in awarding Wife alimony *in solido* of \$6,000, payable in six equal monthly installments, rather than periodic alimony *in futuro*?
2. Did the trial court abuse its discretion when it divided the parties' marital property?
3. Did the trial court err in disregarding the testimony of Dr. Aron Halfin?

We affirm.

#### I. *Facts*

This is a relatively late-in-life marriage. When the parties married, Wife was almost 41 years old, and Husband was approaching 46. Each of the parties had been previously married. At the time of their marriage on June 27, 1987, Wife had been divorced for approximately 19 years and Husband had been single for almost three years.

From 1968 to December, 1987, Wife worked as a travel agent. Some six months after this marriage, she sold her travel agency business for \$40,000. These funds were not put in the marriage; they were used primarily for the education and other needs of her son. Wife was not employed after December, 1987.

Husband had assets of \$363,000 when he married the plaintiff. Excluding the value of the travel agency, Wife brought into the marriage a car with an unspecified value and other assets worth approximately \$13,000 - \$16,000.<sup>1</sup>

Wife has a history of emotional problems. These problems pre-existed the marriage. She claims a flare-up after the parties married.

At the time of the divorce, Husband was earning \$72,342 per year. In addition, he has received a yearly bonus from his employer since 1991.<sup>2</sup> His bonus has increased each year, and for 1994 he received a gross bonus of \$11,000.

No children were born to this union.

## II. Trial Court's Decrees

The trial judge found and distributed the marital assets and debts of the parties as follows:

To Husband	
Appreciation in value of condominium during marriage	\$ 31,899 <sup>3</sup>
Two-thirds of appreciation during marriage of Dean Witter account	79,325
One-half of Bristol Myers Squibb	

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<sup>1</sup>At the time of the marriage, Wife also owned an interest in land in Dover, Tennessee, and was a contingent beneficiary of a trust. The trial court correctly awarded these interests to Wife as separate property.

<sup>2</sup>Husband went to work with his present employer, Bristol Myers Squibb, in October, 1990.

<sup>3</sup>Cents have been eliminated.

account	11,579
Boat and trailer	<u>14,000</u>
	\$136,803
Less: Debts	<u>3,128</u>
	\$133,675
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To Wife

One-third of appreciation during marriage of Dean Witter account	\$39,675
Appreciation in J.C. Bradford IRA during marriage	9,159
One-half of Bristol Myers Squibb account	11,579
1990 Lincoln TownCar	9,500
CD at NationsBank	<u>3,200</u>
	\$73,113
	=====

The parties agree that the marital assets found by the court are in fact properly classified as marital property under T.C.A. § 36-4-121(b)(1)(A); but there is a sharp dispute between them as to whether the trial judge's division is equitable.

The lower court denied Wife's request for periodic alimony *in futuro*, opting instead to award her \$6,000 alimony *in solido*, payable at the rate of \$1,000 per month for six consecutive months.

III. *Trial Court's Memorandum Opinion*

The trial judge filed an excellent, well-written memorandum opinion in which she held that Wife was guilty of inappropriate marital conduct based primarily on Wife's admitted adulterous relationship.

The trial court determined that each of the parties owned separate property at the time of the divorce. Wife's separate property was found to be worth \$53,500; Husband's separate property was valued by the trial court at \$307,000.

The trial judge found that the division of marital property set forth above was "equitable under all of the factors listed at T.C.A. [§] 36-4-121(c)."

In her memorandum opinion, the trial judge made extensive findings on the issue of alimony. Because she has elucidated her reasons for the judgment on alimony far better than we could, we elect to copy her comments verbatim:

The Court has reviewed the factors to be considered in determining whether or not alimony is to be awarded to the wife.

It is noted Jim Sievers has a significantly greater earning capacity than does Mrs. Sievers. The Court does not find she is precluded from engaging in gainful employment. The proof is clear Mrs. Sievers earned between \$12,000.00 and \$20,000.00 per year as a travel agent prior to the marriage and presently maintains some contact with that business. The emotional status Mrs. Sievers asserts as a disability was present at times while she was working prior to the marriage. The Court is not persuaded she is disabled from work. All testimony, with the exception of that of Dr. Halfin, concerning Mrs. Sievers' talents and abilities while gainfully employed and while contributing to the marriage through her community activities established she was well qualified for work as a travel agent or otherwise. The Court finds significant inconsistencies between the testimony of all witnesses who have observed Mrs. Sievers in her day-to-day activities and the testimony of Dr. Halfin. Dr. Halfin's testimony was not persuasive to the Court on any point.

The relative education of each of the parties is considered in the Court's review of the earning capacity and the obligations and needs of the parties.

This is not a marriage of extremely lengthy duration and is a marriage between individuals with enough age and experience to have appreciated the situations into which each of them entered. Each party could have anticipated the risks attendant to the failure of this marriage at its inception. However, it is noted by the Court that the turning point in the marriage occurred when there was a change in the employment status of Mr. Sievers. This was an occurrence outside of the control of either husband or wife. Apparently, the marriage did not weather this change well. Neither party nurtured the marital relationship during this time. However, although both parties contributed to the breakdown of the marriage, the Court finds the affair of Mrs. Sievers was the conduct which resulted in the demise of the marital relationship.

Mr. Sievers brought into the marriage significantly greater assets than did Mrs. Sievers and under the previously discussed distribution of marital assets, Mrs. Sievers leaves the marriage with more assets than she brought into it. The standards of living of both of the parties will have changed as a result of dissipation of assets during the marriage. This dissipation of assets was caused primarily by the change in employment status of both of the parties and no fault for the dissipation of the assets should be attributed to either party. Both parties made significant contributions to the marriage and it is the finding of the Court Mrs. Sievers' participation in the social, philanthropic, and business communities of Chattanooga, as the wife of Mr. Sievers, was an important contribution to the marriage. Having reviewed all the above factors, it is the finding of the Court that the distribution of marital assets places Mrs. Sievers in a position in which she needs alimony for only a short period of time. Therefore, alimony is ORDERED for six (6) months at \$1,000.00 per month. This award is alimony *in solido* payable in installments of \$1,000.00 per month for six months beginning August 1, 1995.

#### IV. Alimony

We review the trial court award of alimony *in solido* ever mindful of the fact that a trial judge has broad discretion on the question of alimony. **Marmino v. Marmino**, 238 S.W.2d 105, 107 (Tenn. App. 1950). The needs of the party requesting alimony, the ability to pay of his or her spouse, and the relative fault of the parties are the three most important factors in the alimony determination, **Bull v. Bull**, 729 S.W.2d 673, 675 (Tenn. App. 1987); but there are other factors to be considered as well. See T.C.A. § 36-5-101(d).

It is obvious from the memorandum opinion that the trial judge carefully considered all of the evidence in deciding whether to award Wife long-term or short-term alimony. She chose to accredit the testimony of some witnesses over that of others. In general terms, the credibility of the various witnesses was her "call." "A [trial judge], 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 critical question regarding alimony was whether Wife had the education and/or work experience to support herself and whether she was emotionally stable enough to put these talents to work. There is testimony in the record, both pro and con, bearing on this question. The trial judge gave more weight

to the evidence tending to show that, given a short period of time, Wife would again be able to support herself in her chosen line of work--the travel agency business. The trial judge was apparently also influenced by the fact Husband had supported Wife from the time of their separation in December, 1994, up until the divorce hearing on June 20, 1995, a period of some six months. After awarding Wife \$6,000 alimony *in solido*, the trial judge observed as follows:

The Court notes and commends Mr. Sievers' voluntary paying off of the credit cards, medical expenses, rent and utilities and other incidentals for the benefit of Judy Sievers since the separation in December of 1994.

Our review of the record, tempered as it must be by the law on the issue of credibility, does not persuade us that the evidence preponderates against the trial judge's determination that the law<sup>4</sup> and the facts dictate that \$6,000 of alimony *in solido* is the appropriate award in this case. This award is in keeping with the short duration of the marriage, the amount of marital property received by Wife, and the trial court's determinations regarding Wife's ability to support herself and the "relative fault of the parties." We find no abuse of discretion in the trial court's alimony decree.

#### V. *Division of Property*

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<sup>4</sup>The law of Tennessee has long shown a bias in favor of alimony *in solido* over that of alimony *in futuro*. See *Williams v. Williams*, 146 Tenn. 38, 236 S.W. 938 (1921).

In a divorce case, a court is required to divide the parties' marital property in an equitable manner. T.C.A. § 36-4-121(a)(1). A trial court has wide discretion in determining what is equitable in a given case. **Batson v. Batson**, 769 S.W.2d 849, 859 (Tenn. App. 1988). In many cases, particularly those involving marriages of long duration and significant contributions by both parties, an equitable division is one that is substantially equal; but equality is not mandated in all cases. *Id.*

T.C.A. § 36-4-121(c)(1)-(10) sets forth the factors to be considered by a court in arriving at an equitable division. These factors are not to be applied in a mechanical fashion. *Id.* A trial judge, exercising his or her sound discretion, must carefully weigh these factors in light of the credible evidence presented by the parties.

In this case, the trial judge awarded Wife a little over 35% of the net marital property. She contends such an award is inequitable. We cannot agree. This was a marriage of relatively short duration. The parties lived together as husband and wife a little over seven years. While both made important contributions in the marriage, it is significant that \$150,899, or some 73% of the total marital estate, came from the natural growth of assets owned by Husband at the time of the parties' marriage.<sup>5</sup> While the source of these marital assets might not be that important in a long marriage with significant contributions

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<sup>5</sup>Husband owned the condominium and Dean Witter account before the marriage.

on both sides, we believe it is in this marriage of relatively short duration. See **Batson**, 769 S.W.2d at 859.

When all of the relevant factors are considered, we cannot say that the evidence preponderates against the trial court's determination that its division of marital property was equitable. Wife came into this marriage with roughly \$13,000 to \$16,000 in assets, plus a car of unspecified value. This does not count the travel agency since the net proceeds from the sale of that asset did not go into the marriage. She left with her separate property and marital property valued at \$73,113. We find no abuse of discretion in the trial judge's division of marital property. **Batson** approves the approach taken by the trial court in this case. *Id.* at 859.

#### VI. *Dr. Halfin's Testimony*

Wife contends that the trial judge erred when she "disregarded" the testimony of Dr. Aron Halfin, a board certified psychiatrist. Dr. Halfin testified regarding Wife's depression, a condition that pre-existed the marriage. He testified that Wife had a genetic predisposition towards depression. He opined that Wife could not presently handle the stress of coping with employment. Wife says the court should have believed this testimony and consequently awarded her alimony *in futuro*.

Wife's contention is fully answered by the Supreme Court case of **Gibson v. Ferguson**, 562 S.W.2d 188 (Tenn. 1976):

Expert opinions, at least when dealing with highly complicated and scientific matters, are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are purely advisory in character and the trier of facts may place whatever weight it chooses upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the case or otherwise unreasonable. Even in those instances in which no opposing expert evidence is offered, the trier of facts is still bound to decide the issue upon its own fair judgment, assisted by the expert testimony.

*Id.* at 189-90.

The question with respect to Dr. Halfin's testimony raises an issue that "is largely dependent on witness credibility." ***Airline Const. Inc. v. Barr***, 807 S.W.2d 247, 264 (Tenn. App. 1990). The trial judge expressly stated that "Dr. Halfin's testimony was not persuasive to the Court on any point." She opted instead to believe "the testimony of [the] witnesses who [had] observed [the Wife's] day-to-day activities." The essence of an advocate's job is to convince the trier of fact. Credibility is at the heart of this contest. In the instant case, Wife lost the credibility "battle" as to whether she was emotionally able to pursue gainful employment that would enable her to support herself. The trial judge did not "disregard" Dr. Halfin's testimony by not listening to it or by ignoring it; she simply found it unpersuasive when compared to other testimony that tended to support an opposite view. She properly performed her role as trier of fact--picking and choosing among conflicting evidence supporting various theories advanced by the parties.

She was not required to accept Dr. Halfin's testimony at face value.

The judgment of the trial court is affirmed. This case is remanded for enforcement of the judgment and collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant and her surety.

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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.