

JENNIE RHEA BURKE SMITH,)
)
 Plaintiff/Appellee,)
)
 VS.)
)
 ROBERT DUDLEY SMITH, JR.,)
)
 Defendant/Appellant.)

Appeal No.
01-A-01-9510-CV-00462

Davidson Circuit
No. 94D-2760

FILED

June 28, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE MARIETTA M. SHIPLEY, JUDGE

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AFFIRMED AS MODIFIED
AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
CRAWFORD, J.
LILLARD, J.

OPINION

In this divorce case the husband contests the trial judge's award of rehabilitative alimony, the division of marital property, and the order to pay private school tuition for the wife's child by a former marriage. The wife insists that the trial judge erred in amending the final decree based on inadmissible evidence and in ordering the wife to pay one-half of the mortgage payment for January 1995. We modify the award of rehabilitative alimony and the order allowing the husband to recover one-half of the property held jointly with the wife's daughter; otherwise we affirm.

I.

Mr. and Ms. Smith were married for eleven years. Ms. Smith had been married once before and had a seven year old daughter at the time of the marriage. Both parties owned a home, a car, and some furniture. They were both employed, and each continued to work after the marriage. After the marriage Ms. Smith sold her home and moved into Mr. Smith's home. When that home burned they bought a condominium, where they lived until the separation.

Ms. Smith worked as an assistant to the Commissioner of Conservation, as a sales representative for National Car Rental, and for a residential mortgage company selling equity mortgage loans. In all, her income ranged from \$17,000 to \$34,700 per year. In 1991 the parties agreed that Ms. Smith would go back to school to pursue a career in health care. She was accepted at a local college for a two year program in physical therapy, but the college lost accreditation for the program and Ms. Smith's efforts were delayed a year. At the time of the divorce, she was in school in anticipation of joining a two year program in occupational therapy.

Mr. Smith is a graduate engineer. After nine years of employment he moved into residential development, and at the time of the divorce he was president of Villages of Mt. Juliet and vice-president of Fox Ridge Homes. His annual salary was approximately \$87,500 at the time of the trial.

Beginning in 1987, both parties became involved in the Church Universal and Triumphant, a church with a very charismatic leader, which stresses survivalist practices. Mr. and Ms. Smith funded two bomb shelters in Montana, and Mr. Smith supervised the construction of a shelter on another piece of property. Eventually, however, Mr. Smith came to view the organization as a dangerous cult. Ms. Smith continued her interest in the church and conducted meetings in her home. Because of the religious items displayed in the home, Mr. Smith did not invite business associates or friends to visit. Ms. Smith's participation in this religious organization was, apparently, the chief cause of the tension that developed in the marriage.

The trial judge declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b) and entered a decree dividing the marital property. In addition, the decree ordered Mr. Smith to pay Ms. Smith rehabilitative alimony of \$1500 per month for three years, as long as Ms. Smith was a full time student with a "C" average. Mr. Smith was also ordered to pay the private school tuition for Ms. Smith's daughter for the 1994-95 school year.

Mr. Smith filed a motion for a new trial and, in the alternative, to alter or amend. The motion included many factual statements about the various properties in the marital estate and was sworn to by Mr. Smith. The trial judge amended the final decree in various respects and ordered that Mr. Smith pay alimony for two and one-half years instead of three.

II.

Rehabilitative Alimony

Mr. Smith argues that the court erred in awarding Ms. Smith rehabilitative alimony because she is already a highly skilled person and does not need to further her education. While it is true that Ms. Smith has a successful employment history, she testified that she was “burned out” on the most lucrative job she held. She wished to spend more time with her family, and she and Mr. Smith agreed that she should go back to school to pursue a professional career. After giving up her prior employment and embarking on this course it would be unfair to make Ms. Smith pick up the old career she and Mr. Smith agreed she should abandon.

The court ordered Mr. Smith to pay the alimony for two and one-half years at \$1500 per month, a total of \$45,000. Taking into account the assets awarded to Ms. Smith in the property division and the factors listed in Tenn. Code Ann. § 36-5-101(d)(1), we are of the opinion that the amount is excessive. Ms. Smith should assume some of the burden for her future educational pursuits. Therefore, we are of the opinion that the amount of rehabilitative alimony should be reduced to \$750 per month for a period of three years from the date of the divorce.

III.

Mr. Smith also contests the trial judge’s order requiring him to pay one-half of the private school tuition for Ms. Smith’s daughter, for the semester just after the separation occurred. The proof showed that the child had been in private schools since the parties married. Mr. and Ms. Smith voluntarily paid the expenses from the family’s joint funds. It also appears that the contract obligating the parties for the tuition payment was entered into prior to the divorce.

Under these circumstances, we think the trial judge correctly considered the school tuition as a joint debt. It is not a question of making a stepparent support someone else's child, which the court in *Pressley v. Pressley*, No. 03-A-01-9311-CV-00400 (Court of Appeals, Knoxville, February 10, 1995) found improper. But where the parties jointly assume an obligation benefitting the wife's daughter, the trial judge may consider the obligation as a marital debt.

IV.

Mr. Smith argues that the trial judge erred in dividing the marital property. It appears that the trial judge awarded Mr. Smith property having a net value of approximately \$110,000, when he pays the marital debts allocated to him. Ms. Smith's share, calculated on the same basis, amounts to approximately \$99,000. Considering all the factors enumerated in Tenn. Code Ann. § 36-4-121(c), and the discretion given trial judges in dividing marital property, we cannot say that the division in this case was inequitable.

The final decree awards Mr. Smith one-half of some property in the name of Ms. Smith's daughter. One account is in the name of Mr. Smith as custodian for the child under the Uniform Gift to Minors Act, Tenn. Code Ann. § 35-7-101, et seq. (repealed). We are of the opinion that since the child was not a party to this action, the trial court could not alter her title to the property in question. See *Reymann v. Reymann*, 919 S.W.2d 615 (Tenn. App. 1995). Thus, to the extent that the division of the marital property reflects that Mr. Smith is to receive \$4,134 from this source, it is erroneous. The property in the child's name shall remain in her name until some court, with jurisdiction over all interested parties, decides otherwise.

We are not persuaded, however, that the removal of that amount of assets from Mr. Smith's side of the ledger automatically requires that the property

division be adjusted. Making an equitable distribution of marital property does not involve an exact science. Therefore, we do not think that the absence of these assets from Mr. Smith's side renders the distribution inequitable.

V.

Ms. Smith argues that the trial judge erred in basing the final decree on inadmissible evidence supplied by Mr. Smith as a part of his motion to alter or amend. We think, however, that, while the procedure used was unorthodox and perhaps erroneous, any error committed in admitting Mr. Smith's post-trial affidavit was harmless. See rule 36(b) Tenn. R. App. Proc. The parties entered the original trial as if most of the facts could be stipulated and only a limited amount of proof would be necessary. When the proof turned out to be more complicated, the supplemental record was necessary to give the court an accurate picture of the marital assets.

The judgment of the lower court is modified as indicated herein and the cause is remanded to the Circuit Court of Davidson County for enforcement of the judgment as modified. Tax the costs on appeal to the parties equally.

BEN H. CANTRELL, JUDGE

CONCUR:

W. FRANK CRAWFORD, JUDGE

HOLLY K. LILLARD, JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

JENNIE RHEA BURKE SMITH,)	
)	Appeal No.
Plaintiff/Appellee,)	01-A-01-9510-CV-00462
)	
VS.)	Davidson Circuit
)	No. 94D-2760
)	
ROBERT DUDLEY SMITH, JR.,)	Affirmed as Modified
)	and
Defendant/Appellant.)	Remanded

J U D G M E N T

This cause came on to be heard upon the record on appeal from the Circuit Court of Davidson County, briefs and argument of counsel; upon consideration whereof, this Court is of the opinion that the award for rehabilitative alimony and the order allowing the husband to recover one-half of the property held jointly with the wife's daughter should be modified, and in all other respects the judgment of the trial court is affirmed.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the judgment of the trial court is affirmed as modified. The cause is remanded to the Circuit Court of Davidson County for the execution of the judgment and for the collection of the costs accrued below.

Costs of this appeal are taxed one-half to Jennie Rhea Burke Smith and one-half to Robert Dudley Smith, Jr., for which execution may issue if necessary.

ENTER _____.

W. FRANK CRAWFORD, JUDGE

BEN H. CANTRELL, JUDGE

HOLLY K. LILLARD, JUDGE