

LAURA GAIL STEPHENS,)
)
 Plaintiff/Appellee,) Appeal No.
) 01-A-01-9511-CV-00504
 v.)
) Davidson Circuit
 DONALD JACKSON STEPHENS,) No. 93D-881
)
)
 Defendant/Appellant.)

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

FILED
June 28, 1996
Cecil W. Crowson
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE MURIEL ROBINSON, JUDGE

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

MEMORANDUM OPINION¹

_____Defendant, Donald Jackson Stephens ("Husband"), appeals from the judgment of the trial court in this divorce action and raises two issues. He insists that the trial court erred in dividing the parties' marital property and in its award of alimony in futuro to plaintiff, Laura Gail Stephens ("Wife"). In addition, Wife raises the issue of whether she should be awarded her attorney's fee and costs on appeal.

The parties married in December 1957. Husband was 19 years old and Wife was 16 years old. The parties had their first child in 1959, and their second child was born in 1968. For the first 23 years of the marriage, the parties lived in Huntsville, Alabama. During the marriage, Wife carefully spent the family's household monies and Husband diverted significant funds into various retirement and savings accounts. As a result, the parties accumulated a substantial marital estate.

Husband began his employment with IBM in 1965 and was still working there as of the hearing date. While with IBM, Husband pursued various educational opportunities. By 1994, he advanced to the position of project manager and earned a base salary of \$49,781.00 per year plus a team performance commission. In 1994, his gross earnings were \$63,798.00 of which \$11,339.00 represented commissions or bonuses. Husband's uncontradicted testimony was that this income level was extraordinary and that his receipt of commissions would cease in the future. As to 1995, Husband's income statement showed biweekly gross earnings of \$2,028.00 equaling \$52,728.00 a year. Husband received no increase in his

¹Court of Appeals Rule 10(b):
The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

base salary of \$49,781.00 between 1994 and 1995. Moreover, Husband participated in IBM's pension plan. As a result, his pension entitlement from IBM will yield approximately \$1,670.00 per month on retirement.

Wife's employment and educational history is practically nonexistent when compared to Husband's. When the parties married, Wife was not working and she quit high school while in the tenth grade. Wife's only employment outside the home consisted of a job she held for two years in the early 1960's as a cloth grader. Wife's work at home, however, was substantial. She cooked, cleaned, and took care of Husband and the children. The evidence established that she kept the home neat and clean, she prepared breakfast, lunch, and dinner for the family, and she disciplined the children when necessary. She carefully spent the household money always looking for bargains and low prices. She also worked in the yard along with Husband. In addition to these duties, Wife took care of Husband's mother who was basically a "vegetable" during the last years of her life.

There is evidence that Wife had low self-esteem and was overweight. She went to TOPS, a weight control program, and cut down on her eating. She insisted that her stomach shrunk causing her to vomit when she was too full. Husband attributed this to bulimia. There is no medical evidence, however, from either party regarding this matter. Wife's eating problem lasted a year, 1985 to 1986. The trial court found that it "wasn't a problem until this divorce."

In 1990, Husband stopped spending weekends at home. He would leave home after breakfast purportedly to go to work and would not return until eight or nine p.m. At trial, Husband admitted that he had an affair with another woman and that he spent

time with her on the weekends. Husband moved out of the parties' home in October of 1992. He then transferred an \$80,000.00 treasury bill from the parties' joint names to his name.

Wife became suspicious of Husband's activities while he lived in the marital home. On one occasion, she found two movie tickets in his pocket. When she asked Husband about them, he said he had gone to the movies by himself. When she asked him why there were two tickets, he said "I wasn't aware of the two tickets." Subsequently, he revealed that he had been untruthful about the movie tickets and that he was with another woman at the movies. Husband insisted that he did not tell Wife the truth about the affair because he did not want to upset her. He characterized Wife's accusations about his affair as obsessive. After Husband left the marital home, Wife hired a private investigator. The investigator's findings led Wife to file for divorce from bed and board. When the truth finally emerged, Husband admitted to affairs with five women during the course of the parties' marriage.

In August 1992, Waldenbooks hired Wife to box books. The job pays hourly and there is little chance for advancement. Wife received a 25¢ per hour raise in 1993 and expected about the same in 1994. Her continued employment prospects are limited as some employees have already been asked to take month-long leaves without pay to avoid formal layoffs. Waldenbooks does not provide a pension plan, but it does provide health insurance for which Wife pays \$44.00 per month. There are no other benefits. Wife earned \$12,464.00 in 1993 and \$16,550.00 in 1994.

After considering the length and duration of the marriage, the education of the parties, the respective abilities to earn income, the needs of the parties, and the fault of the obligor spouse, the trial court provided that the pendente lite alimony of

\$400.00 per month should remain in effect until the parties sold the marital home. Upon its sale the alimony in futuro would increase to \$950.00 per month. The trial court also provided that it would review the alimony award when Husband retires. The record established that the trial court's distribution of the marital estate was nearly equal and that it included Husband's IBM pension and PRP entitlement.

The first issue presented by Husband is "whether the trial court abused its discretion in failing to find that an equitable division of marital property was an unequal division in favor of Husband based upon Husband's disproportionate contribution to the acquisition and preservation of the marital assets and Wife's refusal to participate in the marital partnership." Husband's proposed division of the marital estate appears to be even, but it omits Husband's IBM pension which he accumulated during the course of the marriage. Husband insisted that Wife should not receive any of his IBM pension because he made a larger financial contribution to the marriage. As of March 1995, Husband was entitled to both a monthly benefit at retirement of \$1,670.67 per month with a fifty percent survival benefit and a monthly payment ("PRP") currently worth \$6,066.71. Both of these benefits were vested.

We review this case de novo upon the record with a presumption of correctness attaching to the trial court's findings of fact. Tenn. R. App. P. 13(d). Unless there is an error of law or unless the evidence preponderates against the trial court's finding, this court will affirm. **Gray v. Todd**, 819 S.W.2d 104, 108 (Tenn. App. 1991).

Husband contended that the trial court was either biased against him or too busy to consider the proof he wished to offer on the matter of fault and that this bias was a factor in the court's

division of the marital estate. At oral argument, Husband backed off this contention because the record established that the court was more than willing to hear any additional proof he desired to present. Near the close of the day on 27 April 1995, the court stated: "I've got to be some place at four o'clock. You all can come back in here Monday then." Husband's attorney replied: "Well if you're ready -- If you've pretty much calculated based on what you're going to hear, I'm pretty much ready to wrap it up and not call the other witnesses except for this lady." We have thoroughly reviewed this record and find no evidence to sustain Husband's insistence of bias.

Our review of this record shows that the trial court considered the factors set forth in Tennessee Code Annotated section 36-4-121(c) in making an equitable division of the marital property. The statute requires equitable distribution of the marital property, not an equal distribution. Tenn. Code Ann. § 36-4-121(c)(1991). Under the facts of this case, an equitable division is an approximate equal division. The ownership of marital property is presumed equal unless one of the parties prove otherwise. *Kelly v. Kelly*, 679 S.W.2d 458, 462 (Tenn. App. 1984). We find nothing in this record to support a finding of anything other than equal ownership of the marital estate including Husband's IBM pension.

Tennessee Code Annotated directs the trial court and this court to give the contribution of a party who is a homemaker the same weight as that of a wage earner if that party has fulfilled their role as a homemaker. Tenn. Code Ann. § 36-4-121(c)(5)(1991). Here, there was evidence of Wife's contribution to the marriage as a homemaker for some 35 years. She participated in raising the parties' children. She cooked, cleaned, and took care of the home and Husband. She helped Husband accumulate a marital estate of

almost a half a million dollars not including Husband's IBM pension. Wife did manual yard work while Husband rode the lawn tractor. She also cared for Husband's ailing mother who lived with them for some time. We are of the opinion that there is material evidence of Wife's contribution to the marriage which would entitle her to an equal distribution of the marital property. This issue is without merit.

Husband's second issue is "whether the trial court abused its discretion in awarding alimony in futuro, rather than rehabilitative alimony to Wife in the absence of findings (or of any proof) that Wife's financial rehabilitation is not feasible and in awarding alimony in an excessive amount based upon Wife's needs and the Husband's ability to pay." Regarding alimony as an issue, Husband testified on direct examination as follows:

Q. Now, you don't feel that you should pay your wife any alimony because you think she doesn't need it. Is that your main contention?

A. I don't think -- Had my wife contributed in the marriage what I did or what I felt like she ought to have, I might have. But as far as alimony goes, I'm willing to do whatever the Judge tells me to do.

The amount of monthly income reported on Husband's income and expense statement does not include approximately \$850.00 which Husband diverts into his 401K and other company savings' plans. Notwithstanding the omission of the \$850.00, Husband reported a net take-home pay of \$2,984.00 per month. On his expense statement, Husband listed a \$300.00 per month car payment even though he paid cash for a new car the previous year. He reported food expenses of \$600.00 per month while Wife listed food expenses of only \$300.00 per month. He claimed \$200.00 for recreation expenses while Wife claimed only \$75.00. He reported his legal fees as \$300.00 per month. Finally, he reported additional tax payments of \$200.00 per month over and above the withholding of \$604.00 per month which comes out of his gross paycheck.

Wife sought alimony of \$1,500.00 per month. This figure represented the difference between her income and what she insists are her needs. The non-pension type investments that Wife received consisted of IBM stock. In 1993 and 1994, the stock paid total dividends of \$800.60. Wife also received \$40,000.00 of the \$80,000.00 treasury bill. Her interest on that per year will be approximately \$1,025.00; however, Wife plans to make a down payment on a home. This will reduce her investment income.

Tennessee Code Annotated section 36-5-101(d)(1) sets forth the matters that must be taken into consideration in setting support for an obligee spouse. The intent of this section is to ensure that "a spouse who is economically disadvantaged, relative to the other spouse, be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance." Tenn. Code Ann. § 36-5-101(d)(Supp. 1995). Only when there is relative economic disadvantage and rehabilitation is not feasible, may the trial court grant long term support.

The appellate courts of this state have held that the trial courts have great discretion in deciding alimony issues and that the trial courts' decisions will not be disturbed on appeal except "where its use is clearly erroneous." *Hall v. Hall*, 772 S.W.2d 432, 439-440 (Tenn. App. 1989). "If one spouse is economically disadvantaged compared to the other, the courts are generally inclined to provide some type of support." *Batson v. Batson*, 769 S.W.2d 849, 861 (Tenn. App. 1988).

We have recognized that of the statutory factors set forth in Tennessee Code Annotated section 36-5-101(d) those considered most by courts are the need of the innocent spouse, the fault of

the obligor spouse, and the ability of the obligor spouse to pay. *Bull v. Bull*, 729 S.W.2d 673, 675 (Tenn. App. 1987). "[I]t is appropriate, where possible, for the trial court to grant relief intended to maintain the innocent spouse's pre-divorce status quo." *Id.* at 676. Here, there is no doubt that Wife is disadvantaged economically relative to the Husband.

Husband insisted that there is no evidence that Wife needs the support or that he has the ability to provide it. He argued that Wife has been able to maintain the standard of living she desires from her present income. Husband also contended that Wife should be able to buy a suitable home with her share of the proceeds from the sale of the marital home. Husband estimated Wife's share of the proceeds to be \$87,500.00. Husband also contended that he is unable to pay the support ordered by the court. Husband's monthly income and expense statement listed a permanent, ongoing legal expense of \$300.00 per month as well as an unnecessary \$300.00 monthly car payment. Husband's income and expense statement did not show the \$850.00 per month he deposits into a tax sheltered savings account. Husband's income statement did not include his earnings on the marital assets received by him nor did it take into account the commission and bonuses he received over the past several years. Wife contended that the \$950.00 per month alimony did not close the gap between her income and expenses. She also argued that she demonstrated need and that the trial court determined Husband had income available to meet those needs.

In this case, the trial court did not rule one way or the other regarding rehabilitative alimony. It is Wife's contention that, because the trial court awarded alimony in futuro, it was implicit in its ruling that she was not capable of rehabilitation.

There is no evidence in this record that Wife could be successfully rehabilitated at this stage in her life. As our supreme court has stated: "While alimony is not intended to provide a former spouse with relative financial ease, we stress that alimony should be awarded in such a way that the spouses approach equity." **Aaron v. Aaron**, 909 S.W.2d 408, 411 (Tenn. 1995).

Husband has raised the issue of Wife's entitlement to social security. At the time of the hearing, Wife was 54 years of age and Husband was 57. There is nothing in the record to show that either of them are receiving social security benefits. This court may take judicial notice of the fact that the earliest they would be entitled to social security benefits, in the absence of total disability, is age 62.

It is the opinion of this court that the trial court did not abuse its discretion and that Husband's second issue is without merit. Further, we note that this matter remains in the jurisdiction of the trial court. Thus, at any time, either party may petition the court to modify the alimony if there has been a material change of circumstances. Additionally, the trial court provided that it would review the alimony award upon Husband's retirement.

Wife also asked for an award of legal fees and costs on appeal. We are of the opinion, after review of this record, that Wife is fully able to pay for legal expenses incident to this appeal. This issue is therefore without merit.

Therefore, it results that the judgment of the trial court is affirmed and the cause is remanded to the trial court for any further necessary proceedings. The costs on appeal are taxed to

the defendant/appellant, Donald Jackson Stephens.

SAMUEL L. LEWIS, JUDGE

CONCUR:

HENRY F. TODD, P.J., M.S.

WILLIAM C. KOCH, JR., J.