

CHRISTOPHER E. CLABOUGH,)
)
 Plaintiff/Appellant,)
)
 VS.)
)
 PATRICIA J. CLABOUGH,)
)
 Defendant/Appellee.)

Appeal No.
01-A-01-9605-CV-00200

Davidson Circuit
No. 93D-2075

FILED

November 20, 1996

**Cecil W. Crowson
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE
MIDDLE 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 AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

OPINION

There are two questions raised by the appellant in this appeal: (1) Did the trial court err by granting separate support and maintenance to the wife when no such relief was requested in the pleadings? and (2) Did the trial court's actions deprive the appellant of his right to due process? We affirm the judgment below but remand the cause for a determination of whether the separation is to be deemed temporary or perpetual.

I.

Christopher Clabough filed a complaint for divorce on June 2, 1993 alleging that his wife, Patricia Clabough, was guilty of inappropriate marital conduct and that irreconcilable differences existed between the parties. Mrs. Clabough filed an answer containing a general denial and praying for (1) support and maintenance for her and the minor children, (2) custody of the minor children, and (3) general relief.

After the parties completed discovery the cause was set for trial. An amended decree filed on December 4, 1995 contains the following findings:

1) That the allegations of the Complaint as to grounds for divorce are not sustained but Ms. Clabough is entitled to separate support and maintenance and a division of assets pursuant to T.C.A. 36-4-121 and 36-5-101. Although there was no full hearing on the merits, the parties and their attorneys stated to the court that a hearing on the grounds for divorce was unnecessary in that in the sworn discovery deposition the Husband admitted he has no grounds for absolute divorce. Mr. Clabough's attorney admitted his testimony prevented him from receiving a divorce.

2) The parties have one minor child, and the Wife is a fit and proper person to have custody of the child.

3) The wife's psychological condition has improved, but at this time, she is still unable to obtain full-time employment. Husband's maximum potential net earnings are found to be \$3600.00 per month.

4) The Wife is presently looking for a condominium to purchase for her personal residence. If required for Wife to qualify for a mortgage, Husband shall co-sign the mortgage note payable.

5) The Court specifically finds that there is authority pursuant to T.C.A. 36-5-101 for this Court to grant support and maintenance to the Wife and to divide the assets.

Based on those findings the court awarded separate support and maintenance and custody of the remaining minor child to Mrs. Clabough. In addition, the court divided the marital property and ordered Mr. Clabough to pay family support of \$2400 per month.

II.

Mr. Clabough's first contention is that the trial judge erred in granting Mrs. Clabough separate support and maintenance when she had not asked for it in her pleadings. He also argues that the court heard no proof on the amount of support necessary or the grounds on which it could be based.

With respect to the issue about the pleadings, we think the pleadings support the trial judge's actions. While Mrs. Clabough's answer does not allege any facts relating to separate maintenance and support, the answer does contain a prayer for such relief.

The case of *Stephenson v. Stephenson*, 201 Tenn. 253, 298 S.W.2d 717 (1957) involved almost identical facts. In that case, the wife filed a cross bill for divorce but later amended the answer to delete the grounds alleged and the prayer for divorce. Thus, the case went to trial on the original bill and an answer containing a prayer for separate maintenance. When the court found that the husband failed to prove his grounds for divorce, the court entered a decree of separate maintenance. Although the propriety of that action was not involved in the subsequent appeal, the

Supreme Court stated that the courts have the inherent power to award separate support and maintenance. The power does not rest on the divorce statutes but is founded on the obligation to support the wife.

In *Roberts v. Roberts*, 22 Tenn. App. 651, 125 S.W.2d 199 (1939), this court said, “The right of a wife to separate maintenance is founded on the duty of the husband arising out of the marital relationship to support the wife. She may have it awarded in a divorce proceeding under the prayer for general relief even though a divorce be denied her.” 22 Tenn. App. at 654, 125 S.W.2d at 201.

We hold that the trial court’s action was proper under the pleadings.

With respect to Mr. Clabough’s argument concerning the lack of proof, the final decree recites that it was based on the “testimony of the parties, statement of counsel, and the entire record” There is no transcript of the proceedings and the only evidence of what transpired at the trial is a post-trial affidavit of Mr. Clabough in which he says the court did not take any proof at the hearing but decided the case on the statements of the lawyers.

Without a transcript or a statement of the evidence we must assume that the record, had it been preserved, would support the trial court’s factual findings. *Sherrod v. Wix*, 849 S.W.2d 780 (Tenn. App. 1992). In the face of this time-honored principle of law, we cannot see how the appellant can impeach the trial judge’s decree by his own affidavit, especially where the amended decree recites some of the stipulations made by counsel at the hearing. Therefore, we find that the appellant’s issue concerning the lack of proof in the record should be overruled.

III.

Mr. Clabough also asserts that the procedure employed by the trial court denied him his right to due process guaranteed by the fifth and fourteenth amendments to the federal constitution and article I, § 8 of the Tennessee Constitution. Mrs. Clabough asserts that this issue cannot be raised on appeal since it was not raised in the trial court. See *Mallicoat v. Poynter*, 722 S.W.2d 681 (Tenn. App. 1986) and *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn. 1983).

We think the issue can be raised on appeal because the rule followed in *Mallicoat* and *Lawrence* pertains to constitutional attacks on statutes. It is true the constitutionality of a statute cannot be raised for the first time on appeal, because this court's jurisdiction is appellate only, Tenn. Code Ann. § 16-4-108. This appeal, however, involves a complaint that the procedure in the trial court was fundamentally unfair. The only way to raise that issue is in a post-trial motion or on appeal. In a case tried without a jury there is no requirement that an appellant file a post-trial motion as a prerequisite to raising issues on appeal. See Rule 3(e), Tenn. R. App. Proc.

On the merits of this issue, however, we cannot find that Mr. Clabough's rights to due process have been violated. He was given notice and the right to be heard, the two essential elements of due process. *Phillips v. State Bd. of Regents*, 863 S.W.2d 45 (Tenn. 1993). Even when extended to encompass a meaningful right to be heard, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 640 (1981), the right to due process has not been violated in this case, so far as the record shows. For the same reasons set out in section II of this opinion we must presume that Mr. Clabough was given a meaningful hearing in the trial court.

IV.

In the amended decree the trial judge awarded Mrs. Clabough separate maintenance pursuant to Tenn. Code Ann. § 36-5-101. That section provides in section (a)(1):

Whether the marriage is dissolved absolutely, or a perpetual or temporary separation is decreed, the court may make an order and decree for the suitable support and maintenance of either spouse by the other spouse, or out of either spouse's property, and of the children, or any of them, by either spouse or out of such spouse's property, according to the nature of the case and the circumstances of the parties, the order or decree to remain in the court's control .
...

The amended decree did not specify whether the separation was perpetual or temporary. We are of the opinion that the parties deserve to know what their status is and how they should plan for the future. On remand the trial judge should enter an order designating whether the separation is deemed perpetual or temporary.

V.

Mrs. Clabough seeks damages for a frivolous appeal. We are of the opinion that the appeal is not frivolous and, therefore, deny the application.

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Davidson County. On remand the trial judge shall determine whether the separation is to be temporary or perpetual and enter an order accordingly. Tax the costs on appeal to the appellant.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

SAMUEL L. LEWIS, JUDGE

