

KIMBERLY ANNE (CARUTHERS) )  
LOVAN, )  
 )  
Plaintiff/Appellee, )  
 )  
VS. )  
 )  
MICHAEL GERALD LOVAN, )  
 )  
Defendant/Appellant. )

Appeal No.  
01-A-01-9607-CV-00317

Sumner Circuit  
No. 14544-C

**FILED**  
  
January 17, 1997  
  
Cecil W. Crowson  
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF SUMNER COUNTY  
AT GALLATIN, TENNESSEE

THE HONORABLE THOMAS GOODALL, JUDGE

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AFFIRMED IN PART; MODIFIED IN PART;  
AND REMANDED

BEN H. CANTRELL, JUDGE

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

## OPINION

The trial court granted the wife an absolute divorce, and gave her custody of the two minor children. The court also divided the marital property, and ordered the husband to pay child support and rehabilitative alimony. The husband appealed, arguing that the court erred in its valuation and division of the marital property, and in its support orders. We modify the trial court's orders in regard to alimony and child support. In all other respects, we affirm the trial court.

### I.

Michael Gerald Lovan married Kimberly Anne Caruthers in 1976. Two children were born of the marriage, a boy born in 1983, and a girl, born in 1993. In 1995, the wife left the marital home, and on August 17 of that year, she filed a complaint for divorce which alleged that the husband had been guilty of inappropriate marital conduct. The husband counter-claimed for divorce, on the ground of irreconcilable differences and inappropriate marital conduct.

During a lengthy and hard-fought trial, each party accused the other, among other things, of domestic abuse and child neglect, and protested his or her own innocence of any such conduct. Perhaps the most difficult issue for the court was the question of the proper guardian for the older child (both parties agreed that the younger child should remain with the mother). The court finally granted the divorce to the wife on the ground of the husband's inappropriate marital conduct, and gave her custody of both children. The only issues on appeal, however, involve the financial aspects of the court's decree.

Central to the court's determinations on these issues was testimony as to the value of the two companies in which Mr. Lovan has an ownership interest, a software company called Information Management & Consultants Inc., and an electrical parts company called Southern Electric Motor Sales and Service Inc.

Mr. Lovan had founded the software company in 1990. Information Management & Consultants sells software, written or adapted by Mr. Lovan, for control of industrial processes. The business has four employees including Mr. Lovan himself. He testified that during most of 1995, he was drawing a monthly salary of \$8,000 from the company. The company was also paying \$2,000 a month into a \$2 million life insurance policy with a payout option that would enable him to retire at age 55. At the time of the divorce, Mr. Lovan ran his business from an office in the basement of the home he was renting. Half of the \$3,000 monthly rent was paid by Mr. Lovan, and half was paid by his company.

A balance sheet submitted for the company as of September 22, 1995 showed total assets of \$83,365 and total liabilities of \$23,488, resulting in an equity value of \$59,877. Another balance sheet, prepared by Mr. Paul Young, a Certified Public Accountant who testified as Mr. Lovan's expert witness, showed total assets of \$129,117, as of September 28, 1995. The difference in the two asset figures can largely be traced to the \$54,709 value that was attributed to vehicles listed as assets on the later balance sheet but omitted from the earlier one. The additional assets were more than balanced by additional liabilities, so the balance sheet prepared by Mr. Young showed total equity of \$56,017. A profit and loss statement for the period January 1 through September 28, 1995, showed a net income of \$44,363.

Southern Electric Motors was founded in 1986. According to the wife, the husband owns a one-third interest in that company. According to Mr. Richard Greer, the manager and co-founder of the company, Mr. Lovan owns a 25% interest.

The company has ten employees and annual sales of over \$1 million. The balance sheet for Southern Sales and Service, dated December 31, 1994, shows assets of \$206,382, and liabilities of \$178,258. A profit and loss statement for the year ended December 31, 1994 shows a net loss of \$18,006.

## **II. Valuing the Husband's Business Interests**

Obviously relying upon figures taken from the balance sheets mentioned above, the court found Information Management & Consultants to have a value of \$83,366, and Southern Electric Motor Sales to have a value of \$206,382. The court divided the value of Southern Electric by three to establish an ownership interest of \$68,794 for the husband. The court awarded the husband clear title to his interests in both companies, and awarded the wife a money judgment of \$76,000, representing half the value of the marital property contained in the equity of both businesses. The judgment was ordered to be paid in monthly installments of \$1,809.52.

The husband argues on appeal that the trial court erred by basing its valuations on the assets of the two companies without taking their liabilities into account. We agree that under the asset value method of determining the value of a corporation, such an omission would constitute a fundamental error.

However the asset value method is not the only method of determining the value of a corporation, nor does it appear to be the best method in this case. In *Blasingame v. American Materials Inc.*, 654 S.W.2d 659, 666 (Tenn. 1983), a case involving the rights of a dissenting corporate shareholder, our Supreme Court discussed three methods, the market value method, the asset value method, and the investment or earnings method.

Of the three, the market value method appears to be the least useful in this case, because no evidence was presented of a market for the shares of either closely-held corporation. See *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. App. 1987).

The asset value method looks to the net assets of the corporation, and is only of limited usefulness here, particularly when valuing Information Management & Consultants. The reason is that the prime asset of the software corporation appears to be the energy and acumen of its guiding spirit -- that is, of Mr. Lovan himself. While such an asset is sometimes included in a balance sheet under the general term, "goodwill," the balance sheets in the record contain no entry for goodwill, but only for such tangible assets as accounts receivable, vehicles, computers and office furniture.

Valuing Mr. Lovan's company on the basis of its earnings would appear to be the best way to reach a valid result. The earnings method "relates to the earning capacity of the corporation and involves an attempt to predict its future income based primarily on its previous earnings record." 654 S.W.2d at 666.

Mr. Lovan argues that while 1995 was a good year for his company, it may have been an anomaly, because it followed two years of very poor results. However we note that he failed to supply the court with records for the previous years, that he is apparently anticipating increasing success, in light of his announced intention to retire at age 55, and that as sole owner of Information Management & Consultants, he has been able to characterize revenues that inured to his advantage as profits, salary, benefits or even expenses, according to his preference.

Mr. Young testified that it would not be unusual for a company like Mr. Lovan's to have a sale value of five to six times its annual earnings. Extrapolating the

figures from the 1995 profit and loss statement out to twelve months, and then multiplying the annual profit by five or six would result in a value of between \$295,000 and \$355,000 for the software company, which is far more than the trial court assigned to Mr. Lovan's interest in both companies together.

To reiterate: valuing Information & Management Consultants by the net asset method would result in a value of at least \$56,017. Valuing it by the earnings method would result in a value of at least \$295,000. Thus if the trial court erred in the manner in which it valued the company, the error would have to be considered harmless (at least in regard to Mr. Lovan's claim), as the total value it found for Mr. Lovan's interests in both companies together is within the range established by the proof for Information Management & Consultants alone. For a good discussion of the valuation of closely held corporations in the context of a divorce proceeding, see *Wallace v. Wallace*, 733 S.W.2d 102 (Tenn. App. 1987).

### **III. The Gold Coins**

The most bizarre aspect of this case involved a collection of gold coins that Mr. Lovan had accumulated during nineteen years of marriage. The parties' separation began when the wife left in the middle of the night. When the husband realized that his wife was gone, he looked in the closet for the small safe where the coins were kept, and discovered that it was missing. The husband asked the court to restore the coins to him, and stated that their value was \$3,500. The wife denied taking the coins, or knowing where they were, and stated that their value was probably about \$100,000.

The court declared from the bench that the wife would be awarded the coins, but in the final decree they were listed, with a value of \$100,000, on the husband's side of the ledger. The husband argued on appeal that the trial court erred

in acting contrary to its own decision from the bench, and in overestimating the value of the coins, to the husband's detriment.

We note however, that the court speaks through its decrees, and that oral statements of the court are not reviewable unless incorporated into a decree. See *Massachusetts Mutual Life Insurance Co. v. Taylor Implement & Vehicle Co.*, 138 Tenn. 28, 195 S.W. 762 (1917); *Shelby v. Shelby*, 696 S.W.2d 360 (Tenn. App. 1985). We note also that no itemized list of the coins was submitted to the court, nor were the coins appraised. Their valuation thus apparently came down to a question of the credibility of the parties. Findings of a trial court which are based upon the credibility of witnesses are normally afforded great deference by the reviewing court. See *Town of Alamo v. Forcum-James*, 205 Tenn. 478, 327 S.W.2d 47 (1959).

While granting the coins to the husband may prove to be an empty exercise, it places an obligation on the wife, if she does have them, to return them to the husband. If she should prove to be selling the coins or knowingly retaining possession of them in the face of the court's order, she would be guilty of both conversion and contempt of court, and would be subject to whatever punishment the court chose to impose on her.

#### **IV. Rehabilitative Alimony**

The court granted the wife rehabilitative alimony of \$1,000 per month for 120 months via wage assignment. The proof showed that the wife worked as a paralegal, and had a reliable monthly net income of \$1,766. Her income and expense statement listed monthly expenses of \$6,170, which included monthly payments of over \$1,000 on a 1989 Mercedes automobile.

It is clear that the wife is entitled to alimony in light of the relative earning capacities of the parties, the duration of the marriage, the wife's contributions to the marriage and the relative fault of the parties. See Tenn. Code Ann. § 36-5-101. In that same statute, our legislature has stated a preference for temporary rehabilitative alimony over alimony in futuro. See Tenn. Code Ann. § 36-5-101(d)(1).

The husband argues that the wife is not an appropriate candidate for rehabilitative alimony because she already has a reliable source of income, and there is not much prospect for increasing her earning capacity through further education or training. However, we believe that the wife is entitled to temporary support, while she adjusts her life style to her post-divorce status. We also believe that 120 months is more time than is necessary for that adjustment. We therefore modify the court's order by reducing the period of support from 120 months to 60 months. As was stated in the court's decree, the obligation will terminate if the wife should die or remarry, and it is subject to modification by either party should a change of circumstances occur.

## **V. Child Support**

The husband was ordered to pay the wife \$1,783 per month for child support, an amount based upon the child support guidelines for a monthly income of \$8,000. The husband was also directed to provide the wife with his income tax returns and W-2 forms each year, and to pay the wife a sum equal to 32% of any income received from his business interests in excess of \$96,000 per year.

We believe that the trial court exceeded its authority in ordering an automatic adjustment in child support based upon a percentage of the husband's future income as determined by his income tax return. While the child support guidelines create a rebuttable presumption as to the correct amount of child support,



based upon the obligor's income, Tenn. Code Ann. § 36-5-101(a)(2)(A) only authorizes the courts to provide for the future support of a spouse or of the children “. . . by fixing some *definite amount* or amounts to be paid in monthly, semimonthly or weekly installments, or otherwise, as circumstances may warrant . . . .” (emphasis added).

Such a definite obligation provides the dependent children with a predictable amount of support, and enables the obligor to shoulder a known burden. If the obligor's income should increase or decrease substantially, then either party may apply to the court for a modification of the child support obligation. In view of the existence of a well-established mechanism for adjustment of child support, the court's action, although well-intentioned, amounts to an extension of its authority beyond the mandate of the legislature.

## VI.

We shorten the duration of Mr. Lovan's obligation to pay his former wife rehabilitative alimony from 120 months to 60 months. We also modify the child support award by eliminating any obligation based upon future income in excess of \$96,000 per year. In all other respects we affirm the trial court. Remand this cause

to the Circuit Court of Sumner County for further proceedings consistent with this opinion. Divide the costs on appeal equally between the appellant and the appellee.

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BEN H. CANTRELL, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE  
MIDDLE SECTION

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WILLIAM C. KOCH, JR., JUDGE

IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

KIMBERLY ANNE (CARUTHERS) LOVAN,	)	
	)	
Plaintiff/Appellee,	)	Appeal No.
	)	01-A-01-9607-CV-00317
	)	
VS.	)	Sumner Circuit
	)	No. 14544-C
	)	
MICHAEL GERALD LOVAN,	)	Affirmed in Part;
	)	Modified in Part;
Defendant/Appellant.	)	and 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 Sumner County, briefs and argument of counsel; upon consideration whereof, this Court is of the opinion that the judgment of the trial court is modified as to the rehabilitative alimony and child support, and in all other respects 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 be modified in part and affirmed in part. The cause is remanded to the Circuit Court of Sumner County for the execution of the judgment and for the collection of the costs accrued below.

Costs of this appeal are taxed equally against Kimberly Anne (Caruthers) Lovan and Michael Gerald Lovan, for which execution may issue if necessary.

ENTER \_\_\_\_\_.

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HENRY F. TODD, PRESIDING JUDGE  
MIDDLE SECTION

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BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE