

DAVID JOHN ERDLY, )  
 )  
 Plaintiff/Appellant, )  
 )  
 VS. )  
 )  
 JANENE MARIE ERDLY, )  
 )  
 Defendant/Appellee. )

Williamson Chancery  
No. 24111

Appeal No.  
01A01-9706-CH-00269

**FILED**  
February 20, 1998  
Cecil W. Crowson  
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEAL FROM CHANCERY COURT OF WILLIAMSON COUNTY  
AT FRANKLIN, TENNESSEE

HONORABLE H. DENMARK BELL, JUDGE

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**MODIFIED, AFFIRMED AND REMANDED.**

HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

BEN H. CANTRELL, JUDGE  
WILLIAM C. KOCH, JR., JUDGE

<b>DAVID JOHN ERDLY,</b>	)	
	)	<b>Williamson Chancery</b>
<b>Plaintiff/Appellant,</b>	)	<b>No. 24111</b>
	)	
<b>VS.</b>	)	
	)	<b>Appeal No.</b>
<b>JANENE MARIE ERDLY,</b>	)	<b>01A01-9706-CH-00269</b>
	)	
<b>Defendant/Appellee.</b>	)	

**OPINION**

The plaintiff, David John Erdly, has appealed from the judgment of the Trial Court dismissing his suit for divorce, dividing the marital estate, awarding plaintiff child custody and support and awarding the defendant, Janene Marie Erdly, alimony for the remainder of her life.

Both parties are 44 years old. They were married in 1971 in Michigan where the husband was employed by General Motors Co. The marriage produced three children. The oldest is an adult and is married. The second child, also an adult, is a part-time student at General Motors Institute of Engineering. The third child is now seventeen.

In 1994, the husband came to Tennessee to work at Saturn Motors, a subsidiary of General Motors. The wife remained in Michigan with the two younger children, but visited the husband in Tennessee with the children. In 1996, the wife came to Tennessee with the youngest child.

The alienation of the parties began in Michigan after the birth of the youngest child. The wife began to accuse the husband of adultery. Her hearing was seriously impaired, but she refused to use hearing aids. She was prone to emotional extremes.

On July 1, 1996, the husband initiated the present proceeding by filing a complaint alleging irreconcilable differences and inappropriate marital conduct and praying for an absolute divorce, custody of the minor child and an equitable distribution of the marital estate. The

complaint did not mention false accusations as part of the ground of inappropriate marital conduct. On July 11, 1996, an altercation occurred between the wife and youngest child who called his father. Upon arrival of the father at home, an altercation occurred between the mother and the father. The father called the police who arrested the mother. On the following day, July 12, 1996, the mother filed an answer denying fault and a counterclaim reciting numerous instances of incompatibility and requesting the removal of the father from the home. Neither answer nor counterclaim requested dismissal of the husband's suit for divorce. On July 18, 1996, the husband filed a motion to require the wife to vacate the marital home. On July 26, 1996, the Trial Judge ordered the mother to vacate the home.

The husband's original suit for divorce was heard by a different Trial Judge who had not previously ruled upon any facet of the case. Portions of his judgment pertinent to this appeal are summarized above.

On appeal, the husband presents three issues of which the first is:

1. Whether the trial court's finding that the husband was not entitled to a divorce is against the preponderance of the evidence.

The evidence is uncontradicted that the wife accused the husband of adultery. However, this accusation is not included in the pleadings. From the trial record, it is evident that this issue was tried by consent, and the evidence is uncontradicted that accusations of adultery were made by the wife. In order to constitute a ground for divorce, such accusation must be false, i.e., untrue. *Berry v. Berry*, 191 Tenn. 310, 232 S.W.2d 352 (1950); *Evans v. Evans*, Tenn. App. 1977, 558 S.W.2d 851; *Reitano v. Reitano*, 52 Tenn. App. 289, 373 S.W.2d 213 (1916). The wife did not contradict the husband's denial of any inappropriate marital conduct.

The granting of a divorce on grounds of inappropriate marital misconduct (cruel and inhuman treatment) is discretionary. TCA § 36-4-102(a).

The memorandum of the Trial Judge contains the following findings:

Husband seeks an absolute divorce on grounds of inappropriate marital conduct, i.e. cruel and inhuman treatment. Wife seeks to have husband's divorce claim dismissed and that provision be made for equitable division of marital property and for her support and maintenance.

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The evidence establishes that the wife is by nature quick-tempered. Throughout the marriage wife has subjected husband and their children to intemperate verbal abuse.

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As to the episode which resulted in husband having wife arrested and kept in jail overnight and which preceded the filing of husband's complaint herein by only a few days, the court finds wife's version more creditable than husband's version. Wife's version is that the episode was deliberately provoked by husband and that the "assault" was no more than an inconsequential shove.

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The Court's ultimate conclusion is that the wife's verbal outbursts over the years were a product of her nature, that they were not willful nor were they the cause of husband's decision to terminate the 25 year marriage. The husband's claim for divorce will accordingly be dismissed.

Where the issue for decision depends upon the determination of the credibility of witnesses, the trial judge is the best judge of credibility and his findings of credibility are entitled to great weight on appeal. *Tenn-Tex Properties v. Brownell-Elistro, Inc.*, Tenn. 1989, 778 S.W.2d 423; *Gaskill v. Gaskill*, Tenn. App. 1996, 936 S.W.2d 626.

Although the decree of the Trial Court does not expressly so state, this Court construes its provisions (separation and alimony) to be a divorce from bed and board or separate maintenance. As such, it is subject to TCA § 36-4-102(b) which, after the lapse of two years without reconciliation empowers the trial courts to grant an absolute divorce with final adjudication of support and property rights. TCA §§ 36-4-101(12) and 36-4-102(b).

Both the Trial Court and this Court have jurisdiction to grant an absolute divorce on grounds of inappropriate marital conduct which includes (in the words of the statute)

1. That the husband or wife is guilty of such cruel and inhuman treatment or conduct toward the spouse as renders cohabitation unsafe and improper which may be referred to in the pleadings as inappropriate marital conduct.

Upon review of this record, this Court finds that the evidence preponderates in favor of a finding that the wife is guilty of inappropriate marital conduct which entitles the husband to an absolute divorce at this time.

The judgment of the Trial Court is modified accordingly.

The husband's second issue is:

2. Whether the trial court erred in awarding lifetime alimony to the wife.

The memorandum of the Trial Judge contains the following:

The court concludes that this is an appropriate case for periodic alimony. Wife should be able to obtain full time employment at the \$6.00 hour per rate she now earns at part-time employment. The court expects that she can increase her earning capacity substantially, but that she will probably never reach parity with husband's earning capacity. (The court notes that if husband works 40 hours a week his annual gross income would be about \$60,000.00). The decree will provide for alimony in the amount of \$1,500.00 per month beginning May 5, 1997. In addition husband will provide COBRA health insurance coverage for wife for three years from the entry of the decree. The alimony obligation upon the death of the wife, but not upon the death of the husband. To secure the alimony obligation, husband will maintain life insurance on his life with wife as beneficiary in an amount not less than \$119,000.00.

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Solicitor for wife will prepare and submit a decree in accordance with this memorandum.

The decree prepared by counsel and approved by the Trial Judge contains the following:

5. ALIMONY. Husband shall pay to Wife the sum of \$1,500.00 per month as periodic alimony for Wife's life and will terminate upon the death of the Wife but not upon death of Husband. However, upon death of Husband if the life insurance remains in effect as set forth herein and the proceeds paid to Wife then this will satisfy Husband's remaining alimony obligation in the event of his death. Husband shall pay said sums directly to (sic) beginning May 5th, 1997 and the 5th of each month thereafter as stated above. In addition Husband will provide COBRA health insurance coverage for wife for 3 years from the entry of the decree. The Memorandum of the Court is incorporated herein by reference as findings regarding the issue of alimony. Further, to secure the alimony obligation, Husband will maintain life insurance on his life with wife as beneficiary in an amount not less than \$119,000.00.

This Court has determined that the provision of alimony does not comport with the policy of preference for rehabilitative alimony set out in TCA § 36-5-101(d)(I), and that the decree should be modified to provide alimony of \$1,500.00 per month for 10 years with express reservation of power to modify, terminate, or extend the alimony upon showing of change of circumstances, including failure to make reasonable efforts at rehabilitation, full or partial rehabilitation or inability to achieve rehabilitation. For the present, the amount of \$1,500.00 per month is affirmed.

The husband's third, and last issue is:

Whether the trial court failed to make an equitable division of the marital estate.

The husband has appended to his brief a tabulation of values assigned by the parties and court to the marital estate and its disposition by the Trial Court. The tabulation is as follows:

**DIVISION OF MARITAL PROPERTY**

**ASSETS**

<u>Description</u>	<u>Appellant's (Husband's) Value (Exhibit 5)</u>	<u>Appellee's (Wife's) Value (Exhibit 22)</u>	<u>Value Found by Trial Court (R. 70)</u>	<u>Party To Whom Property Awarded by Trial Court</u>
1. Equity in house at Oxford Glen Drive	\$ 65,000.00	\$ 85,000.00	Ordered to be sold	\$43,520.00 (Wife) Any remaining balance divided equally
2. 1 Share - GM Stock	\$ 57.00	\$ 57.00	\$ 57.00	Wife
3. GM Pension Plan	\$ 822.44/mo.	\$ 822.44/mo.	\$ 822.44/mo.	Divided equally
4. Saturn Individual Savings Plan (IRA)	\$ 12,548.00	\$ 12,548.00	\$12,548.00	Husband
5. GM Personal Savings Plan (IRA)	\$ 15,480.00	\$ 15,480.00	\$15,480.00	Husband
6. Lockheed Checking and Savings Accounts	Non-existent	\$ 6,113.00	\$ 5,534.00	Husband
7. 1995 Pontiac SSEI (Equity)	\$ 11,585.00	\$ 11,560.00	\$11,585.00	Wife
8. 1996 Pontiac* (Equity)	\$ 550.00	\$ 3,490.00	\$ 2,500.00	Husband
* Both Wife and the Trial Court mistakenly used the wrong year (1997)				
9. 1981 Kawaski Motocycle	\$ 1,000.00	\$ 1,000.00	\$ 1,000.00	Husband
10. Tangible personal property In Wife's possession	\$ 4,140.00	\$ 1,056.00	\$ 4,000.00	Wife
11. Tangible personal property in Husband's possession	\$ 11,575.00	\$ 54,730.00	\$22,000.00	Husband
	\$ 100.00	Not listed	\$ 100.00	Husband
12. Husband's First Union Savings and Checking	\$ 110.00	Not listed	\$ 100.00	Husband
13. Wife's Bank Account	Unknown	Not listed	Unknown	

**TOTAL ASSETS AWARDED BY COURT**

**COURT VALUE**

**HUSBAND'S VALUE**

**WIFE'S VALUE**

Husband	Wife	Husband	Wife	Husband	Wife
\$59,984.44	\$59,573.22	\$41,253.00	\$59,162.00	\$93,397.00	\$56,193.00

**DEBTS**

<u>Joint Debts</u>	<u>Appellant's (Husband's) Value</u>	<u>Appellee's (Wife's) Value</u>	<u>Value Found By Trial Court</u>	<u>Party To Whom Property Awarded by Trial Court</u>
1. Mitsubishi TV	\$ 3,200.00	\$ 3,200.00	\$ 3,200.00	Husband
2. Prime Mastercard	\$ 4,900.00	\$ 4,900.00	\$ 4,900.00	Husband
3. GM Mastercard	\$ 3,300.00	\$ 3,300.00	\$ 3,300.00	Husband
4. GE Refrigerator/Freezer	\$ 2,300.00	\$ 2,300.00	\$ 2,300.00	Husband
5. Taxes and Penalty on \$10,000 IRA Loan	\$ 4,000.00	Not Listed	\$ 4,000.00	Husband
6. Agreement with daughter To pay off vehicle	\$ 4,500.00	\$ 4,500.00	\$ 4,500.00	Husband

<b>TOTAL JOINT DEBTS AWARDED</b>		
	Husband	Wife
	\$19,000.00	Zero
 <b>NET ESTATE DIVISION BY TRIAL COURT</b>		
	Husband	Wife
	\$40,984.44	\$59,573.22
 <b>HUSBAND'S SEPARATE DEBTS</b>		
1. Note to Father	\$ 5,740.00	
2. Husband's Attorney's Fees	\$ 4,865.00	
<b>HUSBAND'S TOTAL SEPARATE DEBT</b>	\$10,605.00	
 <b>WIFE'S SEPARATE DEBT</b>		
1. Attorney's Fees	\$ 6,000.00	
2. Anita Polk, Depositions	\$ 567.00	
<b>WIFE'S TOTAL SEPARATE DEBT</b>	\$ 6,567.00	

The division of the proceeds of the sale of the marital home is not finalized by the decree which requires that the home be sold and that the wife receive the first \$43,520.00 of the proceeds and that each party receive one-half of the residue of the remainder. The \$43,520.00 is listed in the above tabulation, but the unknown shares of the remainder are not. However, since such shares are to be equal, their omission or inclusion will not appreciably affect the percentage of the total estate to be received by each party.

The husband complains of the evaluation of his IRA at full value despite the income tax liability when withdrawn. This is a valid complaint, but his complaint of a 10% penalty for early withdrawal is not deemed valid. The amount of tax due on normal withdrawals cannot be accurately computed because the rate of tax and husband's income at the time of future withdrawal is unknown. The unascertainable tax liability is not ground for revising the division of property.



The husband complains that he was burdened with the entire marital debt of \$19,000.00. The equal division would reduce the share of the wife by \$9,500.00 to \$51,484.44 and increase the share of the husband by \$9,500.00 to \$50,093.22. However, in view of the relative earning capacity of the parties, exact equality of division of property is not deemed necessary, and the division made by the Trial Court is deemed equitable and proper, TCA § 36-4-121(a)(c); *Langford v. Langford*, 220 Tenn. 600; 421 S.W.2d 632 (1967); *Loyd v. Loyd*, Tenn. App. 1993, 860 S.W.2d 409.

The husband complains that he was assigned a \$5,534.00 bank account which was non-existent on the day of trial, having been closed on December 31, 1996, at which time the balance was \$3,854.16. In September, 1996, the balance was \$4,766.78. The foregoing dates were two and six months after the husband filed this divorce suit. The changes and closing of the account during the pending of the suit are not explained and are inconsequential to the substantial equity of the division of property.

The husband next complains of the value placed by the Trial Court upon the tangible personal property assigned to the parties. The husband admitted that the personal property assigned to him included tools, a part of which was lost by theft for which he filed an itemized insurance claim showing cost of \$9,995.86 and depreciated value of \$6,820.19. He also testified that he replaced the stolen tools. Otherwise, the total value of personal property assigned to the husband was the subject of a swearing contest between the parties. His testimony was \$11,575.00. The wife's testimony was \$54,730. The Trial Judge found \$22,000.00 which is within the testimony. The evidence does not preponderate against the finding of the Trial Judge in respect to this property.

The differences between the testimony of the parties as to the value of the personal property assigned to the wife is so small as to be inconsequential in respect to the equity of the division. As heretofore pointed out, the conclusion of the Trial Judge as to credibility is

entitled to great weight on appeal, and this rule applies to specific testimony. That is, a Trial Judge may credit one part of the testimony of a witness while discrediting another part of the testimony of the same witness.

Finally, the husband complains that the Trial Judge failed to add to his share of the marital property \$1,382.00 expenses incurred by him for delay in his re-occupation of the marital home, and \$900.00 spent by the wife for clothes for herself. These complaints, if honored, would not be of sufficient importance to affect the equitable nature of the property division ordered by the Trial Court.

The sum of the husband's complaints is not sufficient to justify modification of the division of marital property.

The wife presents an issue of the failure of the Trial Court to grant her attorneys fees and her entitlement to fees on appeal. In view of the cash received and to be received by the wife, the award of fees in the Trial Court and this Court is not required.

The judgment of the Trial Court is modified to grant to the husband an absolute divorce on the grounds stated herein and to change the grant of alimony to \$1,500.00 per month for 10 years subject to future modification in conformity with this opinion.

As modified, the judgment of the Trial Court is affirmed. Costs of this appeal are assessed to the appellant. The cause is remanded to the Trial Court for further proceedings in conformity herewith.

**MODIFIED, AFFIRMED AND REMANDED.**

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HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

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BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE