

IN THE COURT OF APPEALS OF TENNESSEE

**FILED**

November 30, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

**AT KNOXVILLE**

CYNTHIA DIANNE ELKINS,	) C/A NO. 03A01-9812-CH-00415
	)
Plaintiff-Appellee,	) HAMILTON CHANCERY
	)
vs.	) HON. R. VANN OWENS,
	) CHANCELLOR
JOSEPH C. ELKINS,	)
	) AFFIRMED, AS
Defendant-Appellant.	) MODIFIED

WILLIAM H. HORTON, HORTON, MADDOX & ANDERSON, PLLC, Chattanooga, for Plaintiff-Appellee.

ROBERT D. BRADSHAW, JENKINS & BRADSHAW, P.C., Chattanooga, for Defendant-Appellant.

**OPINION**

Franks, J.

In this divorce action, the husband appeals from the property division made by the Trial Court, and the wife appeals from the award of rehabilitative alimony and seeks attorney's fees.

The parties had been married for fifteen years, and met while the wife was attending dental hygiene school and the husband was attending dental school. The wife

worked as a dental hygienist for husband during the early years of the husband's practice, and also worked for another dentist part-time, to earn additional income.

The wife was later diagnosed with Hepatitis C, which the Trial Court found she had probably contracted as a result of working in her husband's office, and she also suffers from migraine headaches and fibromyalgia. She testified that due to her health problems and her fear of transmitting Hepatitis C to patients, she stopped working as a dental hygienist in 1995. The wife and her treating physician testified that she was considering Interferon treatments, a chemotherapy-type drug treatment which lasts 12-18 months and causes hair loss, nausea, fever, etc. The wife's physician testified that 20% of those who take the Interferon treatments will have permanent remission, such that the wife has an 80% chance of going into chronic liver disease and/or liver failure at some point in the future.

The evidence established the husband's net yearly income was \$127,000.00 in 1996 and \$123,000.00 in 1997. He also presented a rehabilitation counselor as an expert who testified the wife could earn \$18.50 an hour as a dental hygienist in Chattanooga, or \$20.02 per hour as a secondary teacher in Chattanooga. In this regard, the wife had worked as a secondary teacher of home economics approximately twenty years ago.

Our review of the Trial Court's property valuation and distribution is *de novo* with a presumption of correctness, unless the evidence preponderance otherwise. T.R.A.P. Rule 13(d), *Mondelli v. Howard*, 780 S.W.2d 769 (Tenn. Ct. App. 1989). The Trial Court has broad discretion in these matters, and its decision is given great weight on appeal.

*Mondelli.*

The husband's appeal focuses on certain items of property which we will review. The husband testified that while his accounts receivable report as of June 1998 showed a balance of \$137,206.00 and his overall collection rate was 90%, he was of the opinion that after analyzing the accounts, that the value of the accounts receivable was \$81,924.00.

The wife testified that in her work with the husband's office she was familiar with the accounts receivable, and believed the overall collection rate to be 98.1%. She also presented a CPA as an expert witness, who testified that the collection rate shown on the husband's accounts receivable summary for 1997, showed a collection rate of 97% for the first quarter, 91% for the second quarter, 96% for the third quarter, and 99% for the fourth quarter. The Trial Court valued the husband's accounts receivable at \$110,000.00 and awarded that amount to husband as part of his dental practice. The evidence does not preponderate against that valuation. *See Koch v. Koch*, 874 S.W.2d 571 (Tenn. Ct. App. 1993).

Next, the husband argues that it was improper for the Trial Court to apportion wife's debts incurred post-separation to her, and then to require husband to make a cash payment to wife to equalize the distribution, because this has the net effect of requiring husband pay one-half of those debts. The wife counters that she was forced to incur these debts because of the husband's erratic and inconsistent support, pending trial.

In *Mondelli*, the Court sets forth the factors a court should consider in dividing marital debt, including which party incurred the debt, the debt's purpose and who benefitted from incurring the debt, as well as who is best able to assume and repay the obligation. In this case, the debts in question were incurred by the wife during the parties' separation, pending trial. The wife was paying the mortgage, taxes and insurance on the parties' marital residence of over \$1,500.00 per month, which was more than the husband paid in support during some months. The wife was also paying her health insurance in the amount of \$430.00 per month, and she testified that she incurred substantial expenses relating to the child's activities. There is no evidence that the wife squandered the funds or unnecessarily incurred these debts.

In this case these debts were incurred as a result of the wife's inability to pay her and the child's living expenses, as well as keeping the mortgage current on the marital

residence. Accordingly, the purpose of the debt was marital, and benefitted both parties, and we affirm the Trial Court's apportionment of one-half of this debt to each party.

The husband also seeks a credit in the amount of \$8,000.00 which represents one-half of the funds that were in the parties' joint Smith-Barney account, which were spent by the wife during separation. The wife testified these funds were used to pay taxes and insurance, to make necessary home repairs, and to pay her attorney and other litigation expenses.

The husband was inconsistent with his support during this time, and the wife had little or no personal income. The account was joint, which could be accessed by either party at the time, and we conclude this situation is analogous to the case of *Watters v. Watters*, 959 S.W.2d 585 (Tenn. Ct. App. 1997), where the husband asked the Court to find that "unaccounted for" bonus funds in a joint account (that wife had spent during separation) should be included in the marital estate. The Court said:

It is clear that both parties had access to this joint account which was primarily used for household and living expenses. Such use at least to some extent benefitted Husband as well as Wife.

Accordingly, we concluded the Trial Court's decision to not include the \$16,000.00 value claimed by the husband in the marital estate, was appropriate.

Husband also claimed a debt in the amount of \$10,000.00 which was owed to his father for a loan made to the husband in January of 1996, should have been included. The husband borrowed the money because he felt his bank balance was low in his office account, and he worried that he would not be able to make payroll. The loan was evidenced by a promissory note, and the Trial Court determined this debt to be separate and not marital, and thus did not apportion it as part of the marital estate. The evidence preponderates against the Trial Court's finding that this debt was separate property. The debt was incurred during the marriage, was for the joint benefit of the parties, and allowed the husband to pay his employees and thus continue working and earning income. Since the dental practice was

found to be marital property, the loan increased its value and thus benefitted both parties.

This marital debt should follow the asset to which it is related, that is the dental practice, and should be assessed to the husband. The apportion of this debt will ultimately reduce the amount of the cash award from the husband to the wife by \$5,000.00, reducing the cash award to \$38,650.00. The overall distribution by the Trial Court was near equal, and equitable considering the statutory factors. This change does not alter the equitable distribution intended by the Trial Court. As modified, we affirm the respective awards of marital property to the parties by the Trial Court.

The Trial Court awarded rehabilitative alimony to the wife for a period of four years.<sup>1</sup> Our standard of review of the Trial Court's findings of fact is *de novo* with a presumption of correctness. However, the Trial Court's conclusions of law are not afforded the same deference.

In T.C.A. §36-5-101(d)(1) it is clear there is a preference for rehabilitative alimony. Courts may grant alimony in futuro when rehabilitative alimony is not appropriate. *Long v. Long*, 968 S.W.2d 292 (Tenn. Ct. App. 1997).

The most important factors to consider in awarding alimony are need and the ability to pay. *Ford v. Ford*, 952 S.W.2d 824 (Tenn. Ct. App. 1996). Moreover, a party obtaining a divorce should not be put in a worse financial condition than she was before the other party's misconduct caused the divorce. *Long*. Alimony is not meant to provide a former spouse with total financial ease, but should be awarded "in such a way that the spouses approach equity." *Id.*

The wife cannot hope to achieve the standard of living to which she was accustomed during the fifteen years of marriage.

The wife's need is further exacerbated by her health problems. The husband clearly has the ability to pay, since his earnings are in excess of \$120,000.00 per year, and he apparently has disposable income, as evidenced by his lavish expenditures on his

girlfriend. Pursuant to T.C.A. §36-5-101(d)(1)(K), it is appropriate to consider the fault of the husband. Given these facts, clearly the wife is entitled to an award of alimony.

The issue thus becomes whether the wife can in fact be rehabilitated. Pursuant to the teachings of *Ford* and *Long*, and other cases dealing with this issue, it is inappropriate to award rehabilitative alimony where rehabilitation is not feasible. These cases deal with situations where one spouse is economically disadvantaged when compared to the other spouse, and thus could not be economically rehabilitated. In this case, rehabilitation is not feasible, not only because of the economic disparity between the parties earning capacity, but also because of the wife's serious health condition, which only has a 20% chance of improving. Accordingly, the Court's award of alimony should have been in futuro, rather than rehabilitative, and we modify the judgment accordingly.<sup>2</sup>

Finally, the wife asks that she be awarded attorney's fees incurred on appeal. Appellate courts may award attorney's fees incurred on appeal, *See Seaton v. Seaton*, 516 S.W.2d 91 (Tenn. 1974), but an award of attorney's fees is generally not appropriate when both parties are partially successful in their appeals. *See Dellinger v. Dellinger*, 958 S.W.2d 778 (Tenn. Ct. App. 1997).

Pursuant to the alimony statute, T.C.A. §36-5-101(I) the court may "make any order that may be proper to compel a spouse to pay any sums necessary for the support and maintenance of the other spouse, and to enable such spouse to prosecute or defend the suit" and further provides that, as with alimony issues, need and ability to pay are the most important factors to consider. The wife has cash assets from the property division and under the circumstances we decline to award these fees to the wife.

The cost of the appeal in our discretion is assessed to the husband.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P.J.

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Charles D. Susano, Jr., J.