

IN THE COURT OF APPEALS OF TENNESSEE

FILED

December 13, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

AT KNOXVILLE

GLORIA GEIGER NEUENSCHWANDER,)	C/A NO. 03A01-9903-CH-00120
)	
Plaintiff-Appellant,)	KNOX CHANCERY
)	
vs.)	HON. WILLIAM M. DENDER,
)	CHANCELLOR BY DESIGNATION
ROY PATRICK NEUENSCHWANDER,)	
)	AFFIRMED IN PART, REVERSED
Defendant-Appellee.)	IN PART, AND REMANDED

L. CAESAR STAIR, III, BERNSTEIN, STAIR & McADAMS, LLP, Knoxville, for Plaintiff-Appellant.

WILLIAM W. JONES, THE JONES FIRM, Knoxville, for Defendant-Appellee.

OPINION

Franks, J.

In this divorce action, the Trial Court granted a divorce to the wife, ordered the marital residence sold, and divided the marital property almost equally. The wife was awarded \$3,000.00 per month rehabilitative alimony for four years, and attorney's fees of \$5,000.00. The husband's Motion to Alter or Amend the judgment to reflect the changed bank account balances was sustained, and wife has appealed from the final Judgment and the Order on the Motion to Alter or Amend.

We review the Trial Court's findings of fact *de novo* with a presumption of correctness. T.R.A.P. Rule 13(d). No presumption of correctness attaches to the Trial Court's conclusions of law.

The wife insists the Trial Court erred in its award of rehabilitative alimony. Our statutory scheme regarding awards of alimony is set forth in T.C.A. §36-5-101(d)(1). While the statute makes clear there is a preference for rehabilitative alimony, courts may grant alimony *in futuro* where rehabilitation is not feasible. *Long v. Long*, 968 S.W.2d 292 (Tenn. Ct. App. 1997).

The most important factors to consider in an award of alimony are need and ability to pay. *Ford v. Ford*, 952 S.W.2d 824 (Tenn. Ct. App. 1996); *Long*. Further, the party obtaining the divorce should not be put in a worse financial condition than she was before the opposite 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.* at 294.

The parties' tax returns for the past six years demonstrated that husband's average yearly total income was approximately \$195,000. Wife last earned \$14,000 per year as a teacher in 1986, but husband argues that her earnings would be greater now.

Assuming, as the husband argues, that the wife could resume full-time employment as a teacher in Knox County schools with a gross yearly income of \$25,056.00, that amount would fall short of the wife's needs as established at trial. Accordingly, there is no question that the wife is economically disadvantaged, as compared to the husband, and would not achieve a standard of living to which she was accustomed during this twenty-six year marriage.

Moreover, pursuant to T.C.A. §36-5-101(d)(1)(K), it is proper to consider that husband is at fault in this divorce due to his extramarital affairs.

With the need for alimony established, the issue is whether the wife can be

rehabilitated. Pursuant to the teachings of *Ford* and *Long* and other cases dealing with this issue, it is improper to award rehabilitative alimony where rehabilitation is not feasible. These cases deal with situations where one spouse is so economically disadvantaged when compared with the other, that the spouses could not be economically rehabilitated. Similarly here, rehabilitation is not feasible because of the huge disparity between the parties' earning capacities, and we conclude that the alimony award should be *in futuro*, rather than rehabilitative.

The trial judge seemed to believe that he could not award periodic alimony, stating that to do so would be "contrary to the law in Tennessee."¹ The Court made no finding regarding the wife's ability to be rehabilitated, except to say that "no one has the right to sit down and not do anything" and the wife "needs to work and make her own living". These observations are not a finding of fact that the wife can be economically rehabilitated. Moreover, such a finding would be against the weight of the evidence. The wife is nearly 50 years old, has a teaching certificate, and six years experience in teaching the fourth grade. While she can earn income, and should, such a level of income will not be sufficient to meet her needs.

Next, the wife argues that it is improper for the Trial Court to reduce the monthly expenses listed in her affidavit, when setting her *Pendente Lite* support. *Pendente Lite* support is within the Trial court's discretion, and we find no evidence that the Trial Court in this case abused that discretion. *Brock v. Brock*, 941 S.W.2d 896 (Tenn. Ct. App. 1996).

As to the property division, T.C.A. §36-4-121(c) sets forth factors that must be considered when distributing a marital estate pursuant to divorce. The law is also well settled that property division does not have to be mathematically equal to be equitable. *Ellis v. Ellis*, 748 S.W.2d 424 (Tenn. 1988.)

Our review of a trial court's valuation and distribution of marital property is *de*

novo affording a presumption of correctness, unless the evidence preponderates otherwise. T.R.A.P. Rule 13(d.) Moreover, the trial court has broad discretion in these matters, and its decision is given great weight on appeal. *Mondelli v. Howard*, 780 S.W.2d 769 (Tenn. Ct. App. 1989).

In this case, the Trial Court distributed the parties' property almost equally, and wife concedes that she was given nearly 49% of the marital estate. The evidence does not preponderate against the Trial Court's award. In this regard, the wife also contends the marital estate should not have been ordered sold, such as she is being forced from her home. On this point, the trial judge has wide discretion, and here the Trial Court felt that the only way to equably distribute the parties' property was to order the house sold and the debt on the house satisfied. The evidence does not preponderate against the Trial Court's ruling that the house be sold in order to effectuate an equitable division, especially since the wife did not demonstrate a real need to retain that property.

Finally, after the Final Judgment of Divorce was entered, the husband filed a Motion to Alter or Amend the Final Judgment, based upon Rules 59 and 60 of the Tennessee Rules of Civil Procedure. The Trial Court, upon hearing the motion, allowed the husband to present affidavits from himself and a bank officer with statements attached showing the balances in the accounts in January 1999, and also allowed the husband to testify regarding these accounts. The wife's counsel objected to the motion evidence. The husband testified that the balances as of January 1999 were different than what was reflected on Trial Exhibit #6, and that the balances were on the bank statements which were sent to his office every month. Husband did not testify, however, that he had never looked at the statements before, had not had access to them during the entire period, had never reviewed Trial Exhibit 6, or advance any other reason why he had failed to object to the values at trial.

Husband's Motion based upon both Rule 59 and Rule 60 of the Tennessee Rules of Civil Procedure, did not specify the grounds upon which relief should be granted.

The language of T.R.C.P. 59.04 provides that a “motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment.” And “the purpose of T.R.C.P. 59 motions is to prevent unnecessary appeals by providing trial courts with an opportunity to correct errors before a judgment becomes final.” *Bradley v. McLeod*, 984 S.W.2d 929 (Tenn. Ct. App. 1998). The Court further explained:

Tenn. R. Civ. P. 59.04 motions may be granted (1) when the controlling law changes before the judgment becomes final, (2) when previously unavailable evidence becomes available, or (3) when, for sui generis reasons, a judgment should be amended to correct a clear error of law or to prevent injustice. They should not, however, be granted if they are simply seeking to relitigate matters that have already been adjudicated.

Typically, T.R.C.P. Rule 59 is used to present newly discovered evidence in order to attempt to reverse a grant of judgment. *See, e.g., Bradley; Collins v. Greene County Bank*, 916 S.W.2d 941 (Tenn. Ct. App. 1995).

The husband cannot prevail on the ground that the evidence was newly discovered, because the bank statements were in his possession during the entire period the litigation was pending, as he so testified. Husband has not and cannot assert that there has been any change in the controlling law. Thus, his only potential argument must be based upon the third ground listed above, i.e., to prevent injustice. It is not appropriate for the husband to rely upon a rule established to “prevent injustice” and “unnecessary appeals”, when he could have easily detected the error before the judgment was ever rendered. He is, in fact, seeking to relitigate the property settlement issue. In this regard *see Seay v. City of Knoxville*, 654 S.W.2d 397, 400 (Tenn. Ct. App. 1983), Likewise, T.R.C.P. 60 does not establish a basis for relief for the husband. The husband’s motion was filed on the 30th day after the judgment was entered, and the judgment had not become final. *See Campbell v. Archer*, 555 S.W.2d 110 (Tenn. 1977). Moreover, Tenn. R. Civ. P. 60 is “not for use by a party that is merely dissatisfied with the results of his case.” *NCNB Nat. Bank of North Carolina v. Thrailkill*, 856 S.W.2d 150, 153 (Tenn. Ct. App. 1993). Under T.R.C.P.

60.02(1) regarding mistake or excusable neglect, the courts have made it clear that “mere negligence or inattention of a party is no ground for vacating a judgment against him. Carelessness is not synonymous with excusable neglect.” *Thrailkill*, quoting *Food Lion v. Washington County Beer Bd.*, 700 S.W.2d 893, 896 (Tenn. 1985). Also, the courts have made clear that the standards of T.R.C.P. 60.02(5) “are more demanding than those applicable to the other grounds for [Rule] 60.02 relief. Tennessee Rule of Civil Procedure 60.02(5) is intended to provide relief only in the most unique, exceptional or extraordinary circumstances. *Thrailkill*, at 154. The husband has failed to carry the burden to establish a basis under this rule for relief. See *Duncan v. Duncan*, 789 S.W.2d 557 (Tenn. Ct. App. 1990).

While this Court reviews the Trial Court’s decision on this issue under an abuse of discretion standard, we conclude the Trial Judge abused his discretion in granting the motion, since husband offered no proper basis to support the relief sought. Accordingly, the Order amending the Final Judgment of Divorce is reversed.

Finally, the wife argues that she should have been awarded additional attorney’s fees by the Trial Court.

The award of attorney’s fees is within the discretion of the Trial Court. The proof that was presented regarding the wife’s attorney’s fees was the wife’s testimony that she had already paid \$9,000.00 to her attorney from marital funds, and her attorney’s representation to the court that an additional \$17,000 in fees remained unpaid. Based upon the property that the wife was awarded in this divorce, there should be sufficient funds from which to pay any fees due to her lawyer. We find no basis to hold that the Trial Judge abused his discretion in this regard.

Accordingly, the Trial Court’s judgment is affirmed in part and reversed in part, and the cause remanded, with one-half of the cost on appeal assessed to Roy Patrick Neuenschwander, and one-half of the cost of the appeal assessed to Gloria Geiger

Neuenschwander.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

John K. Byers, Sr.J.