IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 30, 2022 Session

KRISTIE M. HAUN v. JASON B. HAUN, ET AL.

Appeal from the Circuit Court for Bradley County
No. V-20-045 Lawrence Howard Puckett, Judge

No. E2021-01012-COA-R3-CV

This is an appeal regarding the final decree of divorce for this couple. The husband's in-laws are included as intervening petitioners. The trial court granted the wife a divorce on the ground of inappropriate marital conduct, $1250 per month alimony *in futuro*, and payment of her attorney fees as alimony *in solido*.[1] Further, the court awarded a judgment to the intervening petitioners of $297,670, with a lien in their favor upon all the real property to secure payment of the indebtedness. The husband appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and KRISTI M. DAVIS, JJ., joined.

Karla C. Miller and Rachel S. Upshaw, Nashville, Tennessee, for the appellant, Jason B. Haun.

Andrew J. Brown, Cleveland, Tennessee, for the appellee, Kristie M. Haun.

H. Franklin Chancey, Cleveland, Tennessee, for the appellees, William C. Whaley and Janet Yvonne Whaley.

[1] The final attorney fee award was $30,456.68. Expenses in the amount of $2,080.74 were also found to be reasonable, necessary, and proper.

OPINION

I. BACKGROUND

Kristie M. Haun ("Wife") and Jason B. Haun ("Husband") married on December 1, 1992. They were married for 27 years as of the date of filing for the divorce by Wife. The parties had three children during their marriage; only one of those children was a minor and subject to the trial court's jurisdiction at the time Wife filed for divorce. By the trial date, the children of the couple were all at least 18 years of age and graduated from high school.

Until approximately 2006, Wife was a stay-at-home mother and did not work outside the home. While Wife's mother was receiving chemotherapy treatment in 2006, Wife began working at her mother's business, Ed's Cycles, a Yamaha dealership selling motorcycles, four-wheelers, and wave runners, complete with a service and parts department. After her mother's recovery, Wife, 50 years of age at the time of trial and a high school graduate, continued working at Ed's Cycles and was a manager at the time of trial, making approximately $41,000 per year. In addition, Ed's Cycles covered the health insurance premium of $1,200 per month for Wife, Husband, and their youngest child. The health insurance is secured through the Affordable Care Act marketplace, with Ed's Cycles paying the premium.

During the time Wife was a stay-at-home mother, Husband, 49 years old at the time of the trial, worked with his father and provided the sole means of financial support for the family. Husband lost his job at some point and began working at an industrial company for approximately eight years. Between 2000 to 2002, Husband started a used car business, initially known as Pioneer Sales and Leasing; a few years later, the name became Wholesale Auto. Wife, who performed some clerical work for the car business, acknowledged that Wholesale Auto was financially successful.

The record reveals that around 2014 or 2015, Husband, who has a high school diploma but no higher education or vocational training, ceased his financial support of the family and otherwise neglected his business. Husband was gambling three or four times a week at casinos in North Carolina. Husband ultimately confessed to Wife that he was having an affair. Financial problems resulted in Wife obtaining a mortgage upon the marital residence, which had previously been unencumbered.

In 2019, Wife contended that Husband was generally unsupportive and became more verbal and aggressive. Wife ultimately determined that a divorce was necessary following a trip with Husband during which she believed she was drugged and injured, an incident at Ed's Cycles when Husband became violent, and upon Husband showing pictures of her taken while Wife was sick and scantily clad/nude to her children and people

at Ed's Cycles.

On January 23, 2020, Wife filed a complaint seeking a divorce on the grounds of inappropriate marital conduct. She additionally alleged that she was a victim of domestic violence. Shortly before filing for divorce, Wife filed a petition for an order of protection against Husband, which she obtained ex-parte. Nearly a month later, Wife filed her first motion for criminal contempt against Husband, alleging that (1) he had stalked her in violation of the ex-parte order of protection and (2) that he had transferred two parcels of marital real property during the divorce proceeding and in violation of Tennessee Code Annotated section 36-4-106(d)(1)(A) (Divorce Injunction). Wife eventually submitted an amended motion for criminal contempt against Husband, alleging a total of 85 separate acts of criminal contempt. Ultimately, Husband was found guilty of 27 counts of criminal contempt associated with his harassment and abuse of Wife as well as his destruction (or attempted destruction) of marital property, including "undisputed video tape recordings of Husband speaking to Wife, via video, using demeaning and abusive language as he burns and destroys photos and other valuable items of personal property belonging to Wife." Husband was sentenced to 27 days in jail as punishment for these findings of contempt. During the trial, the court additionally found Husband guilty of two counts of direct criminal contempt for his use of profanity and fined $50 for each.

In July 2020, the court entered orders prohibiting the parties from any gambling activity during the pendency of the divorce and further awarding Wife $1,250 per month in alimony *pendente lite* from Husband. The court noted that this was about the amount of the house payment on the marital residence. In February 2021, however, the court found Husband in willful contempt of court for failure to pay the ordered alimony.

On May 6, 2021, the divorce trial began. The following month, on June 9, 2021, a judgment for divorce was awarded to Wife due to Husband's inappropriate marital conduct. The court equitably divided the marital property and debt, and awarded Wife the sum of $1,250 per month alimony *in futuro* as well as her attorney fees ($30,456.68) as alimony *in solido* to equalize the property division.[2] The court found that Wife needed this amount of money to maintain her pre-divorce lifestyle and that Husband had the ability to pay this amount as alimony *in futuro*. In support of this award, the court found Wife incapable of achieving an earning capacity that would permit her to maintain the same standard of living after divorce that she enjoyed during the marriage. Furthermore, the court found Wife is unable to earn more than $41,000 per year in income and that economic rehabilitation of Wife is not feasible, thus making long term support necessary. The court determined that Husband was capable of generating income around $100,000 annually, and maintaining and permitting Husband an avenue to generate this income was a basis for awarding him certain realty and car inventory for the used car business, Wholesale Auto.

[2] Wife was awarded $2,080.74 in discretionary costs.

After the court denied Husband's motion to alter or amend, he thereafter filed a timely notice of appeal. The resulting appeal involves (1) the couple's divorce and (2) the intervening petition regarding debts claimed owed by Husband and Wife to Wife's parents, William C. Whaley and Janet Whaley ("Whaleys") filed on September 11, 2020. On June 9, 2021, the trial court entered a "Judgment on Behalf of Intervening Parties," in which all of the Whaleys' claims were sustained in a total amount of $297,670, which was ordered assessed against Husband and Wife, jointly and severally.

II. ISSUES

We restate the issues raised in this appeal as follows:

1. Whether the late filing of the notice of appeal as to the claims of the Whaleys should result in dismissal of the appeal as to the court's judgment on their petition;

2. Whether the trial court erred in its determination that the interveners' four subject transactions were loans to Husband and Wife for which the Whaleys should be repaid and in making Husband and Wife jointly and severally liable for all of them:

   A. Whether the $120,000 that was paid to the Estate of Emma Jean Gregg was a "demand note," and was subject to the statute of limitations of six years rather than ten years, resulting in the Whaleys' claim being time-barred;

   B. Whether the $78,000 that was wired from Janet Whaley to Husband on December 10, 2015, should have been assessed solely to Husband for repayment;

   C. Whether the $19,670 in four separate checks in May and August of 2015 from Ed's Cycles to Jason Haun, Kristie Haun, and Wholesale Auto were loans, and whether the three-year statute of limitations for conversion applies to these transactions; and

   D. Whether the $109,640.49 paid on June 4, 2012, to assist Wife in purchasing property at 300 Griffith Drive and 350 Griffith Drive in Cleveland, Tennessee, was not a loan to the parties, but was a loan to Wife for which she should be solely responsible for repayment.

3. Whether the court erred in its determination of the type, duration and

amount of alimony awarded to Wife;

4. Whether the trial court erred in its determination of the property division as to certain items; and

5. Whether the trial court erred in awarding Wife attorney fees.

III. STANDARD OF REVIEW

A trial court has a great deal of discretion in determining the manner in which it divides marital property. Absent a decision inconsistent with the factors set out in Tennessee Code Annotated section 36-4-121(c) or a situation in which the evidence preponderates against the decision, the appellate court will generally defer to the trial court's decision. *Jolly v. Jolly*, 130 S.W.3d 783, 785-86 (Tenn. 2004). An equitable distribution is not necessarily an equal one. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Further, a trial court has broad discretion to determine the need for spousal support, as well as the appropriate nature, amount, and duration of that support. Tenn. Code Ann. § 36-5-121; *Herrera v. Herrera*, 944 S.W.2d 379, 387 (Tenn. Ct. App. 1996). An award of spousal support will not be disturbed on appeal absent an abuse of the trial court's discretion. *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006). An abuse of discretion occurs when a court "applie[s] incorrect legal standards, reache[s] an illogical conclusion, base[s] its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008). When reviewing an alimony determination by the trial court, the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision. *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 102 (Tenn. 2011).

To the extent that factual findings hinge on witness credibility, "trial courts are accorded significant deference in resolving factual disputes when the credibility of the witnesses is of paramount importance." *Davis v. Davis*, 223 S.W.3d 233, 238 (Tenn. Ct. App. 2006). Appellate courts will not re-evaluate a judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (internal citations omitted).

IV. DISCUSSION

Claims by the Whaleys

At trial, the court found as follows:

The Court has resolved all conflicting testimony in favor of interveners, Janet and W.C. Whaley and their witnesses, including witness Kristie M. Haun.

All the credible testimony supports the conclusion that all the amounts for which the Whaleys seek recovery represent amounts borrowed by Jason and Kristie Haun and were not gifts but were loans to them. Janet Whaley loaned one hundred twenty thousand dollars ($120,000.00) to the Hauns, with which to purchase the lot at 642 Inman St., on which the parties' business Wholesale Auto sits, Janet Whaley borrowed from her retirement account to pay the Hauns out of a jam with their Floor Plan provider and Jason Haun promised he would repay her from expected sales of the inventory involved but he has never done so completely and the parties still owe seventy-three thousand dollars ($73,000.00) of the seventy-eight thousand dollars ($78,000.00) the Hauns borrowed to keep their business, Wholesale Auto, financially viable.

Further, the nineteen thousand, six hundred seventy dollars ($19,670.00) Kristie Haun took from the Whaley's business, Ed's Cycles, was a loan from the Whaleys which they expected to be repaid by the Hauns. This money was used by the Hauns to pay off obligations of Wholesale Auto, the business of Jason B. and Kristie M. Haun.

The Whaleys also loaned the Hauns one hundred nine thousand, six hundred forty dollars ($109,640.49) to purchase Wife's ancestral property at 350 Griffith Drive and 300 Griffith Drive which has been promised by all the parties to eventually go to [Daughter] and her husband. Based upon the Hauns' and Whaleys' representation, [Daughter] and her husband invested forty thousand dollars ($40,000.00) to improve the residence at 350 Griffith Dr.

As to the defenses raised by Jason Haun, the Court finds that his and Kristie Haun's repeated promises to repay all of these loans takes each of these loans outside of the statute of limitations defense he has raised. The Court agrees with Mr. Haun that Mr. Haun timely raised this defense. Nevertheless, the Court finds that the Hauns continually reaffirmed their promise to re-pay these loans. Both Jason B. Haun and Kristie M. Haun are legally held to their promises which they knew were sufficient for the Whaleys to forbear filing suit upon. The Whaleys acted reasonably in relying upon the Hauns' repeated assurances of payment and sought collection of all these debts only when Jason B. Haun unequivocally expressed his intention not to honor or pay these debts when the Haun divorce case began. Further, the Court finds that the statute of limitations has not run on the Whaleys' cause of action for payment of the one hundred twenty thousand dollars ($120,000.00) because the Gregg Note was a demand note that was extended by agreement of the parties on the terms existing before Mr. Gregg's decease i.e. a demand note with payment of interest only. As such the ten (10) year statute of limitations

applies. (*Tenn. Code Ann. §* 47-3-118). The Gregg demand note was paid on January 5, 2011 by the Whaleys. Kristie Haun's testimony is accepted and the Court finds as a fact that she and Jason Haun represented to the Whaleys that, upon the Whaleys' payment of the Gregg Note, the Hauns would continue to follow the same terms as the original note as to payment of interest only. The Court finds that the Whaleys were never informed of the Hauns' intention not to repay the note until the divorce was filed by their daughter Kristie Haun and Jason Haun expressed his intentions not to pay them. Under these circumstances, the Whaleys are entitled to their claim on the demand note in the amount of one hundred twenty thousand dollars ($120,000.00).

The Court further finds that all the claims of the Whaleys are for amounts that Hauns borrowed to support and mutually benefit Jason B. and Kristie M. Haun. They all are joint marital debts of the Hauns and will be treated as such by the Court in arriving at an equitable division of the Hauns' marital property and debt. The Court finds that the Hauns intermingled all the proceeds of the Whaleys' loans to them with marital property, primarily their Wholesale Auto business but also the one hundred nine thousand, six hundred forty dollars and forty-nine cents ($109,640.49) that was used by the Hauns to pay off the 350 Griffith Dr. Property. Therefore, the Court finds this property was transmuted into marital property despite title being placed solely in Kristie M. Haun's name. The first five thousand dollars ($5,000.00) Mr. Haun paid down to hold the property came from joint marital funds. Also, the one hundred twenty thousand dollars ($120,000.00), the seventy-eight thousand dollars ($78,000.00), (now seventy-three thousand dollars ($73,000.00) owed) and the nineteen thousand, six hundred seventy dollars ($19,670.00) loans were received by the Hauns and used to financially support the parties' jointly owned and marital business, Wholesale Auto.

Wife and intervening petitioners argue that Husband's appeal of the Whaleys' claims should be dismissed for being untimely. Wife and the Whaleys argue that Husband's failure to appeal the judgments before July 25, 2021, must result in the dismissal of the appeal as to these claims. Tenn. R. App. P. 4.

By order entered March 14, 2022, this court denied the motion to dismiss filed by the Whaleys without prejudice to their right to raise the issues in their appeal brief. This court also clarified that the time for appeal as to the Whaleys' claims did not begin to run on June 24, 2021, but rather on August 2, 2021, the date of the order on Husband's motion to alter or amend, pursuant to Rule 3(a) of the Tennessee Rules of Appellate Procedure. Husband therefore had until September 1, 2021, to file a notice of appeal.

We find no prejudice to the appellees or the appellate process by excusing the

oversight of Husband's counsel to include the Whaleys as appellees in the original notice of appeal. Dismissal of the appeal against the intervening petitioners is not required. *See G. F. Plunk Const. Co. v. Barrett Properties, Inc.*, 640 S.W.2d 215, 216-17 (Tenn. 1982).

$120,000 loan to Husband and Wife

The $120,000 obligation stemmed originally from a promissory note Husband and Wife signed to James Howard Gregg[3] on February 21, 2003, in order to purchase the real property at 642 Inman Drive, where the parties' business, Wholesale Auto, operated. The demand note provided, in pertinent part, that Mr. Gregg had loaned Husband and Wife the sum of $120,000 at the rate of 7% interest per year on which they would make interest only payments, and required the loan to be paid in full within one year of the date of execution of the note. The note also referenced a deed of trust being placed on the subject property. However, the only amounts Husband and Wife ever paid toward this promissory note were interest payments of $700 per month. In 2011, after Mr. Gregg and his wife Emma Jean Gregg had both died, the Estate of Emma Jean Gregg demanded full payment of the $120,000 principal still owed on the promissory note. Alternatively, the Estate would foreclose on the real property. Husband and Wife did not have the money to pay the demanded amount, but they reached an agreement with the Whaleys, at which time the Whaleys agreed to pay the obligation owed to the Estate of Emma Jean Gregg in exchange for Husband and Wife agreeing to pay 7% interest on the $120,000 and the principal upon demand. Thereafter, Husband occasionally made interest payments as agreed but otherwise made promises to pay the amount due the Whaleys. Mr. Whaley testified that, on occasion, he spoke with Husband about the payments having stopped and that they needed to restart. However, the Whaleys did not push the issue because Husband and Wife were having a difficult time financially. According to Mr. Whaley, Husband always indicated that he would try to get the Whaleys paid for the amounts owed and never indicated that he did not intend to repay the debt or contest the amount owed. Wife related the only time Husband asserted that he did not owe the Whaleys for the $120,000 was after she filed for divorce. She recalled that prior to undertaking the obligation related to the $120,000, she, the Whaleys, and Husband all sat down to discuss the terms for repayment. Wife testified that she and Husband received the loan under the same conditions as the note with Mr. Gregg, and only upon Wife filing for divorce did Husband assert the $120,000 was a "gift" from the Whaleys and not a loan. Husband acknowledged having conversations with Mr. Whaley about repaying this debt and stated that he never said he would not pay the obligation.

Husband observes that the trial court apparently considered the $120,000 a "demand note" because the testimony was that Husband and Wife agreed to repay the loan under the same terms and conditions as were contained in the Gregg note, as that note was, on its face, a "demand note." Causes of action "on demand notes shall be commenced within ten

[3] Mr. Gregg was a relative of Wife's.

(10) years after the cause of action accrued." Tenn. Code Ann. § 28-3-109(c). Husband contends, however, that the payment by the Whaleys extinguished the Gregg note, and the action brought by the Whaleys is an action on an alleged loan, not on a note. He asserts that at no point did either of the Whaleys attempt to reduce the agreement for repayment to writing nor did they place any type of lien or other security interest on the subject property. Husband maintains that there was no formal demand ever made for repayment. Husband further argues that the Whaleys did not allege "reliance," equitable estoppel, or promissory estoppel in their motion to intervene and intervening petition. He asserts that any reliance by the Whaleys would be misplaced considering the fact that they did not receive any payments after early 2012. Husband also notes that they did not allege any promise to repay in their pleadings, which occurred six years after the alleged loan. Finally, there was no proof at trial that any promise to repay was made after January 14, 2017. Accordingly, Husband submits that the trial court erred in its conclusion that the claim by the Whaleys for $120,000 was not barred by the six-year statute of limitations. We must review this statute of limitations question de novo.

In this case, the court determined that the $120,000 note is evidenced by the check payable from Janet Whaley to the Estate of Emma Jean Gregg dated January 13, 2011, which was tendered to the Estate by Husband on January 14, 2011. The trial court found that by agreement, the terms of the promissory note to James Howard Gregg were incorporated into the agreement between Husband and Wife and the Whaleys with the exception that only interest was to be paid. No one ever told Husband that the $120,000 was a gift. The Whaleys were only informed of an intention not to repay the debt after the divorce was filed and Wife informed them of Husband's intent. Further, despite the plain language of the court's order regarding "repeated promises to repay" being directed at "all of these loans," not just the $120,000, the trial court found that Husband's own testimony at trial confirmed his repeated promise to repay the debt:

> Q: All right. So one thing that's true about the $120,000.00 for the Gregg matter is that Mr. Whaley approached you about repaying that amount, correct?
>
> A. Mr. Whaley said something to me about it two or three times and said that we're – we're agreeing or we're working off the Howard Gregg terms. And I said, "If that's what you and Kristie agreed to, if that's what yall agreed to" – that's another one of the deals done behind my back . . . [portion omitted]
>
> Q. And so when he approached you about paying back the money, you said, three times -
>
> A. No. I said two or three times, yeah.

Q. Two or three times.
At no point in time did you ever say, "No, sir, I'm not paying you, I don't owe you anything," did you, or similar language?

A. I said, "My wife just paid yall $5,000."

Q. Okay. But you never said, "I'm not paying you anything," right?

A. I didn't say that. I didn't borrow the money.

Q. But when he came to you asking, you didn't say, "No, I don't owe you," right?

A. Well, when he –

Q. Just "yes" or "no," and then you can explain.

A. No. I ain't going to explain. No, I didn't.

We find *Wilson v. Harris*, 304 S.W.3d 824 (Tenn. Ct. App. 2009), instructive here. In that case, plaintiff loaned money to defendants for the purchase of real estate without a written agreement, and defendants orally promised to repay. We determined that this arrangement was not a demand note but rather an oral promise to pay money advanced contemporaneously with the promise; thus, the six-year statute of limitations applied. *Id*. at 827. Under the facts of the instant case, although the original obligation to Mr. Gregg was a demand note, that note was extinguished when the Whaleys wrote the check to pay it off; what remained was an oral promise by the Hauns to pay the Whaleys pursuant to the same terms they had with Mr. Gregg. We observed in *Wilson* that "[t]he cases are in accord that the six-year statute of limitation applies to debts that are not evinced by a note." *Id*. The next question considered in *Wilson* was when the cause of action accrued. We determined that when an obligation neither explicitly states that it is due on demand nor sets a specified date for repayment, it is, nevertheless, a demand obligation, and the cause of action accrues at once, i.e., when the money was received. *Id*. Thus, the cause of action in the case before us accrued on January 14, 2011, and the six-year statute of limitations would have run on January 14, 2017. However, we agree with the trial court's finding that Husband repeatedly made promises to pay and, specifically, failed to contest the obligation until the divorce was filed in 2020. Thus, in our view, his actions tolled the statute of limitations. *See Graves v. Sawyer*, 588 S.W.2d 542, 544 (Tenn. 1979) (holding that a promise to pay a debt serves to "keep the debt alive for the statutory period from that time"). Accordingly, we conclude that the complaint for recovery of this debt was timely filed. As noted by Wife, the debt is marital; thus, the court did not err in finding that the judgment should enter against Husband and Wife, jointly and severally, for $120,000. As the debt was incurred for the purpose of securing the purchase of the property for Husband's car

business, which will continue in operation following the finalization of the divorce and represents Husband's principal source of income, the court correctly allocated the debt to Husband as part of the equitable division of the debts and assets.

$78,000 Obligation assessed to Husband

The uncontroverted proof at trial was that Husband called Mrs. Whaley and specifically said to her, "Mom, I need $78,000.00. I've got to pay off some titles so I can sell the cars" to pay a lender for the floorplan[4] at the dealership. Mrs. Whaley then borrowed the money from her Edward Jones retirement account and wired the $78,000 to the Wholesale Auto bank account on December 10, 2015. Testimony revealed that Wife took $5,000 from Husband, deposited the money in her account, and wrote a check to Edward Jones as a partial repayment on this debt. The court reduced the obligation from $78,000 to $73,000.

It appears that only $47,000 was needed to address the floorplan matter. No clear proof in the record establishes where the additional $31,000 went. There was some testimony that Husband and/or Wife may have spent/lost the money at a casino. The court assigned the full amount of this debt to Husband. Husband, however, contends that he should only be responsible for $47,000.

As noted earlier, the trial court has great discretion when allocating marital debt. *Jolly*, 130 S.W.3d at 785. Husband does not argue the allocation of this debt to him is inconsistent with the relevant statute, and he does not argue the evidence preponderates against the allocation. The court specifically found that the total amount loaned was to "pay off Wholesale Auto Floor Plan." The court awarded Husband all of the vehicles at his car business, and this debt is associated with that property. Given the fact Husband's testimony was found to not be credible and the court has significant discretion to allocate debt, the trial court's decision on this issue must be affirmed. As argued by Wife, equity supports the debt following the assets.

$19,670

The $19,670 obligation owed to the Whaleys from Husband and Wife stems from four checks written to Wholesale Auto, Husband, and Wife from the Whaleys' business checking account for Ed's Cycles. The checks at issue are as follows:

1. May 20, 2015 – Check to Wholesale Auto for $5,000.

2. May 22, 2015 – Check to Jason Haun for $6,670.

[4] An arrangement in which a company provides money to a dealership to purchase cars at auction.

3. August 1, 2015 – Check to Kristi Haun for $3,500.

4. August 12, 2015 – Check to Wholesale Auto for $4,500.

Husband's answer to the Whaleys' petition indicated that these checks were all "gifts" and not amounts he agreed to pay back to the Whaleys. However, at trial, Husband took a completely different position—he admitted the amounts were to be paid back to the Whaleys, but that he had already mostly paid them.

Husband now raises a statute of limitation defense for conversion related to the $19,670. Conversion is the appropriation of another's property to one's own use and benefit, by the exercise of dominion over the property, in defiance of the owner's right to the property. *Ralston v. Hobbs*, 306 S.W.3d 213, 221 (Tenn. Ct. App. 2009); *Hanna v. Sheflin*, 275 S.W.3d 423, 427 (Tenn. Ct. App. 2008); *Brandt v. BIB Enters., Ltd.*, 986 S.W.2d 586, 595 (Tenn. Ct. App. 1998); *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977). A cause of action for conversion occurs when the alleged wrongdoer exercises dominion over the funds in "*defiance of the owner's rights*." *Hanna*, 275 S.W.3d at 427 (citing *Mammoth Cave*, 569 S.W.2d at 836) (emphasis added). The statute of limitations for an action of conversion is three years. Tenn. Code Ann. § 28-3-105.

In the case at bar, Husband asserts that the Whaleys' cause of action for conversion of the $19,670 from Ed's Cycles accrued when they discovered the transactions during their review of the books of Ed's Cycles at the end of the year, which was in 2015. He contends that it is undisputed that Wife did not have permission to write these checks to herself or him. Husband argues that the statute of limitations for conversion of these funds ran at some point at the end of 2018. According to Husband, neither he nor Wife should be responsible for repayment of these funds.

Mrs. Whaley testified that at the end of the year, she and her husband were analyzing their business books and came across an "account to Jason Haun" for the $19,670. She then started asking questions about the account and discovered that Husband had come into Ed's Cycle's at different times and said he needed money to pay off things. Wife and her sister Gina, both of whom helped run the business, agreed to loan Husband the money because he promised to pay it back. Despite Husband paying back other amounts loaned from Ed's Cycles, he never paid the $19,670. When the "loans" to Husband were discovered, the Whaleys wrote a check to Ed's Cycles to repay the sum of $19,670 back to the business and closed out the account.

The conversion defense was not raised by Husband at trial and is considered waived. *Denny v. Webb*, 281 S.W.2d 698 (Tenn. 1955). Despite Husband arguing that the $3,500 check written directly to Wife should be assessed to her, the uncontroverted credible testimony at trial was that this check was made out to Wife so that she could get it timely

deposited to avoid a bank overdraft to the Wholesale Auto business account; Husband requested her to do so he would not have a business issue. The trial court accurately found that the checks amounting to $19,670 were loans for Husband's car business and appropriately assessed the same as joint obligations of Husband and Wife, as the debt was marital in nature. As found by the trial court, Husband is not credible when his testimony conflicts with Wife and/or the Whaleys and the court was correct in establishing this obligation payable to the Whaleys. Further, the court's allocation of this debt in full to Husband as part of the equitable division of the divorce was appropriate, as the money was used in operation of Wholesale Auto.

$109,640.49 (now $85,000 after payments)

It is undisputed that the Whaleys provided $109,640.49 to the couple under an oral agreement that they would be repaid from rental income following the purchase of 300 and 350 Griffith Drive. The court credited Wife's testimony and version of events as to this agreement and found that Wife "told [Husband] to go and put $5,000 on it." It is undisputed that Husband did contribute $5,000 to the purchase of these real properties. At the time of trial, and after years of repayment due to the rental income, the amount owed on this debt by the parties is $85,000. The debt was incurred during the course of the marriage and is marital. Currently the couple's daughter Kristina and her husband reside in the house at 350 Griffith Drive.[5] Mrs. Whaley testified that they plan to eventually take over payment of the loan in the amount of $1,000 per month.

The trial court found the $109,640.49 claimed owed to the Whaleys was an obligation of both Husband and Wife, a joint debt. However, as part of the equitable division of the parties' debts and assets, the court awarded Wife the real property purchased as a result of the indebtedness but also required Wife to be solely responsible for payment of the full amount of the debt. Husband asserts that he should not be jointly and severally liable for this debt because Wife received the property. He contends that Wife has not made payments on this property in years and did not list it on her Income/Expense statement. Husband further complains that Wife has a free and clear piece of real estate for which, in reality, she is not going to have to pay a dime.

We find no error in the trial court's findings on this issue. The court correctly concluded 300 and 350 Griffith Drive were transmuted to marital property as a result of the use of marital funds in the purchase. The trial court also correctly accredited the joint and several judgment in favor of the Whaleys and, under the facts of this case, found that the debt should be awarded equitably to Wife.

Alimony *In Futuro*

[5] The couple has invested $40,000 in improvements to the home.

Alimony *in futuro* is awarded when the court finds that the economically-disadvantaged spouse is unable to achieve an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage. Tenn. Code Ann. § 36-5-121(f)(1). In considering such an award, the court must consider the statutory factors set forth in Tennessee Code Annotated section 36-5-121(i).

The trial court found Wife to be economically-disadvantaged compared to Husband. The court determined that Wife was 50 years old, had only a high school diploma, and annually made no more than $41,000 per year in income working at her family's business. Wife has no income from retirement, pension, or other sources. She spent the first part of the lengthy marriage being a stay-at-home mom caring for the couple's three children. She enabled Husband to focus on his car business and increase his earning potential. Husband, who, was at fault for the divorce given his behavior, treatment, and abuse of Wife, was found to be able to make more than $100,000 per year and was positioned well to increase his income due to his experience in used car sales. The trial court's order as to alimony importantly awarded Husband the couple's business along with its assets. "Without payment of the support the Court has ordered, the award of the business to Husband will not be equitable." To upset the trial court's order as to alimony on appeal would create the net effect of an inequitable division of the parties' marital estate.

Husband argues that Wife has non-contributing individuals living with her in her home who are increasing her expenses. Husband contends that if everyone in the house contributed a small amount, Wife's debts would decrease and she would have little to no need for monthly alimony. The court specifically addressed the third parties in its judgment, finding that the people mentioned are two of the couple's adult children and a boyfriend of one of the children. One of the people living with Wife at trial was Tanner, the youngest son of the couple, who was 18 years old and had recently graduated high school. Wife's testimony was that she was only temporarily helping him out financially until he gets on his feet. The other child in the home was Elizabeth, the parties' 24-year-old daughter, who had recently obtained a master's degree in social work and started a job at a domestic abuse shelter. She and her boyfriend, a 24-year-old Hamilton County Sheriff's Deputy, purportedly, were only living in the home with Wife for a short period of time.

Wife's testimony regarding the third parties living in her house is credible and supported by the evidence. Given the planned temporary presence of these individuals in the home, the trial court accurately found any presumptions regarding contribution that would work against Wife's award were overcome . We uphold the court's judgment on appeal.

Husband further argues against the trial court's judgment based upon the fact that Ed's Cycles will no longer have to pay for his health insurance and that the court did not

include reference to this health insurance premium payment as a fringe benefit to Wife. Wife, however, did not include a health insurance premium as an expense on her income and expense statement, and she did not present any proof at trial as to what the cost would be. Ed's Cycles also provides Wife with a car, the value of which was not considered in arriving at her income for alimony purposes. Although the court did not consider these values, we find the allocation of these benefits/expenses does not significantly affect the ultimate determination of Wife's financial needs. Husband's argument on this issue is unpersuasive.

Additionally, Husband contends that his income is unstable compared to Wife's, and that it has declined over the past several years. Husband, however, testified to have gambling winnings of "200-something thousand dollars" in 2019. As evidenced by Husband's business bank account, between January 2019 and July 2020, he withdrew and used $278,128.92 to gamble at casinos. Between August 2020 and March 2021, a time when Husband was prohibited by injunction against gambling, he had over $27,000 in cash withdrawals in Murphy, North Carolina, mostly at a location near the casino and over $118,000 in deposits into his business checking account.

The trial court found that Husband is not credible and that his testimony regarding his actual income, in general, should be disregarded. The court determined that Husband has a greater earning capacity than Wife does and is more than capable of earning more than $100,000 annually through his car dealership if he works hard. The court correctly found that Wife needs $1,250 per month to maintain her pre-divorce lifestyle and that Husband has the ability to pay this amount as alimony *in futuro*. Husband does not point to any set of facts that credibly stand in opposition to the court's award or represent an abuse of discretion. The trial court's award of alimony *in futuro* to Wife is appropriate and must be affirmed.

Scrap Vehicles

Husband does not contest the court's property division except for the valuation of 87 junk cars, which he claims have a value of between $150 - $200 each. He contends that only 60% to 75% of these cars actually belong to him. Husband argues that the value of the cars owned by him is actually around $10,000. Wife testified the value of the scrap vehicles ranged from $300-$400 each, and that she knew the number of scrap vehicles because she "counted them personally." The court accredited Wife's testimony over Husband's due to his lack of credibility and valued the cars at $26,000.

Husband's testimony regarding the number of scrap vehicles was merely his word that some other people owned them. He did not submit any titles as to ownership and did not have any persons testify that they owned any of the vehicles. In fact, the majority of the cars do not even have titles. Husband acknowledged how he had intentionally reduced the value of the scrap cars by removing the catalytic converters from them during the

pendency of the divorce. The trial court accurately valued the scrap vehicles and accredited Wife's testimony over Husband's. The court's finding of credibility must prevail on these issues in favor of Wife. The trial court's judgment is affirmed.

Attorney Fees

A decision to award attorney fees is within the discretion of the trial court and should not be overturned on appeal absent an abuse of discretion. *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017). Similarly, a trial court's determination regarding the reasonableness of the amount of attorney fees requested is subject to review under the abuse of discretion standard. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011).

Husband argues that it was inappropriate for the court to permit Wife to recover her attorney fees and to prospectively leave the amount and reasonableness of the fee to a successor judge. Wife submits Husband (1) waived this issue for appeal as he consented, without objection, to the award and (2) the award was within the discretion of the trial court while utilizing a process to which Husband has cited no law in opposition.

On June 30, 2010, Wife filed her attorney fee application and requested $30,456.68 in attorney fees and $2,080.74 in expenses pursuant to Rule 53 of the Tennessee Rules of Civil Procedure. Husband did not object to these amounts or the award in general as evidenced by the order awarding them.

"It is well-settled that an award of attorney's fees in a divorce case constitutes alimony in solido." *Gonsewski*, 350 S.W.3d at 113. Such an award is appropriate when the "disadvantaged spouse's income is not sufficient to pay the spouse's attorney's fees and the divorce fails to provide the spouse with a revenue source, such as from the property division or assets from which to pay the spouse's attorney's fees." *Cain v. Swope*, 523 S.W.3d 79, 100 (Tenn. Ct. App. 2016) citing *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002). In determining whether an award of attorney fees is warranted the court is also to consider the relevant factors regarding alimony in Tennessee Code Annotated section 36-5-121. *Cain*, 523 S.W.3d at 100.

In analyzing the referenced factors, the court in its judgment determined that an award of attorney fees to Wife was appropriate as alimony *in solido*. It left the ultimate decision as to the amount and reasonableness of the fees to another hearing on another day and for the successor judge to determine, given the then current judge's retirement on June 30, 2021. Of note, prior to the entry of the court's judgment, the total amount of fees claimed owed by Wife was of record despite no hearing having been conducted, as an attorney fee application was filed with the court. Husband cites to no law that would stand in contradiction to the process utilized by the court, and he does not in any way attack the appropriateness of the award. This issue, to the extent it is before the court if not waived,

is without merit. The trial court's award of attorney fees to Wife is affirmed as alimony *in solido*.

V. CONCLUSION

The judgment of the trial court is affirmed and the case remanded to the trial court for collection of the costs below. Costs on appeal are assessed to the appellant, Jason B. Haun.

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JOHN W. MCCLARTY, JUDGE