

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 26, 2015 Session

REBECCA BURKE PAIR v. CHRIS FRANKLIN PAIR

**Appeal from the Chancery Court for Williamson County
No. 37567 Timothy L. Easter, Judge**

No. M2014-00727-COA-R3-CV – Filed May 29, 2015

In this divorce action, Wife appeals the trial court’s finding that Husband did not dissipate marital funds, the award of alimony, and the division of marital property. Finding that the award of support and division of property is supported by the evidence and consistent with the applicable law, we affirm the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ. joined.

Philip M. Jacobs, Cleveland, Tennessee, for the appellant, Rebecca Burke Pair.

Rose Palermo, Nashville, Tennessee, for the appellee, Chris Franklin Pair.

OPINION

I. FACTUAL BACKGROUND

This appeal arises from the divorce of Rebecca Burke Pair (“Wife”) and Chris Franklin Pair (“Husband”), who were married on April 9, 1988; two children were born of the marriage in December 1992 and September 1995. The parties separated on January 18, 2010, and on January 28, Wife filed a complaint for divorce citing irreconcilable differences and/or inappropriate marital conduct. Husband filed an answer and a counter complaint for divorce, citing irreconcilable differences and inappropriate marital conduct as grounds.

The parties stipulated to the divorce pursuant to Tenn. Code Ann. § 36-4-129, and proceeded to trial on December 4-6, 2013 on the issues of valuation and division of

marital property and spousal support. On January 9, 2014, the court entered an order that *inter alia*, declared the parties divorced; divided the marital property; awarded Wife transitional alimony in the amount of \$5,000 per month for 24 months which, if she was not married or cohabitating after the 24 month period, would be reduced to \$3,000 per month until she reached the age of 67; and awarded Wife \$25,000 alimony *in solido* for attorneys' fees.

Wife filed a timely appeal contending that the court erred by failing to find that Husband had dissipated marital funds, that its division of marital assets was inequitable, that the award of \$25,000 in alimony *in solido* was insufficient, and that she should have been awarded alimony *in futuro*.

II. DISCUSSION.

A.) *Division of the Marital Estate*

In a divorce action, the division of the marital estates begins with classifying the parties' property as either separate or marital. *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). Marital property is defined as "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce . . ." Tenn. Code Ann. § 36-4-121(b)(1).¹ Once property has been classified as marital property, the court is to place a reasonable value on the property that is subject to division. *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003). After valuation, the trial court is to make an equitable division of the property. Tenn. Code Ann. § 36-4-121(a)(1); *Miller*, 81 S.W.3d at 775.

Dividing a marital estate is not a mechanical process but, rather, is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c), *Kinard v. Kinard*, 986 S.W.2d 220, 230 (Tenn. Ct. App. 1998); it does not require that the property be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Although marital debt is not defined by statute, it is subject to equitable division in the same manner as marital property. *Larsen-Ball v. Ball*, 301 S.W.3d 228, 233 (Tenn. 2010). Trial courts have wide latitude in fashioning an equitable division of marital property, *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983), and this court accords great weight to the trial court's division of marital property. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). Thus, we defer to the trial court's division of the marital estate unless it is inconsistent with the factors at Tenn. Code Ann. § 36-4-121(c) or is not supported by a

¹ "Separate property," as defined at Tenn. Code Ann. § 36-4-121(b)(2), is not marital property.

preponderance of the evidence. *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

Here, the parties do not contest the classification or valuation of the marital property; the issue is whether the court's division was equitable.

i.) Dissipation of Marital Funds

In dividing marital property, the court is to consider whether either party has dissipated any of the marital assets. Tenn. Code Ann. § 36-4-121(c)(5)(A). Dissipation of assets requires a showing of intentional, purposeful, and wasteful conduct. *Altman v. Altman*, 181 S.W.3d 676, 682 (Tenn. Ct. App. 2005). The burdens attendant to the required showing are as follows:

“The burden of persuasion and the initial burden of production in showing dissipation is on the party making the allegation, and that party retains throughout the burden of persuading the court that funds have been dissipated.” A party alleging dissipation cannot meet her burden simply by arguing that “since she does not know how the money was spent, dissipation must have occurred.” It is also important to differentiate between “dissipation and discretionary spending.” “Trial courts must distinguish between what marital expenditures are wasteful and self-serving and those which may be ill-advised but not so far removed from ‘normal’ expenditures occurring previously within the marital relationship to render them destructive.”

Burden v. Burden, 250 S.W.3d 899, 919-20 (Tenn. Ct. App. 2007) (internal citations omitted). “After the party alleging dissipation establishes a prima facie case that marital funds have been dissipated, the burden shifts to the party who spent the money to present evidence sufficient to show that the challenged expenditures were appropriate.” *Altman*, 181 S.W.3d at 682 (citing *Wiltse v. Wiltse*, No. W2002-03132-COA-R3-CV, 2004 WL 1908803, at *4 (Tenn. Ct. App. Aug. 24, 2004); *Bratcher v. Bratcher*, 26 S.W.3d 797, 799 (Ky. Ct. App. 2000); *Turner v. Turner*, 809 A.2d 18, 52 (Md. Ct. Spec. App. 2002); *Anderson v. Anderson*, 514 S.E.2d 369, 380 (Va. Ct. App. 1999)).

Wife presented evidence that, during the four years that the parties were separated, Husband deposited \$1,131,738 into his accounts. Husband presented evidence that his expenses totaled \$959,144 during that time; thus, the sum of \$172,594 was not accounted for. Husband testified that he had no “hidden money” and that he had “given [Wife] every wage statement, checking account, credit card statement, [and] investment account.” Wife acknowledged that she had received those documents from Husband and that she had seen each one.

In its oral ruling, the court stated:

This issue of dissipation has been bothersome to the Court. There are funds that I'm satisfied have not been accounted for. But on the one hand, there's so much income coming in here and being used for legitimate purposes that I can't find that [Husband] has willfully done anything that would be considered wasteful during the pendency of this divorce.

And that is, as has been pointed out, the concept of dissipation is based on the idea of waste. I can't find that there's anything in the proof that would support that he's wasted any of their assets.

There is some question about where a big chunk of this money has gone, a sizable chunk, but I can't find that there's any proof that would support that it has been used for some purpose unrelated to the marriage and that it was used in a way for intentional or purposeful misconduct.

And I'm satisfied, based upon the proof, that any dissipation, if any, in this case was monies used by both parties primarily for things for their children and not necessarily for dissipation purposes.

The court went on to hold that it "[found] no dissipation on either side" and memorialized its oral ruling in the Final Decree of Divorce.

As an initial matter, in resolving this issue, Wife asks this court to shift the burdens imposed on her to Husband, asserting that Tennessee is one of a few states in which the burden of showing dissipation of marital assets is placed on the spouse alleging dissipation. She argues that placing the entire burden on her "is not a way to find the truth of what happened, and is also not a way to reduce the incidence of dissipation." As we consider Wife's argument, we are mindful that, under Tenn. Code Ann. § 36-4-121(c)(5)(A), the extent to which there may have been a dissipation of marital assets is one of several factors taken into account in the division of marital property.² We are not persuaded that shifting either the burden of production or the burden of persuasion would, as a practical matter, have much effect on the ultimate determination for the court in

² Tenn. Code Ann. § 36-4-121(c)(5)(B) states:

For purposes of this subdivision (c)(5), dissipation of assets means wasteful expenditures which reduce the marital property available for equitable distributions and which are made for a purpose contrary to the marriage either before or after a complaint for divorce or legal separation has been filed.

dividing marital property and, in any event, are not inclined to depart from the precedent established in *Burden*.

Moreover, on the record presented we see no need to alter the burden placed upon Wife to prove that Husband dissipated marital funds. Husband produced all financial information he had available, which Wife acknowledged she received, and Husband was subjected to cross examination on the same. The court implicitly found that any unaccounted for funds were used for purposes related to the marriage and for the children and not for purposeful or intentional misconduct; significantly, the court did not find that Husband had done anything that would be considered wasteful. Consistent with *Burden*, the absence of an explanation for absent funds does not establish dissipation.

The record does not preponderate against the court's determination that the money was used primarily for familial purposes and that no dissipation occurred by either party; accordingly, we affirm the decision that there was no dissipation of marital funds.

ii.) *Division of Marital Assets*

Wife next contends that the court failed to properly analyze the factors found at Tenn. Code Ann. § 36-4-121(c), rendering the division of marital property inequitable.

In its oral ruling, the court analyzed the factors at Tenn. Code Ann. § 36-4-121(c), made findings of fact as to each, and adopted Husband's proposed division of assets, with some modifications.³ The division gave Wife the marital home valued at \$750,000; a car valued at \$22,803; \$185,593 in vested stock; a checking account that totaled \$5,803; half of Husband's 401(k) account; half of Husband's bonus to be paid in March 2014; and half of Husband's unvested benefits; the court modified Husband's proposal to award Wife one-half of any buyout a future employer might pay to compensate Husband for loss of his current employer's benefits. The division gave Husband a car valued at \$12,828; \$868,145 in vested stock; four checking and investment accounts totaling \$177,336; a life insurance policy with a cash surrender value of \$11,617; half of his 401(k) account; and his Tennessee Titans PSL valued at \$2,000. The court allocated the marital debt, holding that Husband would be responsible for the home equity line of credit totaling \$107,726; otherwise, each party was responsible for any debt in their name.

Wife's contention that the division of marital property was inequitable is based primarily on her argument that Husband dissipated marital assets; since we have resolved the issue of dissipation, our focus is on whether the court abused its discretion in the division of the marital assets.⁴

³ The oral findings were incorporated into the Final Decree of Divorce.

⁴ We acknowledge Wife's contention that the court erred in failing to include the amount of funds she

In its ruling, the court discussed the evidence relating to each of the factors at Tenn. Code Ann. § 36-4-121(c)⁵ and adopted Husband's proposed division with some adjustments. In so doing the court stated:

The Court finds that as divided on this exhibit, this is a fair and equitable division and will adopt this proposed division of the current assets, which leaves both parties with assets in the neighborhood of \$1,362,000, which I believe is certainly a fair and equitable division pursuant to the facts of this case when weighed against the statute.

Wife argues that the court should have considered that, during the pendency of the divorce, Husband was able to use the bulk of the marital funds at his discretion and paid various expenses out of those funds; additionally, after the divorce, Husband retained a greater ability to acquire future assets and income. Wife also argues that because the court held her responsible for debts incurred during the marriage, her award of marital property was significantly reduced and she would have to liquidate the marital property she received in order to meet her monthly obligations.

Many of the matters of which Wife complains, i.e., the parties' respective abilities to acquire assets and produce income in the future, the financial needs of both parties, and the economic circumstances of each party at the time of the division, were statutory factors which were addressed by the court in its findings of fact. The debt referenced by Mother in her brief was debt which the court determined to be her separate debt and, therefore, not subject to division.

After considering the court's division of the marital property and debt, we are unable to conclude that the property division was inequitable or otherwise in error. The court weighed the applicable factors set forth in the statute and made specific findings of fact as to each prior to dividing the parties' marital assets. Wife has failed to demonstrate how the court's division was inconsistent with the factors at Tenn. Code Ann. § 36-4-121(c). The evidence does not preponderate against the court's division; the court's division was reasonable and not an abuse of its discretion.

B.) Award of Spousal Support

Wife contends that the court should have awarded alimony *in futuro* in addition to transitional alimony and that the award of alimony *in solido* was insufficient.

alleges Husband dissipated in its determination of the amount of marital assets. The holding that the evidence does not show that Husband dissipated marital funds pretermits consideration of this argument.

⁵ Tenn. Code Ann. § 36-4-121(c)(10), the amount of social security benefits available to each spouse, was not relevant and, accordingly, not discussed.

Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). In Tennessee, four distinct types of spousal support are recognized: (1) alimony *in futuro*, (2) alimony *in solido*, (3) rehabilitative alimony, and (4) transitional alimony. Tenn. Code Ann. § 36-5-121(d)(1). In *Mayfield v. Mayfield*, our Supreme Court offered a description of each form of support:

Alimony *in futuro*, a form of long-term support, is appropriate when the economically disadvantaged spouse cannot achieve self-sufficiency and economic rehabilitation is not feasible. Alimony *in solido*, another form of long-term support, is typically awarded to adjust the distribution of the marital estate and, as such, is generally not modifiable and does not terminate upon death or remarriage. By contrast, rehabilitative alimony is short-term support that enables a disadvantaged spouse to obtain education or training and become self-reliant following a divorce.

Where economic rehabilitation is unnecessary, transitional alimony may be awarded. Transitional alimony assists the disadvantaged spouse with the “transition to the status of a single person.” Rehabilitative alimony “is designed to increase an economically disadvantaged spouse’s capacity for self-sufficiency,” whereas “transitional alimony is designed to aid a spouse who already possesses the capacity for self-sufficiency but needs financial assistance in adjusting to the economic consequences of establishing and maintaining a household without the benefit of the other spouse’s income.” Consequently, transitional alimony has been described as a form of short-term “bridge-the-gap” support designed to “smooth the transition of a spouse from married to single life.”

Tennessee statutes concerning spousal support reflect a legislative preference favoring rehabilitative or transitional alimony rather than alimony *in futuro* or *in solido*.

395 S.W.3d 108, 115 (Tenn. 2012) (internal citations omitted).

In making an award of spousal support, the court must undertake a careful balancing of the factors in Tenn. Code Ann. § 36-5-121(i)⁶, the applicability of which are

⁶ The factors are as follows:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

dependent on the unique facts and circumstances of the case. *Anderton v. Anderton*, 988 S.W.2d at 675, 683 (Tenn. Ct. App. 1998); *see also Hawkins v. Hawkins*, 883 S.W.2d 622, 625 (Tenn. Ct. App. 1994). We review the trial court's award applying the abuse of discretion standard. *Riggs v. Riggs*, 250 S.W.3d 453, 456-57 (Tenn. Ct. App. 2007) (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). We do not second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown*, 913 S.W.2d at 169.

In making the award of alimony, the court stated:

The Court finds in looking at transitional alimony that this is a type of alimony that is rehabilitative in nature but it's used when rehabilitative alimony is not necessary but one party needs assistance due to being rehabilitated or the economic consequences of this divorce.

[Wife] needs funds to help her bridge the gap during this period of time immediately following the divorce and the economic consequences that this divorce brings to her life.

The court awarded Wife transitional alimony in the amount of \$5,000 per month for 24 months, at which point the monthly award would be reduced to \$3,000 per month until Wife reached the age of 67, if she had not remarried or cohabitated.

-
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
 - (3) The duration of the marriage;
 - (4) The age and mental condition of each party;
 - (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
 - (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
 - (7) The separate assets of each party, both real and personal, tangible and intangible;
 - (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
 - (9) The standard of living of the parties established during the marriage;
 - (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
 - (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
 - (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

The court discussed the statutory factors and articulated findings relative thereto. The court held that Wife was the economically disadvantaged spouse and that Husband had the ability to pay; that Wife had indicated a “passion” for teaching and was pursuing a teaching degree; that she could be rehabilitated; and that she had received substantial assets from the division of marital property. The evidence supports the court’s determination that an award of transitional alimony was appropriate, and we affirm the award.⁷

The court also found that rehabilitative alimony was not necessary and that Wife was pursuing her education and vocation to achieve self-sufficiency; Wife does not challenge these findings, which are fully supported in the record. As noted in *Mayfield*, alimony *in futuro* is appropriate where a disadvantaged spouse cannot achieve self-sufficiency and rehabilitation is not feasible. Consistent with the preference reflected in the statutes and the cases interpreting the same for short-term support, and mindful of the trial court’s findings and award of transitional alimony, we find no basis to conclude that the court abused its discretion by declining to award alimony *in futuro*.

With respect to the award of \$25,000 alimony *in solido*, Wife contends that the court erred in failing to award an amount sufficient to pay her attorneys’ fees.⁸ In *Gonsewski v. Gonsewski*, our Supreme Court stated:

The decision whether to award attorney’s fees is within the sound discretion of the trial court. As with any alimony award, in deciding whether to award attorney’s fees as alimony *in solido*, the trial court should consider the factors enumerated in Tennessee Code Annotated section 36-5-121(i). A spouse with adequate property and income is not entitled to an award of alimony to pay attorney’s fees and expenses. Such awards are appropriate only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, or the spouse would be required to deplete his or her resources in order to pay them. Thus, where the spouse seeking such an award has demonstrated that he or she is financially unable to procure counsel, and where the other spouse has the ability to pay, the court may properly grant an award of attorney’s fees as alimony.

350 S.W.3d 99, 113 (internal citations omitted).

As noted earlier, the court discussed the factors at Tenn. Code Ann. § 36-5-121 in its award of support, an award which included transitional alimony and alimony *in solido*. As a result of the division of property, Wife had adequate assets with which to pay the

⁷ Wife does not assign error relative to the amount and duration of the award.

⁸ In his brief, Husband argues that he paid \$61,000 in legal fees, which included \$21,000 in fees paid on behalf of Wife, exclusive of the \$25,000 alimony *in solido* award.

remainder of her attorneys' fees; Wife has failed to show that she would have to deplete her resources in order to do so. Thus, we conclude that the award of alimony *in solido* was supported by the evidence in the record.

III. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

RICHARD H. DINKINS, JUDGE