

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2018 Session

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DONNA L. STEARNS-SMITH v. JAMES RONNIE SMITH

Appeal from the Circuit Court for Bedford County
No. 2015-CV-12895 Franklin L. Russell, Judge

No. M2017-01902-COA-R3-CV

After Wife filed for divorce from her husband, the parties stipulated to an equitable division of personal property and to the grounds for divorce. The court conducted a trial to resolve questions surrounding the classification and division of two parcels of improved real property and Wife's requests for alimony and attorney's fees. The trial court determined one parcel of real property was separate property while the other was marital and provided for its division. The court also awarded Wife alimony in solido and attorney's fees. On appeal, Husband challenges the classification and division of the real property and the awards of alimony and attorney's fees. We conclude that the court erred in calculating the amounts due from Husband to Wife to accomplish its division of marital property, so we modify the judgment in that respect. Otherwise, because of a failure to fully comply with Rule 7 of the Rules of the Court of Appeals of Tennessee, Husband's issues related to the classification, valuation, and division of property are deemed waived. As to the remaining issues, we affirm the award of lump sum alimony in solido but reverse the award of attorney's fees as alimony in solido.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part as Modified and Reversed in Part

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which ANDY D. BENNETT and THOMAS R. FRIERSON II, JJ., joined.

Raymond W. Fraley, Jr., Fayetteville, Tennessee, for the appellant, James Ronnie Smith.

Barbara G. Medley, Lewisburg, Tennessee, for the appellee, Donna L. Stearns-Smith.

OPINION

I.

A.

On January 20, 2015, in the Circuit Court of Bedford County, Tennessee, Donna L. Stearns-Smith (“Wife”) filed a complaint for divorce from her husband of five and one-half years, James Ronnie Smith (“Husband”). The marriage was not the first for either party. Wife met Husband a year-and-a-half after the death of her first husband. Her previous marriage lasted 30 years. This would be Husband’s third divorce.

The parties differed over the events leading up to the filing. Wife claimed that, eleven days prior, she had just returned home from a mission trip to Louisiana when Husband told her, “I’ve packed up and left you.” Wife described herself as shocked and devastated by the news. She thought their marriage “was fine,” although she acknowledged it was not perfect.

According to Husband, he merely suggested taking some time off so they could think about their relationship. And he had only packed his clothes, what he needed for work, and his yard tools. He would have taken more if he had realized he would never be returning. Husband also did not understand Wife’s shock at his suggestion of time away from one another. He described their marriage as “rocky” and claimed that divorce had been discussed “on multiple occasions.”

The parties eventually stipulated to the grounds for divorce. *See* Tenn. Code Ann. § 36-4-129 (2017). They also stipulated to an equitable division of their personal property. So the case proceeded to trial on the division of real property and Wife’s requests for alimony and attorney’s fees.

Only Wife and Husband testified at trial. When they married in August 2009, Wife was 53, and Husband was 55. Going into the marriage, Husband let Wife know that he planned to retire soon, hopefully to Guntersville, Alabama. Wife described herself as open to the idea of retiring to Alabama.

Wife and Husband both had accumulated assets worth in excess of \$1 million. And leading up to the marriage, they took steps to sell their Tennessee assets. Husband sold his home in Estill Springs not long before the marriage and moved into Wife’s Shelbyville home, which was also listed for sale. Additionally, Wife owned two Merle Norman franchises, one in Shelbyville and another in Tullahoma. Wife sold the Shelbyville franchise before the wedding, and her daughter took over operations of the Tullahoma store. The proceeds of the sale of Husband’s home and the Shelbyville store were placed in certificates of deposit.

Shortly after returning from their honeymoon, Husband and Wife closed on the purchase of a lot in Guntersville. The now-married couple had house plans drawn up, but several events frustrated their move to Alabama. Wife had difficulty selling her Shelbyville home that she now shared with Husband. More significantly, in May or early June 2010, Wife's mother was diagnosed with lung cancer. Then during that same year, a week before Wife's mother died, Wife's sister also received a lung cancer diagnosis. In her testimony, Wife agreed that the illnesses of her mother and sister caused the couple to "put things on hold." According to Husband, the couple "just kind of set everything else aside at the time and decided that maybe we should just make the home in Shelbyville our marital residence."

Whether the decision to remain in Tennessee was permanent or temporary, the parties agree that they spent approximately \$183,000 on the Shelbyville home. Wife and Husband added a pool to the property, but otherwise Wife described the changes to the home as "cosmetic things." According to her, the work on the home provided a needed distraction from her mother's worsening condition. Husband's view was that they were renovating what was now to be their retirement home.

Still, the parties remained interested in Alabama. Around the time of the passing of Wife's mother, the couple purchased another lot, this time in Grant, Alabama. Although the lot was purchased with joint funds, only Husband's name appeared on the deed. From November 2010 to March 2011, the couple spent approximately \$215,000 constructing what would become known as the lakehouse. At trial, the parties generally agreed the property was worth \$320,000.

After the parties separated in 2015, Wife sold the Shelbyville home for \$455,000 and purchased a condominium in Murfreesboro. Later Wife sold the condominium to buy a larger home. Wife also returned to work. By this point, she had sold the Merle Norman franchise in Tullahoma being run by her daughter, so she took an hourly position as a buyer and merchandiser for a retail store associated with a spa and dermatology practice. Wife worked 32 hours per week, making approximately \$15.00 per hour.

Husband officially retired at the end of 2015. He testified to receiving a pension check in the monthly gross amount of \$1,900. But he also had amassed a sizeable balance, in excess of \$1 million, in a 401(k) account. Husband lived in the Grant, Alabama lakehouse.

B.

In its final order, after stating its findings of fact, the court turned to the division of marital property. The court first considered whether to classify the Shelbyville home as marital property. Although Wife owned the home prior to the marriage, Husband argued

that the home had been transmuted to marital property. Alternatively Husband argued that the home had increased in value during the course of the marriage and that he was entitled to a share of the increased value. The court found that Husband had not overcome the presumption that the home was separate property. But the court did agree that Husband was entitled to a share of the increase in the home's equity during the course of the marriage. The court determined that amount would be \$67,750 based on the amount of the mortgage on the home.

The court classified the lakehouse in Alabama as marital property. In doing so, it rejected Husband's argument that the property was always intended to be Husband's separate property. The court determined that it should "be divided equally between the parties." But rather than divide the agreed value of \$320,000 in half and awarding \$160,000 to each party, the court subtracted \$67,750 from the value and divided the difference of \$252,250 in half, awarding each party \$126,125. The court described this as giving Husband "credit for" the increase in the equity in the Shelbyville home during the marriage. Because the lakehouse was awarded to Husband, to accomplish the division, the court ordered Husband to pay Wife \$126,125.

Finally, after consideration of the statutory factors, the court awarded Wife alimony in solido in the amount of \$85,000. The court also awarded Wife attorney's fees of \$10,775 as alimony in solido.

II.

On appeal, Husband raises four issues for review. Husband's first and second issues relate to the classification and division of marital property. Husband's third and fourth issues challenge the alimony in solido awards. As this is a nonjury case, our review of the trial court's factual findings is de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). Our review of questions of law is de novo, with no presumption of correctness. *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013).

A.

Where the classification of property or the division or allocation of marital property are at issue, Rule 7 of this Court requires "the brief of the party raising the issue" to include, either in the body of the brief or as an appendix, a table of property and debt and their valuations. Tenn. Ct. App. R. 7(a). The table must "list all property and debts considered by the trial court, including (1) all separate property, (2) all marital property, and (3) all separate and marital debts." *Id.* Additionally, table entries "must include a citation to the record where each party's evidence regarding the classification or valuation of the property . . . and . . . where the trial court's decision regarding the

classification, valuation, division, or allocation of the property . . . can be found.” *Id.* 7(b). Here, the body of Husband’s brief includes tables, but the tables are only reproductions of tables from Wife’s post-trial brief or tables reflecting the impact of the court’s division of property. There was also a table showing marital expenditures. The tables do not comply with Rule 7.

We have described the Rule 7 table as “essential.” *Blount v. Blount*, No. E2017-00243-COA-R3-CV, 2018 WL 1433198, at *3 (Tenn. Ct. App. Mar. 22, 2018); *Harden v. Harden*, No. M2009-01302-COA-R3-CV, 2010 WL 2612688, at *8 (Tenn. Ct. App. June 30, 2010). The table is so essential that a failure to comply with Rule 7 may be deemed a waiver of issues related to the classification, valuation, and division of property. *Forbess v. Forbess*, 370 S.W.3d 347, 354 (Tenn. Ct. App. 2011); *see also Blount*, 2018 WL 1433198, at *3 (holding that husband waived any challenges to the court’s order granting wife a portion of his military pension for failure to comply with Rule 7); *Butcher v. Butcher*, No. W2011-01808-COA-R3-CV, 2012 WL 2107977, at *2 (Tenn. Ct. App. June 12, 2012) (“We have held that the failure to comply with Rule 7 of the Court of Appeals waives issues relating to the requirements of the Rule.”); *Rountree v. Rountree*, 369 S.W.3d 122, 133 n.7 (Tenn. Ct. App. 2012) (“It is well settled that ‘where an appellant fails to comply with this rule, that appellant waives all such issues relating to the rule’s requirements.’” (quoting *Harden*, 2010 WL 2612688, at *8)).

Another obstacle to our review is the record on appeal. Part of the process of dividing the marital estate is identifying all the marital assets, both real and personal. *See Snodgrass v. Snodgrass*, 295 S.W.3d 240, 246 (Tenn. 2009). The parties’ separate property, both real and personal, is also a relevant factor. Tenn. Code Ann. § 36-4-121(c)(6) (2017). Here, Husband and Wife agreed to a division of personal property, but the stipulation reflecting their agreement is not included in the record. Although both parties make reference to personalty in their briefs, we can neither determine whether those references include all of the personalty subject to the stipulation nor the extent or value of the parties’ personal property.

Under the circumstances of this case, we deem the Husband’s issues related to classification, valuation, and division of the marital property waived, save one. Husband argues that the court made a “mathematical error” in connection with the division of the value of the Alabama lakehouse. We can resolve this issue by resorting to the court’s final order alone.

Husband contends that the court was seeking to make an equal division of the value of the lakehouse. According to Husband, “[t]he value of the [lakehouse] (\$320,000) should have been split in two equal parts first, then the Husband’s credit [for the increase in the equity in the Shelbyville home] should have [been] applied.” In her brief, Wife acknowledges that Husband’s argument “is not unreasonable and is one method by which the Court could have achieved division in this case.” Nonetheless, she

contends that the trial court intentionally applied the credit against the value of the undivided marital asset first as part of making an equitable division of the marital estate.

We construe court orders “[l]ike other written instruments, . . . according to their plain meaning.” *Morgan Keegan & Co., Inc. v. Smythe*, 401 S.W.3d 595, 608 (Tenn. 2013). Thus, we construe orders “as written” and give the court’s words “their natural and ordinary meaning” and “construe them in the context of the entire [order].” *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 597 (Tenn. Ct. App. 1999). We also give effect “to that which is clearly implied, as well as to that which is expressly stated.” *Morgan Keegan & Co., Inc.*, 401 S.W.3d at 608.

Applying the foregoing principles, we agree with Husband. The court gave Husband “credit for one-half of the \$135,000.00 mortgage pay-off [on the Shelbyville home] or \$67,750.” By later applying that credit to a marital asset before division of the asset, the court effectively reduced the credit to Husband without explanation. Given the context of the order, we conclude that the credit should have been applied following the equal division ordered by the court against the amount awarded Wife. So the appropriate amount due to Wife for her share of the Alabama lakehouse was \$92,250 ($\$320,000 \div 2 - \$67,750 = \$92,250$) rather than \$126,125.00.

B.

As noted above, Husband also challenges the trial court’s awards of alimony in solido to Wife. As does Husband, we address the lump sum award of \$85,000 separately from the award of attorney’s fees.

1. Lump Sum Alimony in Solido

Trial courts possess “broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of the award.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). In exercising that discretion, the court must consider a non-exclusive list of statutory factors found in Tennessee Code Annotated § 36-5-121(i) (2017).¹ “[W]hen reviewing a discretionary decision by the trial

¹ The relevant factors include:

- (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;
- (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;

court, such as an alimony determination, the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision.” *Id.* at 105-06. Alimony decisions are factually driven and “involve[] the careful balancing of many factors.” *Id.* at 105. The two most important factors are “the disadvantaged spouse’s need and the obligor spouse’s ability to pay.” *Id.* at 110 (citation omitted).

Husband argues that the court abused its discretion in awarding alimony in solido. Specifically, he claims that the court misapplied the statutory factors, particularly in considering “[t]he duration of the marriage” and “[t]he relative fault of the parties.” *See* Tenn. Code Ann. § 36-5-121(i)(3), (11). Husband also complains that the court never considered Wife’s need. He contends Wife had no need for alimony and that an award of alimony in solido was not otherwise necessary “to adjust the distribution of the parties’ marital property.”

We conclude the trial court did not abuse its discretion in awarding Wife alimony in solido. Based on our review, the court properly considered the applicable statutory factors. Husband makes much of the court’s description of the parties’ marriage as a seven-year marriage. The court found the “parties were married for nearly seven years” and later references the parties’ union as a marriage of seven years. As Husband points out, the parties were only together for five and one-half years. The court’s finding

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- (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.

Tenn. Code Ann. § 36-5-121(i).

appears to measure the parties' marriage from their wedding date to the entry of the decree of divorce, a period of over six years and eight months. We have previously acknowledged that the duration of a marriage may be measured by "the actual dates of marriage," wedding date to divorce decree, or by the period of time from marriage to separation. *See Montgomery v. Silberman*, No. M2009-00853-COA-R3-CV, 2009 WL 4113669, at *3-4 (Tenn. Ct. App. Nov. 24, 2009). The circumstances behind separations and the nature of the parties' relationship dictate the appropriate measure. We do not fault the trial court for using the legal dates here.

On the subject of fault, the court found Husband's relative fault greater than Wife's. Specifically, the court found that "Husband misled the Wife to believe everything was fine while she was on the mission trip, but was secretly carrying out his plan of three months to leave her." Husband "contests whether this constitutes fault as envisioned by Tenn. Code Ann. § 36-5-121(i)(11)" because "[t]here was no hint of infidelity or mental or physical abuse in the record." But we do not read this statutory factor as narrowly as Husband. Additionally, we note that relative fault is just one of several statutory factors that the court took into consideration.

As for the purposes behind the award, we agree with Husband that the court's final order does not reference Wife's need in making the award. Wife submitted a chart of her income and expenses, which showed that her monthly expenses exceeded her income. But the court also found, "[a]t the time of the separation, the evidence presented showed that the parties still had in excess of \$1,000,000.00 each in total assets."

Presuming, as we must, that the alimony award was correct and viewing the evidence in the light most favorable to the decision, we conclude that the lump sum was appropriate even given the relatively short duration of the marriage. The award was, in part, to counter the impact of the sale of Wife's Merle Norman franchise in Shelbyville leading up to the marriage, which was her main source of income. *See* Tenn. Code Ann. § 36-5-121(i)(1). The court found as follows:

The Wife testified she never would have sold her Merle Norman store [in Shelbyville] but for her reliance upon her Husband's representation about their future. The gross sales from her Merle Norman stores in 2007 and 2008 averaged approximately \$400,000.00.

The Wife is now working for a doctor's office earning \$15.00 per hour.

As a result, Wife was "earning significantly less money." At the time of trial, Wife was 59 with only a high school diploma. On the other hand, Husband, who possessed a college degree, was 61 and recently retired of his own volition. He was living off his retirement and investments. The court found that Husband's separate assets exceed the

separate assets of Wife “by at least \$140,000, if not more.” *See id.* § 36-5-121(i)(7). On appeal, Husband does not contest his ability to pay the alimony.

The court also took into consideration the parties’ standard of living during the marriage. *See id.* § 36-5-121(i)(9). The court found that the parties spent extravagantly during the marriage.

2. Attorney’s Fees

“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. So we again review the trial court’s decision under the deferential abuse of discretion standard. *Id.* As with all alimony awards, the court’s decision must be guided by consideration of the relevant statutory factors. *Id.*; *see* Tenn. Code Ann. § 36-5-121(i). Again, the most important factors are need and ability to pay. *Watson v. Watson*, 309 S.W.3d 483, 501 (Tenn. Ct. App. 2009). An award of alimony to pay attorney’s fees is only appropriate when one spouse lacks sufficient funds to pay their own legal expenses or would be forced to deplete their resources to pay them and the other spouse has the ability to pay. *Gonsewski*, 350 S.W.3d at 113. So “[a] spouse with adequate property and income is not entitled to an award of alimony to pay attorney’s fees and expenses.” *Id.* (citing *Umstot v. Umstot*, 968 S.W.2d 819, 824 (Tenn. Ct. App. 1997)).

We conclude that the trial court erred in awarding Wife attorney’s fees. As the court found, Wife owned separate assets in excess of \$1 million. And she presented no evidence that she lacked funds to pay her own legal expenses. *See id.* (“The record contains nothing to suggest that Wife was unable to secure counsel, either at trial or on appeal, but for an award of attorney’s fees.”).

III.

We modify the division of marital property to provide that Husband will pay Wife \$92,250 for her interest in the Alabama lakehouse. We reverse the award of attorney’s fees to Wife in the amount of \$10,775. In all other respects, we affirm the judgment of the trial court. The case is remanded for further proceedings consistent with this opinion.

W. NEAL MCBRAYER, JUDGE