

LARRY STEVEN BRIDGES,)	
)	
Plaintiff/Counter-Defendant/Appellee,)	
)	Robertson Circuit
)	(Domestic Relations)
VS.)	No. 8809
)	Appeal No.
)	01-A-01-9510-CV-00463
RUBY ADCOCK BRIDGES,)	
)	
Defendant/Counter-Plaintiff/Appellant.))	

<p>FILED</p> <p>March 29, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT OF ROBERTSON COUNTY
AT SPRINGFIELD, TENNESSEE

HONORABLE JAMES WALTON, JUDGE

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MODIFIED, AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE
WILLIAM C. KOCH, JR., JUDGE

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OPINION

In this divorce case, the defendant/counter-plaintiff /wife has appealed from a judgment which dismissed the complaint of the plaintiff/counter-defendant/husband, granted a divorce and alimony to the wife, and divided the marital estate.

The wife presents the following issues:

1. Whether the Trial Court erred in its valuation of the marital property - specifically the valuation of the parties' real property.
2. Whether the Trial Court erred in its distribution of the marital property.
3. Whether the Trial Court erred in its award of alimony as to nature, amount and duration.
4. Whether the appellant is entitled to an additional award of attorney fees and costs for post-trial motions and on appeal.

The parties were married on December 19, 1958, and separated in 1993. The husband is now 56 and the wife is 55. They have two adult children. Husband has been employed by Dupont Co. since 1960. His 1994 gross earnings were \$66,900. After raising the children, the wife was variously employed, but was not regularly employed at the time of trial. The parties owned a farm of 38.96 acres on which the marital residence was situated.

To the wife the Trial Judge awarded the residence and adjacent seven acres which he valued at \$150,000. To the husband, the Trial Judge awarded the remainder of the farm

which he valued at \$93,000. The wife's first issue challenges these evaluations which total \$243,000.

At the trial the wife testified that the entire farm, including the residence, was worth \$175,000. She did not evaluate the separate portions of the farm. The husband testified the home and seven acres were worth \$175,000 and the remainder was worth \$100,000.

The wife relies upon an interrogatory propounded to the husband on August 6, 1993 and answered under oath by him on September 10, 1993, which contained the following inquiry and response:

Interrogatory No. 5: Please list all assets . . . specifying . . . present fair market value.

. . . .

Response: 1. Real property: house and 38 acres . . . value about \$200,000.

The wife also relies on the deposition of the husband, taken on October 12, 1993, which contains the following:

Q. Now, on Item No. 1 in your response to Interrogatory No. 5, you have listed real property and house and 38 acres owned jointly with Ruby Bridges, value about 200,000. Is it your contention then and do you agree that the property has a fair market value of \$200,000?

A. Yes, or greater.

Q. If you believe it's greater, how much greater?

A. I would guess 50,000 greater or 50 to 100, but this is the appraised value based on a refinancing, so I can't argue that.

Q. When was the refinancing performed?

A. January or February of 1993.

Q. So within the year?

A. Yes.

Q. So you are not going to contest a \$200,000 value on that property?

A. No.

At the trial on May 24, 1995, the husband testified:

Q. Can your property be cut up into other tracts?

A. Yes, sir; I see that there is a 300 foot frontage here that is remaining that could be cut into a 150 foot acreage tract frontage and two five acre tracts that could be made here.

....

Q. In taking two five acre tracts down here, can you tell me in your opinion what they should sell for?

A. Twenty-five thousand dollars per tract.

Q. How much per acre?

A. Five thousand dollars.

....

Q. Could that 50 foot right of way be on either side of the house?

A. That's correct.

Q. Again in your opinion, what would a five acre tract behind the house sell for?

A. I would put a value of four thousand per acre.

Q. So that's twenty thousand dollars?

A. Yes, sir.

....

Q. Do you feel that the remaining property that's not in the 15 acres or the seven acres your wife wanted -- what do you think that could be sold for?

A. Two to three thousand dollars per acre.

....

Q. If we sold off the property as you've set out--I have to figure how many I've got left. Maybe we ought to mark that right on here.

A. There's fifty here and twenty there and -- that's in excess of a hundred four thousand dollars.

....

Q. Let me ask this question. If your wife maintained the seven acres and the home place, the gazebo, and the building back here--that's a driveway?

A. That's a drive, yes.

Q. In your opinion, what would that be worth?

A. This here? My estimate is a hundred seventy-five thousand dollars.

....

Q. Mr. Bridges, continuing on the sheet that we've gone through, we got through the SIP account. We now have the house and farm in Springfield, Tennessee.

You've already testified, I think, as for the different values. If you did everything you suggested to do, what would be the value of all the land and the home and so forth?

A. I would say two hundred seventy-five thousand dollars.

The wife argues that the quoted testimony is inconsistent with previous responses to interrogatory and the deposition should not be considered because the respondent/deponent did not give notice of his changed opinion as to value. Such a contention might be effective in respect to a "request for admission" under T.R.C.P. Rule 36 which contains a provision entitled: "Effect of Admission." The general rule for discovery, Rule 26, and deposition, Rule 27, do not contain an "Effect of Admission" provision. Rule 26.05 states a rule for supplementation of responses in respect to certain matters.

Even if the failure to revise a response should justify exclusion of testimony, such exclusion was waived by failure to object. T.R.A.P. Rule 36(a); *Thompson v. Thompson*, Tenn. App. 1988, 749 S.W.2d 468.

While possibilities of profitable use of property may be a circumstance reflecting upon its value, such possibilities are not the measure of value. See *Davidson County Board of Education v. First American National Bank*, 202 Tenn. 9, 301 S.W.2d 905 (1957).

The nature of the responses and testimony in the present case do not justify the total rejection of the testimony, but relate only to the weight to be given to the testimony. The Trial Judge evidently gave some weight to the testimony of the husband as to value. His judgment in respect to weight is not readily reviewable by an appellate court. *Leek v. Powell*, Tenn. App. 1994, 884 S.W.2d 118.

The wife did not state her opinion of the values of the two parts of the farm, she testified only as to the value of the whole farm.

Although there is no evidence exactly corresponding to the value fixed by the Trial Court, the value of land must be determined by the finder of fact from his own knowledge and the opinion of witnesses in connection with proven circumstances. *Green v. Arnold*, 25 Tenn. App. 67, 150 S.W.2d 1075.

The evidence does not preponderate against the finding of the Trial Judge as to the value of the farm and its parts.

The second issue presented by the wife complains of the division of the marital estate. The judgment of the Trial Court states:

vi. Division of marital property should be equal in this matter, with the husband being awarded property valued at \$217,616 and the wife being awarded property valued at \$211,874;

Using the values fixed by the Trial Court, the wife received property worth \$189,874, and the husband was ordered to pay her \$12,000, making a total of \$201,874.

Using the same values, the Trial Court awarded the husband property worth \$219,619.80, less the \$12,000 to be paid to the wife, leaving \$207,619.80.

This division is not exactly equal, but this is a 49%-51% division which is approximately equal.

Nevertheless, the wife argues that the Trial Court erred in its evaluation of certain personal property in making its distribution.

First, the Court valued a "SIP Account" (Savings and Investment Plan with Dupont Co.) at \$93,000. The wife insists this value should be \$93,465.30. The husband valued the same account at \$93,090 as of March 11, 1995, two months before trial. The husband testified at trial that \$946.80 had been added to the account and that some interest had accrued since March 11, 1995. He also testified that he had "borrowed" \$11,000 from the account to pay his attorney on an unspecified date. No other evidence is found whereby this Court could conclude that the value of the account was some amount other than \$93,000.

The wife complains that the Trial Court valued a tractor and tools at \$11,000, when the husband testified they were worth \$12,000. In summary, the wife argues:

According to the values set by the Court, husband received a total value of \$219,619.80, although the court stated the value to be \$217,616.00.

As already stated, the division made by the Trial Court is equitable, if not exactly equal. Any slight inequality is not sufficient to require revision by this Court. When the Trial Court referred in its order to an "equal division" the intended meaning was approximately, rather than precisely equal.

The wife's third issue complains of the amount of alimony awarded. The judgment of the Trial Court states:

G. Husband shall pay the full mortgage. The wife having been granted 62% of the real property, husband may consider 62% of the mortgage payment, whether lump sum or otherwise, as alimony. This alimony obligation shall terminate upon the mortgage being paid.

H. Based upon the marriage of 36 years and wife's medical difficulties, which are a factor in her ability to have gainful employment in the future, the wife should have alimony. Based upon the wife's age and health conditions and other circumstances, the wife is not rehabilitatable, and the alimony set forth hereinafter, unless otherwise qualified, shall continue until her death or remarriage.

I. The wife has income of \$480.00 per month and husband has net income of \$4,000 per month. Income and expense statements of both parties show that there is not enough money to satisfy the needs of both parties.

J. Husband shall pay alimony to the wife in the amount of \$650 per month until such time as he retires from his employment at which time the alimony figure will change to reflect the total figure received from retirement and alimony will equal \$650.

An order for *pendente lite* support states that the mortgage payments are \$1,158 per month. Sixty-two percent of this amount is \$717.96, which combined with the \$650 monthly alimony will total \$1,367.96 alimony so long as the husband is paying the mortgage.

The finding that the wife is not "rehabilitatable" is not a finding that she is unable to earn any income. The word is not defined by Webster's Third New International Dictionary, unabridged; but the same work defines the word, "rehabilitation" as "the physical restoration of a sick or disabled person by therapeutic measures and re-education to participation in the activities of a normal life within the limitations of the disability." As used in T.C.A. Section 36-5-101, the words "rehabilitated," and "rehabilitative" refer to improvement in ability for self support, principally by therapy, training or further education.

Thus, the finding of the Trial Judge is interpreted to mean, the ability of the wife to support herself cannot be improved by therapy, training or further education. A consequence of this finding is that the wife's ability to support herself cannot be expected to improve.

The evidence shows that the wife operates a frame shop from which she derived gross profit of \$7,713 per year. The wife admits \$482.26 per month net income and claims \$1,893 expenses, producing a need of \$1,410.74 per month.

The husband admits \$3,906 monthly net income and claims expenses of \$2,109 per month plus the total mortgage payment of \$1,158, or \$3,267 per month. The \$650 monthly alimony increases his expenses to \$3,917 per month.

Even though the \$650 per month alimony is not equal to the needs of the wife, it appears that the husband is not able to pay more.

The wife complains of the provision in the judgment that the alimony will be reduced by any amount received by her out of the pension to be received by the husband upon retirement. The pension was found to be part of the marital estate and divided equally between the parties. It hardly seems just to permit the husband to satisfy all or part of his alimony obligation with funds which have been awarded to his wife. Unquestionably, when the husband ceases to receive his salary and begins to receive a pension, his ability to pay alimony may be affected. Also, when the wife begins to receive one-half of the pension, her need for alimony may be affected. However, it is doubtful that fair provision can be made at this time to accommodate the uncertain effect of these developments.

Since the alimony awarded is alimony in futuro, it is subject to revision at any time for good cause. T.C.A. §36-5-101(a)(5). Accordingly, upon the retirement of the husband or any other substantial change in circumstance, the alimony may be revised upon application to the Trial Court.

Finally, the wife requests the allowance of additional counsel fees for post-trial motions and this appeal. The allowance of fees for post-trial proceedings rests in the sound discretion of the Trial Judge. This Court, in the exercise of its corresponding discretion, declines to allow fees in this appeal.

The judgment entered by the Trial Court on July 12, 1995, is modified by deleting therefrom the quoted paragraph "J" and substituting therefor the following:

J. Husband is hereby ordered to pay to the wife the amount of \$650 per month until changed for good cause by order of this Court.

As modified, the judgment of the Trial court is affirmed. Costs of this appeal are taxed against the husband. The cause is remanded to the Trial Court for entry of an order in conformity with this opinion and for necessary further proceedings.

Modified, Affirmed and Remanded.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE