IN THE COURT OF APPEALS OF TENNESSEE

JOAN EPSTEIN,	) C/A NO. 03A01-9704-CV-00111
Plaintiff-Appellee,	)
	)
	) APPEAL AS OF RIGHT FROM THE
v.	) HAMILTON COUNTY CIRCUIT COURT
	)
DAVID EPSTEIN,	)
Defendant-Appellant.	) HONORABLE WILLIAM L. BROWN, JUDGE

For Appellant

MARTIN J. LEVITT
Levitt & Levitt
Chattanooga, Tennessee

For Appellee

CINDY SENTELL DEERE
Chattanooga, Tennessee

O P I N I O N

VACATED IN PART
AFFIRMED IN PART
REMANDED WITH INSTRUCTIONS

Susano, J.

The trial court's judgment dissolved a marriage that had endured for 42 years. The court granted Joan Epstein ("Wife") a divorce on the ground of inappropriate marital conduct, noting that it "d[idn't] know how [she] put up with it as long as she did." The trial court made a number of decrees regarding the parties' property and debts, and awarded Wife alimony, including an allowance on her attorney's fees and expenses. The defendant David Epstein ("Husband") appealed, arguing that the division of property and debts is not equitable, that the court's decrees with respect to alimony are in error, that Wife is not entitled to an allowance on her attorney's fees and expenses, and that the court erred in ordering a non-party -- the estate of Husband's parents -- to make his alimony payments in the event he predeceases Wife.

I. *Standard of Review*

Our review of this non-jury case is *de novo*; however, the record of the proceedings below comes to us with a presumption that the trial court's factual findings are correct. Rule 13(d), T.R.A.P. We must honor this presumption unless we find that the evidence preponderates against those findings. ***Id.*** ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are not afforded the same deference. ***Campbell v. Florida Steel***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

Our *de novo* review is tempered by the well-established proposition that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn.App. 1995); ***Bowman v. Bowman***, 836 S.W.2d 563, 566 (Tenn.App. 1991). In fact, this court has noted that

> ...on an issue which hinges on witness credibility, [the trial court] will not be reversed unless, other than the oral testimony of the witnesses, there is found in the record clear, concrete and convincing evidence to the contrary.

Tennessee Valley Kaolin v. Perry, 526 S.W.2d 488, 490 (Tenn.App. 1974).

II. *Husband's Credibility*

The trial court's findings regarding Husband's credibility were central to its decrees in this case:

> ...the Court wants the record to be very clear that the Court does not find that Mr. Epstein is a credible witness. He has a convenient memory. He can recall facts and circumstances in events when it's beneficial to him. He cannot recall any of the events or transactions that would be detrimental to his position in this case. Not only that, he wants the Court to believe that he can't remember transactions that took place in July of '96 and this is the 8th day of October, 1996. He can't remember other transactions that occurred for which checks were written, and no explanation is offered to the Court. So the Court feels that he has attempted at least to flimflam the Court with regards

> [sic] to his financial condition and expenditures and his ability to manage his finances and to run his [plumbing] business.

We review the evidence in this case with this significant credibility determination in mind.

III. *Division of Property and Debts*

Husband argues that the trial court erred when it held that a $20,000 transfer of funds from Husband to Wife was a gift. He contends that the payment was not a gift and that, at a minimum, the funds represented by the transfer should be utilized to reduce the parties' past-due federal income tax liability of $32,233.

In November, 1995, Husband was facing heart surgery. Because he doubted his ability to pay for the surgery,[1] he sold three duplexes to his brother. He realized a net of $42,000 from the sale. Wife asked Husband to give her $20,000 out of the proceeds of the sale. Husband complied. Wife filed for divorce the next month. Husband contends that this payment should not be considered a gift because, so the argument goes, Husband made it unaware of a relevant fact -- Wife's already-made decision to file for divorce.

It appears from the record that Husband had moved out of the parties' residence when the payment was made. Wife so testified. Furthermore, it is clear that the parties had had a

[1]The surgery was ultimately paid for by insurance.

"rocky" marriage for many years -- a fact that was well known to Husband. The couple had participated in marriage counseling, and Wife had frequently expressed her unhappiness with their marriage. We agree with the trial court that the evidence supports a finding that the payment was voluntarily made by Husband.

We also believe that the court's decree with respect to the $20,000 payment can be sustained on another basis. Husband testified that the bulk of the property interest sold to his brother, along with that of seven other duplexes, were given by his siblings "to me and my wife." Thus, while it is clear that this property originally belonged to Husband's parents, it is likewise clear that Husband's siblings had "gifted" their four-fifths interest in these duplexes to Husband and Wife.[2] The money from the November, 1996, sale of the three duplexes was put in a bank account, in which the parties had commingled their funds for many years. We find that the award of the $20,000 to Wife can be justified as an equitable division of marital property. There was no attempt by Husband or his siblings to segregate these duplexes as Husband's separate property. Husband testified that the four-fifths interest was a gift to *both of them*. Wife executed a mortgage indebtedness on at least some of these duplexes at one point during the marriage. The proceeds from the sale to the brother were placed in an account that was treated by the parties as joint property. Therefore, we find that the $42,000 at issue represented marital property.

[2]The other one-fifth already belonged to Husband.

"When this Court is reviewing a record *de novo* on appeal, we are called upon ultimately to pass upon the correctness of the result reached in the proceeding below, not necessarily the reasoning employed to reach the result." ***Kelly v. Kelly***, 679 S.W.2d 458, 460 (Tenn.App. 1984). We find no error in the trial court's decree with respect to the $20,000 payment.

Husband next contends that the court below erred when it required him to pay all of the past-due taxes of $32,233 to the Internal Revenue Service (IRS). He also argues that Wife should have been required to pay the debt due on the 1994 Plymouth Mini-Van awarded to her in the divorce. The trial court awarded the van to Wife, but decreed that Husband should pay the remaining debt on the vehicle.

A trial court is vested with broad discretion in dividing marital property and debts. T.C.A. § 36-4-121(a)(1); ***Batson v. Batson***, 769 S.W.2d 849, 859 (Tenn.App. 1988). It is true, as Husband argues, that courts, in dividing marital property, frequently match a debt to the asset to which it is related, and assign that debt to the party receiving the asset in question, ***Mondelli v. Howard***, 780 S.W.2d 769, 773 (Tenn.App. 1989) ("When practicable, the debts should follow the assets they purchased."); but this is not an inflexible rule. The real obligation of the court is to divide the marital property and debts in an equitable fashion. ***Id***. This is the statutory rule, to which all other rules must bend. *See* T.C.A. § 36-4-121(a)(1).

The federal income taxes in question relate to capital gains that arose out of the sale of the ten duplexes alluded to earlier in this opinion. Those sales, all of which occurred in the 1993-1995 time frame, produced net proceeds of approximately $180,000, most of which was taxable gain because of the parties' low basis in each of the properties. Without Wife's involvement, Husband had agreed with the IRS to liquidate this indebtedness at the rate of $1,186 per month.[3]

Husband was cross-examined as to why he had not paid the taxes when due. His explanation was that he "just procrastinated on that." At the same time he was *not* paying the taxes, he was writing checks to cash over a two-year period for some $27,000 and contributing to the support and needs of his adult children. The trial court concluded that Husband should pay all of these taxes because the court found that he "h[ad] squandered money." The court also found that the tax obligations are related to property over which Husband exercised control. It pointed out that Wife's income had been subject to withholding tax and that she was not responsible for the fact that the taxes had not been paid.

With respect to the van debt, the record reflects that, prior to the divorce, Husband had been making the monthly payment and Wife had been paying for the car insurance. The trial court, in effect, continued the parties' arrangement by ordering Husband to pay off the van debt.

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[3]Of this amount, there was a formal agreement to pay $336 per month to liquidate a combined 1993 and 1994 tax bill of $9,827 and an informal understanding to pay a 1995 tax bill of $22,406 at the rate of $850 per month.

We find and hold that the evidence does not preponderate against the trial court's division of property decrees, including its allocation of the IRS and van obligations to Husband. The trial court was not satisfied with Husband's explanation as to the disposition of the $180,000 realized from the sale of the ten duplexes. Wife acknowledged receiving $20,000 of this sum, but the evidence was not clear as to the disposition of the remainder. Husband claimed that none of the remaining $160,000 was still available. The court gave Wife a disproportionate share of what appears to be a negative net worth because of Husband's lame explanations and the court's finding that Husband had "squandered" the parties' property. The evidence does not preponderate against these determinations.

IV. *Alimony*

The trial court ordered Husband to pay alimony of $700 per month until the van debt is fully paid, at which time his monthly alimony obligation is to increase to $1,000. It also decreed that this obligation is to continue

> for the remainder of [Wife's] life unless [Wife] remarries. In the event [Wife] remarries the alimony obligation shall continue for a period of 5 years from the date of entry of this decree.

The trial court also ordered Husband to pay $2,500 toward the attorney's fees of Wife's counsel.[4] Husband argues that fixed

[4]The affidavit of Wife's counsel reflects fees of $5,195 and expenses of $597.55.

alimony for five years was not appropriate; that Wife is voluntarily underemployed and therefore not deserving of "permanent" alimony; and that Wife should be required to pay all of her counsel's fees and expenses.

The issue of alimony was considered in the Supreme Court case of ***Aaron v. Aaron***, 909 S.W.2d 408 (Tenn. 1995):

> "The amount of alimony to be allowed in any case is a matter for the discretion of the trial court in view of the particular circumstances." ***Ingram v. Ingram,*** 721 S.W.2d 262, 264 (Tenn.Ct.App. 1986) (*citing* ***Newberry v. Newberry***, 493 S.W.2d 99 (Tenn.Ct.App. 1973)). While there is no absolute formula for determining the amount of alimony, "the real need of the spouse seeking the support is the single most important factor. In addition to the need of the disadvantaged spouse, the courts most often consider the ability of the obligor spouse to provide support." ***Cranford v. Cranford***, 772 S.W.2d 48, 50 (Tenn.Ct.App. 1989) (citations omitted). Further, the amount of alimony should be determined so "that the party obtaining the divorce [is not] left in a worse financial situation than he or she had before the opposite party's misconduct brought about the divorce." ***Shackleford v. Shackleford***, 611 S.W.2d 598, 601 (Tenn.Ct.App. 1980) (citations omitted).

Id. at 410-11. On the issue of attorney's fees, it is clear that this is also a subject that addresses itself to the sound discretion of the trial court, and an appellate court will not interfere absent a showing of an abuse of that discretion. ***Elliot v. Elliot***, 825 S.W.2d 87, 92 (Tenn.App. 1991); ***Threadgill v. Threadgill***, 740 S.W.2d 419, 426 (Tenn.App. 1987).

We find no error in any of the trial court's alimony decrees, including its award of attorney's fees. Wife was 63 years old at the time of the hearing below. She had been in an emotionally abusive[5] marriage for some 42 years. She had worked as a registered nurse for 37 years, retiring in 1992 because, according to her, she was emotionally and physically unable to continue this line of work. At the time of trial, she was receiving social security of $417 per month, and was working 20 hours a week at the Tennessee Aquarium for $5.50 per hour. She was sharing an apartment with the parties' daughter.

During the entire time that the parties were living together, Wife gave her check to Husband, who put it in his plumbing business checking account, the only checking account used by the parties during most of their marriage. It is clear that he was in control of that checking account. Wife testified that there were many times that he would come to her place of business to pick up her paycheck in order to cover his business obligations.

The record is clear that Wife was almost totally responsible for the care of the parties' children during their minority. It is also clear that Wife, not Husband, attended to the various household chores. There is no evidence that Husband contributed substantially to any of these endeavors.

The evidence does not preponderate against the trial court's judgment that Wife needed and was entitled to the alimony

[5]There was no evidence of physical abuse.

decreed by the trial court, pursuant to the provisions of T.C.A. § 36-5-101(d)(1)(A)-(L).

Husband argues that he does not have the resources to pay the alimony ordered by the trial court. We disagree. A witness called by Husband calculated that his net income per month, from his plumbing business and social security, was $2,793. While the record is not clear, this figure apparently does not include the net rentals from his one-fifth interest in 25 duplexes. His net rental income had averaged $712 per month.

The trial court did not believe that Husband's income was limited to the amounts testified to by the accountant:

> The Court further finds that Mr. Epstein is very capable of paying alimony, and the Court believes his earnings are much in excess of what he is showing on tax returns and what he is showing by virtue of his income and expense statement that was filed. You know, figures don't lie. Based just upon canceled checks that Mr. Epstein has written to Mrs. Epstein and the children in the last five years, that totals $45,202, which divided by five over a five-year period of time, that comes out to be $9,040.40 per year or $753.37 a month. That could not have existed based upon the income that he is reflecting in his tax returns and the information he has given to his accountant.

As we have previously indicated, the trial court simply did not believe Husband. With this credibility determination in mind, we are unable to say that the evidence preponderates against the trial court's holding that Husband should pay alimony in the amounts decreed and under the terms set forth in the judgment. We find no error in the trial court's alimony decrees.

Husband's argument that his almost-absolute[6] obligation to pay alimony for five years runs afoul of T.C.A. § 36-5-101(a)(2)(B)[7] is without merit. That statute does not *prohibit* a court from decreeing an alimony obligation for a specific period of time. We find no violation of the statute in the court's decree.

V. *Decree as to Non-Party's Obligation*

The trial court decreed that Husband's alimony obligation would survive his death. In this case, we believe this was an appropriate decree. *See* ***Bringhurst v. Tual***, 598 S.W.2d 620, 621 (Tenn.App. 1980). However, the court went further and opined as follows:

> ...if Mr. Epstein becomes deceased before Mrs. Epstein, then it is the Court's intent that his interest in the estate of his parents shall continue to pay that obligation till such time as those funds or assets are exhausted or until such time as Mrs. Epstein becomes deceased.

This holding was incorporated into the court's judgment with the following language, as set forth in paragraph 7 of that document:

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[6]The alimony does not survive Wife's death.

[7]T.C.A. § 36-5-101(a)(2)(B) provides, in pertinent part, as follows:

> In all cases where a person is receiving alimony in futuro or alimony the amount of which is not calculable on the date the decree was entered, and that person remarries, the alimony in futuro or alimony the amount of which is not calculable on the date the decree was entered, will terminate automatically and unconditionally upon the remarriage of the recipient.

> If Defendant predeceases Plaintiff, Defendant's interest in the estate of his parents shall continue to pay the obligation of alimony to Plaintiff until such time as those funds or assets are exhausted or until such time as Plaintiff becomes deceased.

Husband argues that this provision imposes an obligation on an entity -- "the estate of [Husband's] parents" -- that was not before it. While this provision is subject to this interpretation, we do not believe that this is what the court intended. Rather, we believe the court intended to award Wife a lien on Husband's one-fifth interest in the 25 duplexes to secure the payment of his alimony obligation after his death. Such a lien is authorized by T.C.A. § 36-5-103 ("The court may enforce its orders and decrees...by...the imposition of a lien against the real and personal property of the obligor.") In order to clarify this matter, this court will vacate the present language of paragraph 7 of the judgment. On remand, the trial court will enter an order deleting this language and substituting the following language:

> If Defendant predeceases Plaintiff, his alimony obligation will survive his death and be a charge against his estate. To secure Plaintiff's alimony in the event Defendant predeceases her, she is hereby awarded a lien against Defendant's undivided one-fifth interest in the 25 duplexes, which were previously owned by Defendant's parents. Defendant will execute such documents as may be necessary to memorialize this lien so as to permit the registration of same in the office of the Register of Deeds in the county where the properties are located. In any event, this alimony obligation and the lien will terminate upon Plaintiff's death.

VI. *Conclusion*

Paragraph 7 of the trial court's judgment is hereby vacated. The remainder of the judgment is affirmed. Costs on appeal are taxed against the appellant and his surety. This case is remanded to the trial court for the entry of the order described above; for enforcement of the judgment, as modified; and for collection of costs assessed below, all pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.