

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 14, 2007 Session

CHRISTINE DALL ANZALONE v. JOSEPH JOHN ANZALONE

**Appeal from the Circuit Court for Hamilton County
No. 04-D-0853 L. Marie Williams, Judge**

No. E2006-01885-COA-R3-CV - FILED OCTOBER 30, 2007

Husband and Wife stipulated to grounds for divorce pursuant to Tenn. Code Ann. § 36-4-129, as well as to the amount of child support and the division of marital property. Wife received the marital residence, valued at \$236,000, and additional items for a total of \$267,580 worth of marital assets. Husband received \$259,544 in marital assets, resulting in a nearly equal division of the marital property. These stipulations were announced to the Trial Court, and both parties stated to the Trial Court their acceptance of the terms. A trial was conducted on the remaining issues – Wife’s request for alimony; both parties’ requests for attorney fees; and Wife’s request that Husband pay the cost of medical insurance for the parties’ three children, who were insured by TennCare at the time of trial. The Trial Court awarded Wife rehabilitative alimony of \$400 per month for three years, \$5,000 in attorney fees, and ordered Husband to provide health and dental insurance for the children through his employer. On appeal, Husband contests the Trial Court’s award of the marital home to Wife, the grant of alimony and partial attorney fees to Wife, and the requirement that Husband provide medical insurance for the parties’ children. Husband also asserts that the Trial Court violated his equal protection rights. We hold that Husband waived his equal protection claim by not raising it at the Trial Court level. Furthermore, we hold that the Trial Court did not err in its overall division of the marital property, the award of attorney fees to Wife, or by requiring Husband to provide the children’s health insurance. However, we conclude that Wife’s alimony is more appropriately characterized as transitional instead of rehabilitative because of the lack of evidence regarding Wife’s ability or intent to rehabilitate herself, and we modify the Trial Court’s judgment accordingly. We affirm as modified.

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

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Robin Ruben Flores, Chattanooga, Tennessee, for the Appellant, Joseph John Anzalone.

Bruce C. Bailey and Heather H. Sveadas, Chattanooga, Tennessee, for the Appellee, Christine Dall Anzalone.

OPINION

I. Background

Husband and Wife married in 1985. After nearly twenty years of marriage, Wife filed for divorce in April of 2004, alleging irreconcilable differences and inappropriate marital conduct. In her complaint, Wife also requested custody of the parties' three minor children.¹ Husband filed his answer and counterclaim for divorce based on several grounds, including inappropriate marital conduct, abandonment, irreconcilable differences, and Tenn. Code Ann. § 36-4-101(12).² Wife filed an answer to Husband's counterclaim, seeking child support, permanent periodic alimony, adoption of her proposed permanent parenting plan, and an equitable division of the parties' marital assets.

The Trial Court entered an order granting Wife \$86 per month in *pendente lite* spousal support and child support in the amount of \$914 per month pursuant to the Child Support Guidelines, for a total of \$1,000 per month. Husband also was ordered to purchase an insurance policy for the marital residence. In a later order, the Trial Court, upon Husband's motion and by agreement of the parties, appointed a guardian *ad litem* to represent the interests of the parties' children. Husband filed a Motion to Modify Child Support and Alimony Obligation. Husband's motion stated that he had been laid off from his job and that his new job paid nearly \$5 an hour less than his previous position, and that this decrease in his income prevented him from meeting his *pendente lite* support obligations. In response, the Trial Court eliminated the \$86 per month alimony payment, but required Husband to continue paying \$914 per month in child support.

The parties participated in two sessions of mediation, after which the mediator filed with the Trial Court two documents, the "Memo[s] of Understanding," signed by Husband and Wife. In the first memo, the parties agreed that the parties and their daughter would attend counseling, and they set a graduated parenting schedule for Father's visitation with his two sons. The second memo included agreements about conducting an inventory of the marital residence, allowing Husband to collect his personal effects from the home, obtaining homeowners' insurance for the residence, paying property taxes, preparing proposals for the division of marital property, and gathering information about health insurance for the children. The second memo also set forth a detailed parenting schedule for holidays and birthdays.

On the morning of trial, the parties met to see if they could reach an agreement on any issues without having to try them. From the Trial Court's transcript, it appears that at least a portion of these discussions were held in chambers with the Trial Judge present, following which the Trial Court summarized on the record the agreements reached by the parties. The parties agreed that Wife would be the primary residential parent of the parties' three children and that the family therapist would set the residential parenting schedule. They also agreed that

¹ The parties' oldest child turned 18 during the pendency of this appeal.

² Tennessee Code Ann. § 36-4-101(12) lists the following as a ground for divorce: "The husband or wife has offered such indignities to the spouse's person as to render the spouse's position intolerable, and thereby forced the spouse to withdraw."

Husband's child support obligation would remain at the previously set amount of \$914 per month, despite the fact that Husband had recently received a \$2 per hour raise. Husband and Wife clarified the valuation of several marital assets, including the marital residence as to which they stipulated the value as being \$236,000. The parties agreed to the division of marital property using Wife's proposed division of assets as a starting point. This agreement resulted in Wife obtaining the marital residence and Husband getting most of the liquid assets. Wife's portion of the marital estate totaled \$267,580, while Husband received \$259,544 in assets.

After reciting all of these agreements, the Trial Court set forth the three remaining issues to be tried – alimony, attorney fees, and provision of medical insurance for the children. The Trial Court then had the parties sworn and asked each of them whether they agreed with the stipulations that had been announced. Husband and Wife both expressed their consent to the stipulations, and the trial proceeded on the remaining issues. Following testimony by Husband and Wife, the Trial Court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129 and took the remaining issues under advisement. In its memorandum opinion entered on October 31, 2005, the Trial Court granted Wife rehabilitative alimony in the amount of \$400 per month, ordered Husband to pay \$5,000 of Wife's attorney fees, and directed Husband to obtain dental and health insurance through his employer for the parties' children. Husband filed a Motion to Alter and/or Amend Judgment, which the Trial Court granted in part by specifying the duration of Wife's alimony to be three years, but denied in all other respects. Husband appeals.

II. Discussion

Husband has presented the following issues on appeal, which we restate as follows:

1. Whether the record supports the Trial Court's finding of fact regarding the parties' stipulated agreement as to the property division.
2. Whether the Trial Court's order requiring Husband to obtain medical insurance for the children was equitable.
3. Whether the Trial Court erred by awarding Wife alimony and attorney fees despite her inheritance.
4. Whether the Trial Court denied Husband his right to equal protection under the law because of its rulings regarding property division and alimony.

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the Trial Court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The Trial Court's conclusions of law are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

A. Property Division

Husband argues that the record does not support the Trial Court's finding that he acknowledged his agreement to the property division announced by counsel before the trial began. In particular, he claims that he never understood, acknowledged, or consented to the award of the marital home to Wife. Before entering an order based on the parties' stipulations, including the division of marital property, the amount of child support, and the parenting schedule, the Trial Court questioned both parties regarding their consent to these stipulations. The following colloquy occurred between Husband and the Trial Court at this time:

[Trial Court]: Mr. Anzalone, do you agree that the statement, as announced by counsel, was an accurate statement of the parts of the case you have agreed to settle?

[Husband]: Yes, ma'am, I do.

[Trial Court]: Do you agree that the permanent parenting plan is in the best interest of the children?

[Husband]: Yes, I do.

[Trial Court]: You understand that, no matter how the Court rules on the remaining issues, you are bound by the agreement, having been sworn and having testified this is your stipulation.

[Husband]: Yes, ma'am.

The Final Decree of Divorce was entered and signed by the attorneys for both parties based in part on the stipulations agreed to by Husband and Wife on the day of trial. Specifically, the Trial Court stated as follows:

The Parties agreed to a division of marital assets, using [Wife's] proposed division subject to certain adjustments, including valuing the Marital Home at \$236,000, awarding the Martial [sic] Home to [Wife], and awarding other assets to Mr. Anzalone to make an overall equitable distribution. Before the contested hearing began, the Parties announced this agreement to the Court, the Court examined both [Husband] and [Wife] regarding their agreement, and both affirmed the stated agreement.

We find Husband's assertion that he did not agree to the award of the marital home to Wife to be contrary to the weight of the evidence. Husband was present in court when counsel announced the agreement based, in part, on Wife's proposed division of marital property awarding the marital home to Wife. Husband not only did not express any objections to the stipulations at that time, but instead, in answer to the Trial Court's questioning, specifically acknowledged his agreement to the stipulations. Furthermore, Husband's attorney signed the decree containing the same property division. If Husband did not understand the terms of the agreement, he should have asked his attorney or the Trial Court to explain them, rather than

expressing his assent. Therefore, we conclude that the Trial Court did not err in relying on Husband's sworn statement that he agreed to the division of marital property which, in part, awarded the house to Wife.

Regardless of Husband's assertions on appeal as to this issue, Husband loses even if the issue is restated as being not whether Husband agreed to the property division announced in open court, but whether the overall division was equitable. *See* Tenn. Code Ann. § 36-4-121. A trial court has wide discretion in dividing the interest of the parties in marital property. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). As noted by this Court in *King v. King*:

The trial court's goal in every divorce case is to divide the parties' marital estate in a just and equitable manner. The division of the estate is not rendered inequitable simply because it is not mathematically equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because each party did not receive a share of every item of marital property. *Brown v. Brown*, 913 S.W.2d [163] at 168. . . . In the final analysis, the justness of a particular division of the marital property and allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. App. 1990).

King v. King, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (quoting *Roseberry v. Roseberry*, No. 03A01-9706-CH-00237, 1998 WL 47944, at *4 (Tenn. Ct. App., Feb. 9, 1998)).

Wife received marital assets totaling \$267,580, including the marital residence valued at \$236,000. Husband received marital assets valued at \$259,544, including gold and silver bars and coins valued at more than \$196,000. Thus, the Trial Court awarded Wife 50.8 percent of the marital estate and Husband 49.2 percent of the marital estate. Husband has failed to present any evidence of why this overall division of marital property, which both parties agreed to in open court, is not equitable in any event. Before the parties reached a compromise on this issue, Husband's apparent concern was that he receive an appropriate amount of the equity in the marital home. He did not contest Wife's desire to retain the marital residence, and given her role as primary residential parent, we find no fault with the Trial Court's award of the home to Wife. In addition to the parties having agreed to the property division, we also conclude that Husband has failed to show that the Trial Court's overall division of the marital property was not equitable, and we, therefore, affirm the Trial Court's ruling on this issue.

B. Alimony and Attorney Fees

Tennessee courts have stated on numerous occasions that a trial court has broad discretion in determining the type, amount, and duration of alimony, depending on the particular facts of each case. *See, e.g., Wood v. Wood*, No. M2003-00193-COA-R3-CV, 2004 WL 3008875, at *4 (Tenn. Ct. App. M.S., Dec. 28, 2004). The General Assembly has set forth the following factors for a trial court to consider when reviewing a request for alimony:

- (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;
- (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). Appellate courts are disinclined to second-guess a trial court's decision regarding alimony unless it is not supported by the evidence or is contrary to public policy. *Nelson v. Nelson*, 106 S.W.3d 20, 23 (Tenn. Ct. App. 2002). The Tennessee Supreme

Court has stated that “[t]he two most relevant factors in determining the amount of alimony awarded are the economically disadvantaged spouse’s need and the obligor spouse’s ability to pay.” *Broadbent v. Broadbent*, 211 S.W.3d 216, 222 (Tenn. 2006).

Regarding her need for alimony, Wife testified that she was a stay-at-home mother for the majority of the parties’ nearly 20-year marriage. Wife home schooled the parties’ three children for several years, and then began working part-time in 1996 or 1997. Wife is a high-school graduate and attended college for some time but discontinued her studies before receiving a degree. On cross-examination, Wife admitted that she was within a few credits of obtaining a four-year degree. However, Wife did not provide a transcript of her studies, nor did she offer any evidence about whether she planned to enroll in the additional classes needed to receive a college degree. At the time of trial, she was a full-time employee at a CVS Pharmacy earning \$7.75 per hour. During the pendency of this lawsuit, Wife’s father died, and left her an inheritance of approximately \$172,000 plus additional property that had not been sold at the time of trial. Wife stated that she had spent approximately \$20,000 of her inheritance to pay attorney fees, and she also had used the money for other expenses such as an inventory of the marital residence. Relying on Wife’s income and expense statement filed in June 2004, as well as her testimony that she had recently received a 50-cent raise in her hourly wage (to \$7.75 per hour from \$7.25 an hour), the Trial Court calculated her gross monthly income at \$1,251 per month. Including Husband’s child support payment of \$914 per month, Wife’s gross monthly income was \$2,165.³ She reported expenses of \$2,260.76 for herself and the parties’ three children.

Husband has held various jobs during his lifetime, including operating two successful restaurants and making custom cabinetry. His income has ranged from \$35,000 to \$40,000. At the time of trial, Husband was working as a textile spinning operator earning \$12.11 per hour, with a 75-cent shift differential. He also worked eight hours of overtime every other week. Husband’s income and expense statement filed in June 2004 shows a monthly gross income of \$2,860 per month. Although Husband filed a revised income and expense statement in May of 2005, during the trial Husband’s counsel relied on the income and expense statement filed in June 2004.⁴ Husband’s testimony regarding his income – a net income between \$920 and \$940 every two weeks – more closely resembles the June 2004 document than the May 2005 version, which states gross income of \$200 less per week (approximately \$867 less per month) than Husband’s earlier income and expense statement used at trial. The Trial Court utilized Husband’s June 2004 income and expense statement in deciding whether Husband had the ability to pay alimony to Wife, and we find no error in its decision to do so.⁵

After deducting Husband’s child support payment of \$914 from the income reported in his 2004 income and expense statement, Husband is left with a monthly gross income of \$1,946 per month to pay his remaining expenses. Husband sets forth expenses of \$1,249 per month in

³ The Trial Court reported her gross income after receiving child support as \$2,166.16, rather than \$2,165.

⁴ Although Husband’s counsel relied on figures from the 2005 income and expense statement on appeal, our review is limited to the evidence that the parties offered to the Trial Court at trial – namely, Husband’s 2004 income and expense statement and his testimony at trial.

⁵ In its Memorandum Opinion, the Trial Court declined to rely on Husband’s testimony of \$920 to \$940 net pay every two weeks, because “there was no testimony given as to his gross [income] or what deductions are made to arrive at the net figure.”

his 2004 income and expense statement.⁶ Although Husband claimed the full amount of his rent and utilities as expenses, he actually is sharing an apartment with his mother, who pays at least a portion of these bills.

The Trial Court awarded Wife \$400 per month in rehabilitative alimony for three years. The General Assembly has stated the following regarding the nature of rehabilitative alimony:

To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(e)(1). The Trial Court found that Wife had a “demonstrated need and an ability to be rehabilitated.” However, Wife failed to present any evidence of how she could rehabilitate herself. She did not express a desire to return to college or take any additional training which would result in increased earnings. The record contains no evidence of Wife's ability or intent to be rehabilitated. Therefore, we find that Wife's alimony is more properly characterized as transitional alimony. According to Tenn. Code Ann. § 36-5-121(g), “Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded.” We hold that Wife's alimony should have been designated as transitional alimony.

Husband argues that Wife has no need for alimony, because of her substantial inheritance. The record indicates that Wife already had received \$172,000 from her father's estate at the time of trial, and that she also would receive proceeds from the sale of property located in Dunlap, Tennessee. The Trial Court stated, “[Wife] does have some separate independent funds because of her inheritance. However, it is anticipated that fund will be depleted through the activities of normal living.” Wife spent approximately \$20,000 of her inheritance to pay part of her attorney fees, and it is entirely likely that she may have to use more of that money to pay her and the children's daily expenses, despite her wish to establish college trust funds for the children with those proceeds. It is an unfortunate reality of divorce that two households are more expensive to maintain than one, and, therefore, it is not always possible for the ex-spouses to enjoy the same standard of living following a divorce as they did when they were married. This appears to be one of those situations, and both parties must adjust their spending habits accordingly. Wife earns barely more than half of what Husband earns, and we see no reason to expect that her salary will increase substantially in the future. Because of her inheritance, Wife does have a not insubstantial amount of separate property. After carefully considering all of the evidence in this case, including Wife's separate property, we find the evidence does not preponderate against the Trial Court's findings that Wife has a need for

⁶ Husband's revised income and expense statement, filed in May 2005, lists expenses of \$1,735, not including child support. As we mentioned previously, however, the 2005 document was not relied upon by the parties or the Trial Court during the trial and we, therefore, we will disregard these figures in our analysis as well.

alimony to help her adjust to her post-divorce lifestyle and that Husband has the ability to pay alimony as awarded. Accordingly, we affirm Wife's alimony award of \$400 per month for three years, but modify the Trial Court's order so that the alimony is designated as transitional alimony rather than rehabilitative alimony.

An award of attorney fees constitutes alimony *in solido*. *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996). In determining whether to award fees, a trial court must consider the relevant factors regarding alimony set forth in Tenn. Code Ann. § 36-5-121(i). *Echols v. Echols*, No. E2006-02319-COA-R3-CV, 2007 WL 1756711, at *7 (Tenn. Ct. App. E.S., June 19, 2007). Awards of attorney fees are within the sound discretion of the trial court. As a result, we will not disturb such an award on appeal unless the Trial Court clearly abused its discretion. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2002).

Invoices submitted by Wife's counsel establish attorney fees in excess of \$35,000, which includes services provided through the end of the trial. Wife testified that she paid approximately \$20,000 of that amount from her inheritance. The Trial Court ordered Husband to pay \$5,000 toward Wife's attorney fees, an amount less than one-seventh of the fees she had incurred. We find no abuse of discretion in the Trial Court's order awarding Wife \$5,000 in attorney fees, and we affirm on this issue.

C. Insurance

Husband maintains that the Trial Court's requirement that he obtain and pay for medical and dental insurance for the parties' three children was error. Husband testified that the cost to provide such insurance through his employer would be approximately \$160 per month, an amount he stated would "further impoverish him." Husband did not present an exact figure for the cost of the children's health and dental insurance. He stated that he pays approximately \$80 per month for his own medical insurance, and he thinks that the premium for himself and three children would be around \$240 per month.

At the time of trial, the children were insured through TennCare with Wife paying the TennCare premiums and co-payments since the parties' separation. Husband wants to maintain the status quo by continuing the children's TennCare enrollment. However, we agree with the Trial Court that such a result would be contrary to the edict of the General Assembly requiring parents who are able to provide private health insurance for their children to do so. Regarding the payment of insurance premiums for minor children following a divorce, Tenn. Code Ann. § 36-5-101 provides in pertinent part:

(h) (1) The court may direct the acquisition or maintenance of health insurance covering each child of the marriage and may order either party to pay all, or each party to pay a pro rata share of, the health care costs not paid by insurance proceeds. *In no event shall eligibility for or receipt of Medicaid or TennCare-Medicaid by the custodial parent be considered to meet the need to provide for the child's health care needs in the order, if reasonable and affordable health insurance is available.*

Tenn. Code Ann. § 36-5-101(h)(1) (emphasis added). Furthermore, the Child Support Guidelines provide as follows:

1. If health and/or dental insurance that provides for the health care needs of the child can be obtained by a parent at reasonable cost, then an amount to cover the cost of the premium shall be added to the [Basic Child Support Obligation] as indicated above in subparagraph (a). . . .

4. *Eligibility for or enrollment of the child in TennCare or Medicaid shall not satisfy the requirement that the child support order provide for the child's health care needs.*

Tenn. Comp. R. & Regs. 1240-2-4-.04(1)(a) (emphasis added). Clearly, the public policy of this state disfavors allowing parents to escape their obligation to support their children by obtaining TennCare or Medicaid when private health insurance is available at a reasonable and affordable cost to the parents. We agree with the Trial Court's implicit finding that \$160 per month is not an unreasonable premium to secure health insurance for three children. Although Husband claims that this amount will "further impoverish him," we do not believe the record before us supports Husband's claim. Therefore, we affirm the Trial Court's order requiring Husband to provide health and dental insurance for the parties' children.

D. Equal Protection

In his appellate brief, Husband asserts that his equal protection rights were violated in that “the appearance is that the trial court favored the woman while depriving the husband of the same access to attorney fees and alimony.” However, Husband did not raise this issue before the Trial Court, and we have repeatedly held that an issue, with certain limited exceptions, is waived if it is raised for the first time on appeal. *Lee v. Lee*, 66 S.W.3d 837, 847 (Tenn. Ct. App. 2001) (citing *Barnhill v. Barnhill*, 826 S.W.2d at 458); *see also Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc.*, 677 S.W.2d 457, 467 (Tenn. Ct. App. 1984); *Hohenberg Bros. Co. v. Missouri Pac. R.R. Co.*, 586 S.W.2d 117, 119 (Tenn. Ct. App. 1979). Therefore, we find no merit in Husband’s equal protection argument.

III. Conclusion

After careful review, we affirm the Trial Court’s judgment in this case, but modify the designation of Wife’s alimony from rehabilitative to transitional. We affirm the decision of the Trial Court as modified and remand for further proceedings consistent with this opinion. Costs on appeal are taxed against the Appellant, Joseph John Anzalone.

D. MICHAEL SWINEY, JUDGE