

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2007 Session

MICHAEL ROWDY ECHOLS v. JOYCE BUTLER ECHOLS

**Appeal from the Chancery Court for Knox County
No. 150771-2 Daryl Fansler, Chancellor**

No. E2006-02319-COA-R3-CV - FILED JUNE 19, 2007

In this divorce case, Husband argues that under the doctrine of judicial estoppel, the trial court was precluded from awarding Wife spousal support in excess of the amount she listed as the value of her divorce settlement in the bankruptcy schedules she signed under oath and filed over two years prior to the divorce trial. Husband also argues that the trial court erred in the division of marital property and in awarding Wife transitional alimony in the amount of \$500 per month for one year and attorney's fees in the amount of \$50,250. In the absence of evidence that the prior statement of value in Wife's bankruptcy schedules was willfully false, we hold that the doctrine of judicial estoppel is not applicable in this case. We further hold that the trial court's division of marital property and award of transitional alimony was equitable and was supported by the evidence. However, we hold that the grant of attorney's fees to Wife in the amount of \$50,250 was excessive and should be reduced to \$15,000. Accordingly, the judgment of the trial court is affirmed in all respects, except that the award of attorney's fees to Wife is reduced to \$15,000.

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

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Kevin C. Angel, Clinton, Tennessee, for the appellant, Michael Rowdy Echols.

George T. Underwood, Jr., Knoxville, Tennessee, for the appellee, Joyce Butler Echols.

OPINION

I. Background

Michael Rowdy Echols (“Husband”) and Joyce Butler Echols (“Wife”) were married in December of 1989. No children were born of the marriage. In April of 2001, Husband filed a complaint for divorce upon grounds of irreconcilable differences and inappropriate marital conduct, and the parties separated approximately eight months later. Thereafter, Wife filed an answer and countercomplaint for divorce, also upon grounds of irreconcilable differences and inappropriate marital conduct.

On November 30, 2001, the trial court entered a pendente lite order that included a stipulated provision that Wife would have exclusive possession of the marital residence and Husband would pay the mortgage payments due on the residence in the amount of \$1,140 per month. It appears that Husband made these mortgage payments through July of 2002; however, he discontinued making such payments after that date. Although no further mortgage payments were made by either party and the residence was eventually foreclosed on, Wife was allowed to continue to occupy the residence through July of 2004 without cost to her.

During the pendency of their divorce case, both parties invoked the protection of the United States bankruptcy court: Husband filed a Chapter 13 bankruptcy petition in July of 2003, receiving a discharge in September of 2004, while Wife filed a Chapter 7 bankruptcy petition in February of 2004 and was subsequently granted a discharge at some time that is not clear from the record.

The parties’ complaints for divorce came on for hearing on March 27, 2006, after which, on April 21, 2006, the trial court entered its decree and incorporated transcription of its findings of fact and conclusions of law. The decree granted Wife a divorce upon grounds of adultery or inappropriate marital conduct upon stipulation by Husband that during the marriage he had sexual relations with approximately twenty-five other women. It appears that with the exception of the parties’ retirement benefits and two vehicles, the parties’ marital property was either disposed of in their bankruptcies or divided by agreement. As to the retirement benefits, the order provided that Wife be awarded one-half of Husband’s pension when he begins receiving same, based on the duration of the marriage and the duration of Husband’s employment at the time he retires, and that she further receive \$14,174, representing one-half of Husband’s 401(k) savings account. The decree provided that Wife retain her own pension and 401(k). As to spousal support, the decree ordered Husband to pay Wife a spousal support arrearage in the amount of \$49,260¹, representing the \$1,140 per month mortgage payments, as required by the November 21, 2001 pendente lite order, that Husband failed to make from August of 2002 to the time of trial. Additionally, the decree ordered that Husband pay Wife \$500 per month for twelve months as transitional alimony with permission to move for modification should the \$49,260 arrearage be paid within thirty days of March 27, 2006.

¹This amount reflected a credit to Husband of \$900 which was the value of Husband’s interest in a motorcycle that went missing while in Wife’s possession and control.

Shortly after entry of the divorce decree, Husband filed a motion for new trial or to amend judgment wherein he asserted that in her February 2004 bankruptcy schedules, Wife failed to list the divorce “as a matter in which she was likely to receive a judgment;” failed to “indicate that she had any present or future right to alimony, maintenance support, or property settlements;” and failed to “[i]ndicate that she had any possible claim in the divorce over \$20,000.00.” Based upon these assertions, Husband argued that Wife was estopped from receiving any settlement in the divorce exceeding \$20,000 and “from receiving any alimony, maintenance support, and/or property settlements from [Husband].” Wife filed her response to this motion denying its merits and a separate motion requesting that Husband be ordered to pay her attorney’s fees in the amount of \$50,250. All of these matters were set for hearing, after which the trial court entered its order denying Husband’s motion for new trial or to amend judgment and granting Wife’s request for attorney’s fees. This appeal by Husband followed.

II. Issues

The following issues are presented for our review:

- 1) Whether Wife was judicially estopped from receiving spousal support in excess of the \$20,000 value she placed upon her divorce settlement in her bankruptcy schedules.
- 2) Whether the trial court erred in awarding Wife the full arrearage of monthly support payments related to payment of the mortgage on the marital residence.
- 3) Whether the trial court erred in its division of marital property.
- 4) Whether the trial court erred in awarding Wife transitional alimony.
- 5) Whether the trial court erred in awarding Wife attorney’s fees in the amount of \$50,250.

III. Analysis

A. Standard of Review

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 there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court’s factual findings. *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999). 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).

B. Judicial Estoppel

The first issue we address is whether, pursuant to the doctrine of judicial estoppel, Wife was barred from an award of spousal support in excess of \$20,000. In this regard, Husband reiterates the argument presented in his motion for new trial or amended judgment that \$20,000 should be the limit of any such award, based upon the fact that in her sworn bankruptcy petition of February 12, 2004, Wife assigned a value of \$20,000 to her “Pending Divorce Settlement.”

The equitable doctrine of judicial estoppel prohibits a party from taking a position which is “directly contrary to, or inconsistent with” a position that party has taken under oath in prior litigation, where such party “had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by this action.” *Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn. 1999) (quoting *Obion County v. McKinnis*, 364 S.W.2d 356, 357 (Tenn. 1962)). The doctrine’s distinctive feature “is the expressed purpose of the court, on broad grounds of public policy, to uphold the sanctity of an oath.” *Id.* (quoting *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313, 318 (Tenn. 1924)), and because the doctrine of judicial estoppel is based on public policy, it need not be pled by a party and may be raised by the court itself. *Gilley v. Jernigan*, 597 S.W.2d 313, 318 (Tenn. Ct. App. 1979). However, the doctrine is not appropriately invoked unless it appears that the prior sworn statement was a willful falsehood, rather than the result of inadvertence, inconsideration, or mistake. *State ex rel. Ammons v. City of Knoxville*, 232 S.W.2d 564, 567 (Tenn. Ct. App. 1950). Anything short of “conscious and deliberate perjury” is insufficient to give rise to the doctrine of judicial estoppel. *State ex rel. Scott v. Brown*, 937 S.W.2d 934, 936 (Tenn. Ct. App. 1996).

Among other things, Wife’s bankruptcy petition required that she set forth a schedule of her assets, to include “[o]ther liquidated debts owing debtor including tax refunds” and that she show the “current market value” of her interest in any such property. In response, Wife listed “Pending Divorce Settlement,” assigning such asset a market value of \$20,000 at that time. Although, as we have stated, the final decree of divorce subsequently ordered that Husband pay Wife funds in an amount greatly exceeding the \$20,000 value set forth by Wife in her bankruptcy schedule, it does not follow from that fact alone that Wife’s statement in her bankruptcy schedule was willfully false or constituted “conscious and deliberate perjury.” The record shows that Wife signed her bankruptcy schedules on February 11, 2004, asserting them to be “true and correct to the best of [her] knowledge, information and belief” at that time. There is no basis for concluding that in February of 2004, Wife had “knowledge, information and belief” that at that time the value of her divorce settlement was more than \$20,000. Belying any assertion that her statement was a willful falsehood, she cannot reasonably have been expected to know or even to have formed a reliable belief as to the amount she would be entitled to in a divorce case that would not come to trial until over two years later. Nor was willful falsehood demonstrated by the fact that after July of 2002, Husband had failed to comply with the trial court’s pendente lite order of November 21, 2001, requiring that he pay \$1,140 per month to cover the mortgage payment on the marital residence. Although the pendente lite order set forth the specific monthly amount Husband was to have paid Wife and the number of months he had been in arrearage was apparent, the total arrearage due when Wife filed her bankruptcy totaled \$18,380 and thus, did not exceed the \$20,000 set forth by Wife in her bankruptcy

schedules. Furthermore, the trial court found, as noted by Husband in his appellate brief, “that both parties believed that the bankruptcies effected [sic] their obligations and abilities to collect on the arrearage.” This finding indicates that regardless of the amount of arrearage due under the pendente lite order, it was Wife’s belief that her ability to collect the arrearage in full at the time of her bankruptcy petition, and therefore the value of the arrearage at that time, was handicapped as a consequence of Husband’s then pending bankruptcy. Under all of these circumstances, we do find that it has been shown that Wife’s statement as to the value of her divorce settlement was a deliberate falsification and accordingly, we hold that the doctrine of judicial estoppel was not applicable in this case.

C. Mortgage Arrearage

Next, Husband argues that the trial court should not have awarded Wife the full arrearage for the mortgage payments due under the November 21, 2001 pendente lite order. Husband observes that even though the mortgage remained unpaid after he discontinued making such payments in August of 2002, Wife was permitted to continue living in the residence without financial consequence until July of 2004. Husband apparently contends that, because no mortgage debt was incurred by Wife from August of 2002 until July of 2004, the trial court’s award to Wife of \$1,140 per month arrearage for that period left her with a windfall which, as a matter of equity, she should not receive.

Husband does not dispute the validity of the pendente lite order or deny that under its terms he agreed to make monthly spousal support payments of \$1,140 for the residential mortgage. Although Husband complains that Wife was allowed to live in the residence for a period of time during which no mortgage payments were demanded, he filed no motion for a modification of the pendente lite order in light of these asserted changed circumstances. Rather, he unilaterally discontinued such payments in violation of the trial court’s decree and his own agreement, and as a consequence, the marital residence was eventually foreclosed on, and Wife moved into a two-bedroom apartment. Under these circumstances, it is our determination that Husband is barred from the relief he requests by the well-settled maxim that “[h]e who comes into equity must do so with clean hands.” *O’Brien v. O’Brien*, 734 S.W.2d 639, 643 (Tenn. Ct. App. 1987) (citing Gibson’s Suits in Chancery, Sixth Edition § 18, pp. 20-21). This maxim is appropriately applied in the instant matter as Husband seeks to be relieved of his obligation under the pendente lite order because of events that came about as a result of his deliberate refusal to comply with such order’s terms. A party is precluded from taking advantage of his own wrong. *McCallie v. McCallie*, 719 S.W.2d 150, 153 (Tenn. Ct. App. 1986). This argument is, therefore, without merit.

D. Marital Property

The third issue we address is whether the trial court erred in its division of marital property. The trial court began its division of the marital property in this case by noting that the parties’ bankruptcies had resulted in the disposition of a number of their assets and liabilities. The trial court also noted the parties’ agreement as to the division of most of their personal property, and the

primary marital assets not subject to such agreement were the parties' retirement benefits. Apparently, Husband contends that the trial court failed to divide these benefits in an equitable manner and that its decision was punitive in nature. We disagree.

In determining what constitutes an equitable division of marital property, T.C.A. § 36-4-121(c) provides that the court is required to consider "all relevant factors," which include:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

A trial court is allowed wide discretion in dividing marital assets, and its decision in that respect is to be given "great weight" by this Court. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). While there is a presumption that marital property is owned equally, there is no presumption favoring equal division of marital assets, and it is, rather, the duty of the court to reach an equitable division based upon its consideration of the factors set forth at T.C.A. § 36-4-121(c). *Bookout v. Bookout*, 954 S.W.2d 730, 731 (Tenn. Ct. App. 1997).

In its memorandum opinion, the trial court specified those statutory factors it considered relevant in dividing the parties' retirement benefits. In this regard, the trial court noted the duration of the marriage (approximately twelve years before separation); the age of the parties at the time of trial (Husband was forty-two, Wife was forty-six); and the parties' health (Husband has no health problems, while Wife testified that she was scheduled to have foot surgery in the near future and that she recently discovered that she is borderline diabetic and that this will result in future medical

expense). The trial court previously noted that Wife earns approximately \$30,000 per year and is employed by UT Battelle, while Husband, who is employed as a security officer by Wackenhut Services, earns in excess of \$80,000 per year and earned approximately \$86,000 in the year preceding trial. The trial court discussed the disparity in the parties' financial conditions and further stated the rationale for its decision as follows:

Obviously, [Husband] earns about three times per year what his soon-to-be former wife earns. There is no reason to believe that he will sustain any impairment to his ability to earn that kind of money. He takes karate lessons and he is an expert marksman which both qualify him well for his current position and he's been there for a period of time. When asked, [Wife] stated that her employer had projected that her retirement pension would only net her about \$900 per month and the Wackenhut 401(k) is worth about \$28,348 today and [Wife's] is about \$16,000 today. For those reasons that I've recited from the statute, I'm going to award her one-half of his 401(k) at Wackenhut, and that can be accomplished by a Qualified Domestic Relations Order. I also will award her a portion of his pension at the time he starts receiving that and that's to be calculated according to the formula that the cases tell us; that you will take the length of the marriage, which in this case is about 16 years and three months, over his years of service to get - - to get that fraction and then she would receive whatever that fraction is of 50 percent of his retirement at the time he starts receiving it. ... And because of his ability to acquire assets in the future being so far greater than hers, then I think an equitable division of this marital property requires the Court to leave her 401(k) in her pension plan in place as it is. That should bring some equalization in their retirement plans as they near retirement age.

Our careful review of the trial court's opinion and the record as a whole compels us to conclude that the trial court's decision as to disposition of the marital estate, including the parties' retirement benefits, was equitable and based upon proper consideration of relevant statutory factors. Husband's argument that the evidence preponderates to the contrary is without merit.

E. Transitional Alimony

The next issue we address is whether the trial court erred in awarding Wife transitional alimony in the amount of \$500 per month for twelve months.² Again, it appears to be Husband's contention that the trial court's decision in this regard was not equitable, and again, we disagree.

² In his brief, Husband misstates the total amount of transitional alimony awarded to Wife as being \$12,000 rather than the \$6,000 that the trial court's award actually totals.

The statutory factors to be considered in determining the propriety of an award of alimony are set forth as follows at T.C.A. § 36-5-121(i):

- (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 earning 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.

While a trial court should consider each of the above factors relevant under the circumstances, the two most important factors to be considered in awarding spousal support are need of the disadvantaged spouse and the obligor spouse's ability to pay. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001).

Our legislature has specifically further provided as follows with respect to transitional alimony:

Transitional alimony means a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time. 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, such as a petition for an order of protection.

T.C.A. § 36-5-121(g)(1).

In this case, the trial court correctly determined that Wife is not in need of rehabilitation and its determination in that regard is not in dispute. We have already discussed several of the statutory factors relevant to an award of alimony in our discussion of the trial court's division of marital property and as we have further indicated, the trial court correctly found there to be a significant disparity between the parties' financial conditions. Additionally, with regard to the Husband's ability to pay alimony and Wife's need of same, the trial court noted that Husband's income and expense statement shows "that he lives in a rather lavish lifestyle" and that after paying all of his expenses, including \$30 per day for food and \$300 per month for clothing, he has approximately \$1,100 left at the end of each month. By contrast, the trial court found that Wife was merely breaking even. The trial court further noted Wife's testimony that she will incur medical expenses for treatment of current and potential medical problems and that, therefore, it will be necessary for her to purchase health insurance from her employer. The trial court specified that its award of transitional alimony in the amount of \$500 per month factored in \$132 a month for this insurance and an additional unspecified amount for medication that may not be covered by insurance.

Our review of the record confirms the trial court's finding as to factors warranting its award of transitional alimony to Wife, and Husband's argument that such award was inequitable is not supported by the evidence.

F. Attorney's Fees

The last issue we address is whether the trial court erred in awarding Wife attorney's fees in the amount of \$50,250.

An award of attorney's fees in a divorce case constitutes alimony in solido. *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996). As such, an award of attorney's fees should be based on a consideration of the factors set forth at T.C.A. § 36-5-121(i), cited above. An award of attorney's fees is only appropriate when the spouse seeking them has inadequate funds to pay his or her own legal expenses; however, such spouse need not use assets provided by the court for future income to pay such expenses. *Koja v. Koja*, 42 S.W.3d 94, 98 (Tenn. Ct. App. 2000). In all events, any attorney's fees awarded must be reasonable and not excessive. *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980).

While we agree that the record warrants an award of attorney's fees to Wife in some amount, given Wife's need and Husband's ability to pay, we do not agree that the award of \$50,250 was reasonable, based upon the record before us. It appears that the trial court granted such fees because

Husband failed to present any argument or pleading opposing Wife's counsel's fee application petition. However, it further appears from the trial court's memorandum opinion that the trial court determined on its own cognizance that an award of attorney's fees in the requested amount of \$50,250 was excessive, addressing Wife's attorney as follows:

I don't think it's a reasonable fee in this case. Did you spend that much time, I don't doubt it, I'm not questioning that. But I think that when I look at the complexity of the case and what was at issue, I mean ten to fifteen thousand dollars would be a pretty high figure on this case I think I'm going to grant your attorney's fees, but I'm going to make a note in this record that I think a more reasonable fee would have been a ten to fifteen thousand dollar range, but I haven't had an objection.

Our review of the record persuades us that the trial court was correct in finding that an attorney's fee of \$50,250 was not reasonable under the circumstances of this case. We believe that this finding by the trial court precluded a fee award in that amount, despite Husband's failure to object to same. Accordingly, and consistent with the trial court's further finding that a reasonable fee would have been in the ten- to fifteen-thousand dollar range, the award of attorney's fees to Wife is reduced to \$15,000.

As a final matter, we acknowledge Wife's request that she be awarded attorney's fees incurred by her in this appeal. In our discretion, we decline this request.

IV. Conclusion

For the foregoing reasons stated, the judgment of the trial court is affirmed in all respects except that the award of attorney's fees to Wife is reduced to \$15,000. This case is remanded for further action consistent with our opinion herein. Costs of appeal are assessed to the parties equally.

SHARON G. LEE, JUDGE