

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 12, 2007 Session

THOMAS G. ERICKSON v. RUTH CHRISTINE ERICKSON-MITCHELL

**Appeal from the Chancery Court for Williamson County
No. 31398 Russ Heldman, Chancellor**

No. M2006-00895-COA-R3-CV - Filed on May 29, 2007

In this divorce action, Husband appeals the trial court's decision to invalidate the parties' Prenuptial Agreement and the decision to award alimony in the form of attorney's fee to Wife. The trial court found that Husband inadequately disclosed his financial position. The trial court also found that Husband materially misrepresented to Wife, prior to the marriage, that he was a social drinker and not an alcoholic. Finding the evidence preponderates against the trial court's findings, we reverse the trial court's decision to invalidate the Prenuptial Agreement. We also find the Prenuptial Agreement bars an award of attorney's fees to Wife.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Thomas F. Bloom, Nashville, Tennessee, and Mary Catherine Kelly, Franklin, Tennessee, for the appellant, Thomas G. Erickson.

Donald Capparella and Amy J. Farrar, Nashville, Tennessee, for the appellee, Ruth Christine Erickson-Mitchell.

OPINION

Thomas Erickson, Husband, and Ruth Erickson-Mitchell, Wife, met at a wine and cheese reception in August 2000. They began socializing and became romantically involved in the fall of 2000. They married in December 2001.

This marriage was the third for Husband and the fourth for Wife. They were both sixty-four years of age when they met and both had professional careers; Wife was a retired Vice President of Third National Bank, and Husband worked at Global Accessories. At the time of the parties' marriage, Wife was living off of social security income and withdrawals from her investment

accounts, which totaled over \$200,000, and Husband was earning a salary of approximately \$82,000 a year.

Before marrying, the parties entered into a Prenuptial Agreement to protect their respective assets and provide for an agreed settlement in the event of a divorce. Both parties were adequately represented by counsel during the discussions, drafting and execution of the Prenuptial Agreement. The Prenuptial Agreement provided in pertinent part that the parties' separate property would remain separate and that neither party could receive alimony or any other type of support payments from the other in the event of a divorce.¹

As agreed upon, the parties moved into Wife's home following the marriage, and they also refinanced and titled in both of their names the home in March 2002.² Unfortunately, approximately fifteen months into the marriage, the parties began to experience financial difficulties. One of the side effects of these and other difficulties in the marriage was that Husband became stressed and began drinking more than before the marriage. As a consequence, he voluntarily attended counseling and meetings with Alcoholics Anonymous and, as a consequence, his excessive drinking resolved.

In an effort to ease the financial strain, the parties attempted to sell the marital home, but they had difficulty finding a buyer. In March of 2005, the parties put a deposit down on a new home. They intended to downsize to a \$250,000 home, but after meeting with their financial advisor, they decided to move into one of Husband's rental properties. After making this decision, their marital home sold for \$460,000. The parties began preparing to move by tearing down wallpaper, packing, and picking out paint colors. Although things seemed to be going well, approximately two weeks later, on March 28, 2005, Husband filed for divorce citing irreconcilable differences. Husband moved out of the marital home and into an apartment the next day. The marital home sold as planned, and Wife moved into a rental property she had purchased during the marriage.

Wife filed her Answer and a Counterclaim for Divorce on June 2, 2005. Wife denied that the parties had irreconcilable differences, and she contested the validity of the Prenuptial Agreement. She sought a divorce based on inappropriate marital conduct and sought damages in tort for intentional misrepresentation. On June 28, 2005, Husband filed an Answer in which he contended, in pertinent part, that he had not misrepresented his finances or his drinking. He also moved to dismiss Wife's claim for monetary damages as being barred by the Prenuptial Agreement.

¹The Prenuptial Agreement also provided that the parties would live in Wife's home, refinance it, and title it in both of their names, and that Husband would contribute \$30,000 to the renovation of the garage into an office, and in the event of a divorce, Husband would receive his \$30,000 contribution and one half of the appreciation of the house up to the date of the divorce.

²They planned for Husband to retire in a few years at which time they would live off of their social security and investment accounts. In furtherance of this plan, they developed and implemented a financial strategy that involved making higher payments on the house while Husband was still working and then upon his retirement, selling the home, and downsizing to a home that would allow them to live within their anticipated income of approximately \$4000 per month. The parties' relationship, however, began to deteriorate before they could fully implement their plan.

The matter was tried on February 22, 2006, and March 2, 2006. By Order dated March 7, 2006, the Chancellor awarded the divorce to Wife, declared the Prenuptial Agreement invalid, and awarded transitional alimony and attorneys' fees to Wife. This appeal followed.

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

THE PRENUPTIAL AGREEMENT

Prenuptial agreements are favored by public policy in Tennessee. *Perkinson v. Perkinson*, 802 S.W.2d 600, 601 (Tenn.1990). Prenuptial agreements benefit the parties by defining their marital rights in property, *Sanders v. Sanders*, 288 S.W.2d 473, 477 (Tenn. Ct. App. 1955), and they enhance the opportunities for middle-aged persons to re-marry by protecting their separate assets for the children of previous marriages. *Wilson v. Moore*, 929 S.W.2d 367, 370 (Tenn. Ct. App. 1996) (citing *Pajak v. Pajak*, 182 W.Va. 28, 385 S.E.2d 384, 388 (1989)). Courts are statutorily required to uphold prenuptial agreements provided they meet certain criteria. *See* Tenn. Code Ann. § 36-3-501.

Notwithstanding any other provision of law to the contrary, except as provided in § 36-3-502, any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage that is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse. The terms of such agreement shall be enforceable by all remedies available for enforcement of contract terms.

Tenn. Code Ann. § 36-3-501.

When preparing to enter into a prenuptial agreement, parties “must make ‘a full disclosure of the nature, extent and value’ of their property in order to enable their prospective spouse to make a knowledgeable decision about entering into the agreement.” *Wilson*, 929 S.W.2d at 371 (citing *Williams v. Williams*, 868 S.W.2d 616, 619 (Tenn. Ct. App.1992)). The adequacy of the disclosure depends on the context in which the disclosure is provided. *Wilson*, 929 S.W.2d at 371. The courts, however, have not formulated precise tests for determining whether a particular disclosure is adequate, but they generally require that the disclosure be essentially fair under all of the circumstances. *Wilson*, 929 S.W.2d at 371. “[M]ost courts have not construed the full and fair disclosure requirement to mandate detailed disclosures such as financial statements, appraisals, balance sheets, or the like.” *Wilson*, 929 S.W.2d at 371 (citing *In re Estate of Lopata*, 641 P.2d 952, 955 (Colo.1982); *In re Thies (Thies v. Lowe)*, 273 Mont. 272, 903 P.2d 186, 189 (1995); *In re Estate of Geyer*, 516 Pa. 492, 533 A.2d 423, 427 (1987); *Hartz v. Hartz*, 248 Md. 47, 234 A.2d 865, 871 n. 4 (1967); *In re Estate of Hill*, 214 Neb. 702, 335 N.W.2d 750, 753 (1983)).

The inadvertent failure to disclose an asset or the unintentional undervaluation of an asset will not invalidate a prenuptial agreement as long as “the disclosure that was made provides an essentially accurate understanding of the party's financial holdings.” *Wilson*, 929 S.W.2d at 371. “The disclosure will be deemed adequate if it imparts an accurate understanding of the nature and extent of a person's property interests.” *Wilson*, 929 S.W.2d at 371 (citing *Nanini v. Nanini*, 166 Ariz. 287, 802 P.2d 438, 441 (1990)).

The basis for the trial court holding the Prenuptial Agreement invalid was the conclusion that Husband “failed to make adequate prior financial disclosures and duped Ruth Erickson into the marriage and into executing the prenuptial agreement.” The record, however, reveals that Wife was adequately represented by counsel, that Husband made extensive financial disclosures, and while some of the disclosures were high and some were low, the net value of his estate was accurately represented. For example, Husband represented that his life insurance with New York Life was worth \$20,000 when the cash value was \$8,829.58; the value of his Morgan Stanley account was \$70,660 when it was actually \$83,302.51; and, he failed to identify two small accounts at Union Planters Bank, one totaling \$4,500.07 and the other totaling \$1,944.03.³ Significantly, however, Husband represented his total assets to be worth \$295,724 yet, if we recalculate Husband’s assets using the values Wife claims to be correct, his total assets were \$303,640.19, a mere two percent differential. In the absence of any proof of “fraud or overreaching,” we find this discrepancy wholly inadequate to justify invalidating a prenuptial agreement between these parties.

Husband and Wife were sophisticated parties, each was represented by counsel, and the disclosures Husband made provided an essentially accurate understanding of his financial holdings. The parties entered into the Prenuptial Agreement knowledgeably, in good faith and without exertion

³Husband’s disclosed assets included a 1998 Oldsmobile Intrigue valued at \$10,000, a Manulife Life Insurance Policy valued at \$15,175, a New York Life Insurance Policy valued at \$20,000, a 401K valued at \$12,000, an IRA with Morgan Stanley valued at \$70,660, a savings account at Union Planters valued at \$133,533, mutual funds with Morgan Stanley valued at \$4,356, and real property at 901 W. Main Street in Franklin, Tennessee valued at \$30,000.

of duress or undue influence. We therefore conclude that the parties' Prenuptial Agreement is valid and enforceable.

MISREPRESENTATION

Wife contends that Husband misrepresented his drinking habits prior to the marriage, and that the misrepresentation supported a finding of intentional misrepresentation entitling Wife to damages in tort. We find this contention to be without merit.

To sustain a cause of action for fraudulent misrepresentation, the plaintiff must show:

- 1) the defendant made a representation of an existing or past fact;
- 2) the representation was false when made;
- 3) the representation was in regard to a material fact;
- 4) the false representation was made either knowingly or without belief in its truth or recklessly;
- 5) the plaintiff reasonably relied on the misrepresented material fact; and
- 6) plaintiff suffered damage as a result of the misrepresentation.

Metro. Gov't of Nashville and Davidson County, 852 S.W.2d 233, 237 (Tenn. Ct. App. 1992)(citing *Graham v. First American Nat'l Bank*, 594 S.W.2d 723, 725 (Tenn. Ct. App. 1979)).

The representation made by Husband prior to marriage was that he was a "social drinker." This representation was made during a conversation where Wife told Husband her former husband had been a bad alcoholic whom she would not have married had she known of his addiction. Husband responded that his former wife had also been an alcoholic, but he was just a social drinker.⁴ As proof of Husband's misrepresentation, Wife points to an incident in 1994, nearly seven years before the parties married and of which she learned during the marriage, where Husband was hospitalized for problems arising out of mixing alcohol with prescription medication. The record contains no proof, however, that this was a habitual problem or that Husband was an alcoholic. Our review of the record reveals no evidence that Husband exhibited any signs of a drinking problem while the parties were dating or early in the marriage.⁵ There is no proof of an excessive consumption of alcohol prior to the marriage or within the first year thereafter.

Wife alleges that fifteen months into the marriage Husband was "drinking a lot." This fact, however, does not support a finding that Husband misrepresented his alcohol consumption prior to the marriage, which is the essential fact at issue. The record reveals that Husband's consumption of alcohol increased substantially due to financial problems; however, the undisputed evidence is

⁴We note that neither party provided an explanation of what criteria constituted a "social drinker."

⁵Wife states that prior to the marriage Husband would only have a glass of wine with dinner, and it was not until much later that Wife "realized he was probably having two or three glasses of vodka before he came over for dinner." The record is void of any proof concerning Husband's actual vodka intake.

that Husband voluntarily attended counseling and Alcoholics Anonymous meetings soon thereafter to address his drinking. Moreover, there is nothing in the record to establish that Husband's increased alcohol intake continued thereafter. Accepting the trial court's determination that Wife was a credible witness and Husband was not, the evidence fails to support a finding that Husband made a representation of an existing or past fact that was false when made during the parties' discussion of alcohol prior to the marriage.

WIFE'S ATTORNEYS' FEES

An award of attorneys' fees in a divorce case is considered to be a part of the alimony awarded. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002) (citing *Storey v. Storey*, 835 S.W.2d 593 (Tenn. Ct. App.1992)).

The Prenuptial Agreement provides in pertinent part:

[T]he provisions of this Section 7 and the mutual release given by each to the other with respect to the assets described in Sections 1,2,3, and 4, shall apply, shall constitute the division of said property and the settlement of their rights therein in the event either party institutes against the other a divorce proceeding, a proceeding for permanent or temporary support pending the resolution of any such proceeding, and *shall be in full satisfaction and discharge of any and all rights which either party might have against the other for alimony, of any kind, support, and maintenance under applicable law in the event of a separation or divorce.* (emphasis added)

An award of attorney's fees in a divorce case is a form of spousal support, and the award is characterized as alimony *in solido*. *Wilder v. Wilder*, 66 S.W.3d 892, 894 (Tenn. Ct. App. 2001). The parties made provisions for the full satisfaction and discharge of any and all rights which either might have against the other for alimony, of any kind. Thus, Wife is precluded from seeking any form of alimony, which includes attorneys' fees. Accordingly, we find the trial court erred by awarding Wife her attorneys' fees in the divorce.

CONCLUSION

We reverse the trial court's decision to invalidate the Prenuptial Agreement, vacate the award of attorney's fees to Wife, and vacate the judgment of \$240,142.26 against Husband. We also remand this matter to the trial court with instructions to determine the respective rights and responsibilities of the parties pursuant to their Prenuptial Agreement. Costs of appeal are assessed against Ruth Erickson-Mitchell.

FRANK G. CLEMENT, JR., JUDGE