

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 23, 2008 Session

SCOTT R. HALL v. ELISHA G. HALL

**Direct Appeal from the Circuit Court for Knox County
No. 10026 Hon. Bill Swann, Circuit Judge**

No. E2007-02564-COA-R3-CV - FILED OCTOBER 15, 2008

In this long running divorce action, the Trial Court awarded the wife's attorney \$115,682.00 in attorney's fees against the husband. The principal issue on appeal is whether the award of fees was appropriate. Another issue raised by the husband is whether the division of marital property was proper. We affirm the Trial Court.

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

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Mitchell A. Byrd, Chattanooga, Tennessee, for appellant.

Wanda G. Sobieski, Diane M. Messer and Maia Niemann, Knoxville, Tennessee, for appellee.

OPINION

In this divorce action, the husband filed a Complaint on May 5, 2005. The Final Decree in this divorce case was entered November 15, 2007.¹

¹ The technical record before us contains two additional volumes detailing court proceedings following the entry of the Decree of Divorce.

The Decree declared the parties divorced pursuant to Tenn. Code Ann. §36-4-129, and found that the husband had caused delay and loss of assets by his actions, and that he had engaged in “creative, dogged and resourceful efforts” to do so. The Court found that \$841,000.00 had been lost due to the husband’s actions, and the Court adopted the Master’s findings and recommendations with regard to the property distribution, but found the wife was due additional attorney fees because of the husband’s actions. The Court found that fees of \$115,682.00 were reasonable and appropriate. The Court observed that the husband had refused to appear at trial, and thus would not now be allowed to present evidence that he could have presented then. The Court found that the wife had not violated an injunction, and that all liens filed by the husband were void.

Issues presented on appeal are:

1. Did the Trial Court err in awarding attorneys fees in the amount of \$115,682.90 as a judgment against the appellant?
2. Did the Trial Court err in assessing dissipation of assets to husband, some of which were shown not to exist at the time of filing the divorce, and did the Court err in assessing 100% of the assets rather than 50%?
3. Did the Trial Court err in its division of property/debts?
4. Should appellee receive an award of fees for this appeal?

The husband argues that it was error for the Trial Court to make such a large award of attorney fees to the wife, but it has long been recognized that an award of attorney fees in a case of this nature is in the trial court’s discretion, “except where there is a clear showing that the trial court reached the wrong conclusion with the result such that manifest injustice will be done if the decision is allowed to stand.” *Hanover v. Hanover*, 775 S.W.2d 612, 618 (Tenn. Ct. App. 1989). The husband prolonged this litigation unnecessarily by refusing to comply with discovery and agreed orders, by switching attorneys numerous times and seeking many continuances, and by failing to appear for hearings. He increased both his own fees and those of his wife by drawing the litigation out and forcing the wife to file petition after petition to enforce the Court’s orders.

We have previously upheld an award of substantial attorney’s fees where the husband used the judicial system to try and deplete the wife’s assets by refusing to comply with discovery and generally failing to cooperate with the divorce process. *Gilliam v. Gilliam*, 776 S.W.2d 81 (Tenn. Ct. App. 1988). We said that the wife should not have to use her share of the marital estate to pay her attorney’s fees, especially where the fees were caused by the husband’s conduct. *Id.*; see also *Long v. Long*, 957 S.W.2d 825 (Tenn. Ct. App. 1997); *Bauer v. Bauer*, 2002 WL 256802 (Tenn. Ct. App. Feb. 22, 2002).

The evidence in this case establishes that the husband’s misconduct during this litigation was substantial. His actions caused the case to drag on for over three years, which substantially increased attorneys fees. As the Trial Court found, it is appropriate to have the

husband bear the expense that he himself caused. We affirm the award of attorney's fees awarded by the Trial Court to the wife's attorney.

The husband argues that the Trial Court erred in assessing him with the dissipation of marital assets, and that even if such assessment was proper, he should have been charged with only 50% of those assets, rather than 100%. It is appropriate to consider the dissipation of assets in fashioning an equitable distribution of the marital estate. Tenn. Code Ann. §36-4-121; *Altman v. Altman*, 181 S.W.3d 676 (Tenn. Ct. App. 2005). Moreover, dissipation has been defined as wasting/reducing the assets available for distribution. *Id.*

It is undisputed that the husband dissipated marital assets, as the evidence established that he expended sums of over \$300,000.00 on his alleged paramour, that he bought expensive gifts and gave money to friends and relatives without the wife's knowledge or consent, that he allowed judgments to go down against the parties and businesses that could have been avoided. Also, he caused the parties' attorney fees to be greatly increased, and he took/dissipated numerous assets as well, as they simply "disappeared". In sum, the Trial Court found the husband dissipated the marital estate by over \$841,000.00, and the evidence does not preponderate against this finding, Tenn. R. App. P. 13(d).

The Trial Court thus considered this dissipation of assets in its overall distribution of the marital estate. The Court did not err in considering same, as its findings regarding the dissipation of assets by the husband were undisputed at trial.

□

The husband argues the Trial Court erred in the overall distribution of marital property and debts, asserting that he should not have been charged with the entire dissipation of assets. The record does not support these arguments, however, because our review of the overall distribution demonstrates that the distribution was equitable.

In a divorce action, the trial court is charged with the task of rendering an equitable division of the marital property without regard to fault. Tenn. Code Ann. § 36-4-121(a), but the trial court is under no obligation to divide the parties' marital estate equally, but must do so equitably, for "[t]he division of the estate is not rendered inequitable simply because it is not mathematically equal, or because each party did not receive a share of every item of marital property." *King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App.1998).

The Trial Court's Judgment and the Rule 7 property statement shows that the wife was awarded slightly over 50% of the marital estate, and was assessed with a little less than 1/3 of the marital debt, thus giving her an overall distribution of approximately 56% of the marital estate. The husband did not dispute any of the proof offered by the wife regarding the value or existence of any assets, and the Trial Court clearly considered the appropriate factors in fashioning its distribution, and the ultimate award was equitable.

Next, the husband argues that he should not have been awarded certain items as an asset, such as the lawsuit against Ms. McKinney.² We have previously held, however, that when one spouse makes an assets “no longer accessible” to the other spouse, those funds can be charged to that spouse who “put them out of the other party’s reach”. *Elbell v. Elbell*, 2004 WL 2159021 (Tenn. Ct. App. Sept. 27, 2004). The wife presented proof that the husband had filed suit against Ms. McKinney claiming to have loaned her over \$300,000.00, and thus he clearly made those funds “no longer accessible” to the wife, and was properly charged with same as part of his share of the equitable distribution. We find this issue to be without merit.

∫;

The wife argues she should be awarded attorney’s fees incurred in defending this appeal, pursuant to Tenn. Code Ann. §27-1-122. In this case the appeal is not so baseless as to warrant an award of fees, and does not appear to have been taken solely for purpose of delay. Accordingly, we do not award fees, as requested by the wife.

For the foregoing reasons, we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to appellant, Scott R. Hall.

HERSCHEL PICKENS FRANKS, P.J.

² The wife testified that in 2004 she learned there was about \$400,000.00 missing from one of the companies, and she later found out that this was money the husband had given to Christina McKinney.