

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 29, 2004

MARIE F. OGLESBY ELBELL v. CHARLES LUTHER ELBELL

**Appeal from the Chancery Court for Knox County
No. 154323-2 Daryl R. Fansler, Chancellor**

No. E2003-03017-COA-R3-CV - FILED SEPTEMBER 27, 2004

This is a divorce case. Following a bench trial, the court below granted a divorce to Marie F. Oglesby Elbell (“Wife”) and Charles Luther Elbell (“Husband”), and divided their marital property. Husband appeals the trial court’s division of marital property, in particular the allocation of several rental properties which served, during the parties’ marriage, as their primary source of income. We affirm.

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

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

Roland E. Cowden, Maryville, Tennessee, for the appellant, Charles Luther Elbell.

John M. Norris, Strawberry Plains, Tennessee, for the appellee, Marie F. Oglesby Elbell.

OPINION

I.

In this action, the trial court dissolved a marriage of approximately nine and a half years. The parties were married on August 10, 1992, when Wife was soon to be 55 years old and Husband was approaching the age of 54. This was the second marriage for Wife and the fifth marriage for Husband.

Prior to their marriage, the parties lived together for two years in Kingsport. During this period of cohabitation before marriage, Wife owned property at 1411 Callie Oglesby Lane, Knoxville (“1411 Callie Oglesby”). She also owned a car and her own trailer. Husband owned property in Johnson City, which he sold so he could invest in other property. During the aforesaid two-year period, the parties jointly acquired an interest in two properties. They purchased property

in Elizabethton (“the Elizabethton property”), which was subsequently sold on May 4, 2004.¹ They also obtained a leasehold interest in a 14-unit rooming house at 310 West Sullivan in Kingsport known as the Ballis Tourist Home (“the Ballis Tourist Home”). The lease agreement was never recorded. They used the rental income from these two properties to purchase additional real estate once they were married.

Subsequent to their marriage, the parties acquired a number of properties which provided a substantial portion of their income. These properties included the following: 410 West Sullivan Street, Kingsport (“410 West Sullivan”); 913 East Sullivan Street, Kingsport (“913 East Sullivan”); 170 West Winola, Kingsport (“Winola”); 8107 Old Sevierville Pike, Knoxville (“Sevierville Pike”); and 1424 Callie Oglesby Lane, Knoxville (“1424 Callie Oglesby”). The couple also invested approximately \$15,000 in improvements to 1411 Callie Oglesby, which, as previously indicated, Wife owned prior to their marriage. In 2001, they purchased property with Husband’s brother, Jack Elbell, in Citrus Park, Florida (“the Florida property”), where they also purchased a camper. The deed to the Florida property was in the names of Husband and Jack Elbell.

The bulk of the parties’ income stemmed from managing and renting their real estate interests in both Kingsport and Knoxville. The parties lived in Kingsport in one of the rooms at the Ballis Tourist Home, but they would often travel to Knoxville on the weekends. Wife would rent the apartments and collect the rent payments. Husband also had a painting business.

The parties separated on March 19, 2002. Wife filed for divorce on April 12, 2002, on the grounds of irreconcilable differences and inappropriate marital conduct. Husband responded with an answer and counterclaim. Subsequently, Wife filed a motion seeking a monthly accounting of rental income and expenses associated with the Ballis Tourist Home and the Winola property, which motion the court granted on November 25, 2002. When Husband failed to comply with the order for an accounting, Wife filed a motion for appointment of a receiver, pointing out that Husband had failed to submit the accounting ordered by the court and stating that she had not received any of the rental income collected by Husband since their separation.

Following the parties’ separation, Wife received a number of phone calls from a hospital in upper East Tennessee which she believed to be a mental hospital. She had several conversations with a counselor at the facility indicating that Husband was a patient there. Without the accounting and in light of Husband’s mental health issues during this period of time, Wife was concerned that the marital estate was in jeopardy if Husband was not available to collect rents on the properties located in Kingsport, and she was not in a position to travel given her employment in Knoxville. By this time, Wife had started working as a cashier at Food City.

The trial court appointed a receiver to report on the following: the condition of the properties and estimated cost of repairs; whether the properties were being rented; whether tenants were

¹The proceeds from the sale of the Elizabethton property were divided equally and consequently are not at issue here.

honoring their lease obligations; the current monthly income on the properties; and the estimated rental value of the properties that were not occupied at the time. The receiver was directed by the court to collect rent payments and to take action with respect to the collection of past due rents for the following properties in Kingsport: the Ballis Tourist Home, Winola, 410 West Sullivan, and 913 East Sullivan. The receiver filed his first report on June 23, 2003, noting his difficulty in adhering to the order given that Husband was very uncooperative and had ordered his tenants to continue to furnish rental payments to him rather than to the receiver as instructed by the court. In a second report, filed on July 17, 2003, the receiver recited continuing problems in his efforts to collect the rents.

At a bench trial, the parties stipulated to a divorce and the court heard testimony from Husband and Wife with respect to their property. The court entered a judgment of divorce on August 20, 2003, dividing the rental properties, releasing certain items of personal property to the Husband, and dividing the various automobiles in the parties' possession. The court also assigned the cost of the receiver and costs associated with the cause of action to Husband. No alimony was awarded; rather, the court stated it was accounting for this in the division of property. On September 18, 2003, Husband filed a motion to amend or stay the execution of judgment pending a modification of the court's final determination. Following oral argument, the court denied Husband's motion. Husband now appeals the trial court's division of the marital property. In addition, Wife has filed a motion for attorney fees incurred in connection with the appeal.

Wife lives in the home at 1411 Callie Oglesby and continues to work as a cashier at Food City. Husband is living in one of the rooms at the Ballist Tourist Home and continues to collect rental income from various properties. Both parties also receive Social Security benefits.

II.

In a non-jury case, our review is *de novo* upon the record of the proceedings below, which comes to us accompanied by a presumption of correctness as to the trial court's findings. Tenn. R. App. P. 13(d). This presumption must be honored unless the evidence preponderates against the lower court's factual findings. *Id.* The trial court has broad discretion in dividing marital property, and accordingly its judgment should be given great weight on appeal and presumed proper unless the evidence preponderates otherwise. *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). The trial court can only be found to have abused its discretion when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). Consequently, this standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

III.

In an action for divorce, 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) (Supp. 2003). The trial court is under no obligation to divide the parties' marital estate equally, but rather 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) (quoting *Roseberry v. Roseberry*, C/A No. 03A01-9706-CH-00237, 1998 WL 47944 (Tenn. Ct. App. E.S., filed February 9, 1998)) (internal citations omitted). In dividing marital property, courts are required to allocate interests in a manner consistent with the relevant statutory factors set forth in Tenn. Code Ann. § 36-4-121(c). *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

Prior to dividing the parties' property, the trial court is charged with (1) determining which property is separate and (2) which is marital property, subject to division. See Tenn. Code Ann. § 36-4-121. In the instant matter, Husband does not contest the classification of property; but he does seriously contest the allocation of certain rental properties to Wife. Husband contends that the court's allocation was inequitable, thereby creating gross disparities in the parties' income streams and discrepancies in the total amount of real estate encumbrances allotted to each party. Husband contends the court neglected to consider Wife's income during the marriage. In addition, Husband contends that the trial court neglected to properly consider all of the statutory factors, namely his Wife's failure to substantially contribute to their assets, and their respective earning abilities in light of Husband's history of alcoholism and mental health issues.

As to the discrepancies in income streams, Husband argues that the lower court awarded Wife a monthly income stream 167% of that awarded to him, thereby giving Wife \$596.78 in income more than was awarded to him. The court awarded the following properties to Wife, which generated approximately \$1,076.78 per month in rental income: 1424 Callie Oglesby, which generates \$450 per month in rental income; Sevierville Pike, generating \$425 per month; and 410 W. Sullivan, generating \$201.78 per month.² Husband noted that the assessed rental income value was solely based on the testimony of Wife at trial, yet Husband does not seem to challenge the accuracy of this testimony on appeal. To Husband, the court awarded the following, which generate approximately \$880 per month in rent: 913 E. Sullivan, generating \$140 per month; and 171 Winola, generating \$740 per month.

The trial court noted that Husband continues to receive income from the largest income producing property—the Ballist Tourist Home—which generates an additional \$1,800 per month. Husband attempts to argue that this property should not be included since he transferred the lease

²Husband also indicates in his brief that Wife receives \$400 per month in rental from the 1411 Callie Oglesby property, and includes this amount in the sum total of her monthly income stream. However, this is where Wife presently lives and consequently she is not obtaining rental income from this property. Accordingly, we have excluded it from our calculation. Furthermore, the deed to this property is solely in Wife's name, and the overall division of property accounts for Husband's contributions to improvements on this property during the course of the marriage.

to his brother, Jack Elbell, following the parties' separation. Husband submitted a letter from Frank Gibson, the executor of the Gibson estate, from whom the Ballist Tourist Home is leased, stating that Husband no longer received income from this property. The trial court, however, was not moved by this argument, finding that, although Husband testified at trial that his only remaining interest in the Ballist Tourist Home was that he lived there and periodically helped out his brother in order to generate enough income to cover his monthly car payment, he also testified to having rented the last room in the house a week prior to trial, suggesting to the court that Husband still managed the property.

The lower court based its division of property, to a large extent, on its failure to believe Husband's testimony. Credibility determinations such as those made by the court are within the trial court's discretion, and must be accorded "considerable deference" in view of the fact that the trial court sees and hears the witnesses. *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001). It is clear that the court questioned Husband's contention that the Ballist Tourist Home was no longer within his control, and we find this was within its discretion to do so.

The court also factored in Husband's admission at trial that he made several efforts to dispose of various properties during the separation period, as well as the evidence of Husband's continued lack of cooperation by refusing to make an accounting and by directing his tenants not to pay rents to the court-appointed receiver. The court, based on all of this, determined that Husband was attempting to diminish his assets and place them beyond Wife's reach. The manner in which a party dissipates his or her assets is relevant to the trial court's judgment on division of marital property. Even if Husband transferred his leasehold in the Ballist Tourist Home such that he no longer receives any income from it, when a party waives a payment owed, it can be found that he "dissipated, secreted or gave away [the] funds," thereby putting them out of the other party's reach. *Long v. Long*, 957 S.W.2d 825, 832 (Tenn. Ct. App. 1997). Where there is no credible evidence in the record to suggest otherwise, it is appropriate for a court to order that one party be compensated for those assets no longer accessible. *Id.* By transferring his leasehold interest to his brother, assuming he did, Husband effectively waived money owed to him and precluded Wife from reaching those funds.³

In dividing the property as it did, the court took note of the fact that Husband's conduct was such as to indicate that Wife would have difficulty in collecting any alimony that the court might order. For this reason, the court did not award alimony but factored in the lack of alimony plus Husband's retention of the rental income during the period of separation when it fashioned its division of the marital property. We find no abuse of discretion in the trial court's consideration of these two factors in its division of property.

³Husband's testimony at trial also revealed that during the separation period, Husband sold a number of vehicles, including the following: a 1992 Toyota truck for \$1,200; a 1991 Toyota truck for \$5,000; a motor home for \$6,000; and a 1989 Nissan for \$1,200 that he had yet to collect at the time of trial. Husband retained the proceeds of these sales for himself.

Husband also contends that he was burdened with a disproportionate share of the debt in that Wife's real estate encumbrances total \$32,000, while his amount to \$50,000. However, as previously noted, the debts need not be divided equally, but equitably in light of the total division of property. We hold that the trial court did not abuse its discretion in its allocation of marital debt.

In further support of his argument that this judgment was inequitable, Husband contends that the trial court failed to consider Wife's receipt and disposal of income prior to the separation. In particular, he asserts that for the duration of the marriage, she had the benefit of income derived from the Elizabethton and Winola properties, and for eighteen months she managed and collected the rents from the Ballist Tourist Home while Husband was working out of town. Accordingly, he contends that Wife's gross income during the marriage was \$847,080, whereas he received only \$352,920. However, we find the evidence does not preponderate against the trial court's findings on this point. It is apparent that throughout the course of this marriage, the parties acquired a number of properties and profited from renting and managing these properties. Their individual incomes as a result of these jointly owned properties are not for consideration where, as the trial court noted, they went into the marriage.

Lastly, Husband challenges the court's failure to properly weigh the statutory factors set forth in Tenn. Code Ann. § 36-4-121(c).⁴ In particular, he alleges that Wife did little to contribute to the income generated from these properties, arguing that when there were undesirable tenants, he collected the rent, that he cleaned the rooms, and that essentially he worked three jobs throughout

⁴Tenn. Code Ann. § 36-4-121(c) provides as follows:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

- (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 benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

the marriage by painting, managing the properties, and remodeling the properties, while Wife made no contribution and merely sat in front of a computer screen. Husband cites *Koch v. Koch*, 874 S.W.2d 571, 579 (Tenn. Ct. App. 1993), for the proposition that Wife should not receive her full partner's due where she failed to contribute to the assets generated during the marriage. Yet, Husband fails to recognize the distinction in the facts presented here and those before the court in *Koch*, where the wife had left the husband for periods of time throughout the marriage, and consequently the court upheld a division that awarded the wife only 45% of the marital estate. *Id.* Furthermore, Husband's own testimony at trial belies his argument, as he admitted that Wife collected rents from some of the properties (thereby enabling her to generate more income during the marriage than he did), managed the Ballist Tourist Home in his absence, did office work relative to renting these properties, and, by Husband's own admission, looked after properties when his drinking was a problem.

Husband also references the statutory direction to consider the parties' physical and mental health, and relative earning capacities. *See* Tenn. Code Ann. § 36-4-121(c)(2). He states that where Wife is presently healthy and able to work full time, he is a recovering alcoholic who has been hospitalized in a mental institution. Husband cites to cases where an unequal division of property was merited where one spouse had greater earning potential than the other. *See Harrington v. Harrington*, 798 S.W.2d 244 (Tenn. Ct. App. 1990); *Dube v. Dube*, 104 S.W.3d 863, 868 (Tenn. Ct. App. 2002). We find, however, that the evidence does not preponderate against the trial court's application of the statutory factors to the facts of this case. First, the cases cited concern gross disparities in education and ability to generate income that are not present here. Second, there is no evidence in the record to support Husband's contention that his status as a recovering alcoholic and his mental condition adversely affect his ability to work or otherwise earn income.

The evidence does not preponderate against the trial court's division of the parties' marital property. Accordingly, we find no abuse of discretion on the part of the trial court.

IV.

Prior to oral argument in this court, Wife filed a motion for attorney fees for costs incurred on this appeal, which was reserved to be disposed of upon review by this panel. In her initial complaint for divorce, Wife sought attorney fees. At trial, she argued fees were appropriate given the number of times the parties were required to return to court on account of Husband's actions. The court determined that since this was not a case for alimony given the property division, attorney fees were not appropriate. We do not find that this is an appropriate case for an award of fees for professional services rendered on appeal. Accordingly, we decline to award such fees.

V.

We affirm the judgment of the trial court in all respects. This case is remanded for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Charles Luther Elbell.

CHARLES D. SUSANO, JR., JUDGE