

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

KATHY WILLIAMS HICKS v. ROGER CARL HICKS

**Appeal from the Circuit Court for Davidson County
No. 04D-1731 Muriel Robinson, Judge**

No. M2006-00082-COA-R3-CV - Filed on June 18, 2007

In an action for divorce, Husband appeals the trial court's divorce award, the division of the marital estate, and the award of attorney's fees and court costs. Husband also alleges that the trial court was prejudiced against his attorney. We affirm the decision of the trial court and find that Husband's appeal was frivolous, thus warranting the award of damages.

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

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

Charles C. Morrow, Brentwood, Tennessee, for the appellant, Roger Carl Hicks.

Mary B. Langford, Nashville, Tennessee, for the appellee, Kathy Williams Hicks.

MEMORANDUM OPINION¹

This case concerns the termination of a thirty-four year marriage. On July 7, 2004, Mrs. Kathy Hicks filed a Complaint for divorce alleging irreconcilable differences, inappropriate marital conduct, and adultery. Her husband, Mr. Roger Hicks, answered and counter-claimed on August 6, 2006, denying Mrs. Hicks' grounds for divorce and alleging that Mrs. Hicks was guilty of inappropriate marital conduct. On December 13, 2005, the court awarded Mrs. Hicks a divorce.

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

The court divided the marital estate in an essentially equal manner, awarding Mrs. Hicks the marital home, appraised at \$176,000 with an outstanding mortgage of \$23,000, and two cemetery plots, valued at \$2,195 each. The court then awarded Mr. Hicks the parties' real property in Sevier County, appraised at \$30,000 and a lien on the marital home in the amount of \$61,680. The court also ordered that Mr. Hicks pay court costs and a portion of Mrs. Hicks' attorney's fees in the amount of \$3,500.

Mr. Hicks appeals, arguing that the trial court erred in (1) awarding Mrs. Hicks the divorce; (2) equitably dividing the marital estate; (3) awarding Mrs. Hicks a portion of her attorney's fees and assessing the court costs against Mr. Hicks; and (4) exhibiting prejudice against Mr. Hicks' counsel. Mrs. Hicks requests her attorney's fees for the appeal, alleging that Mr. Hicks' appeal is frivolous.

Issues pertaining to the trial court's divorce award, the division of the marital estate, and the assessment of court costs and attorney's fees are questions of fact. *Hull v. Hull*, No. 01A01-9403-CV-00139, 1994 WL 649147, at *3 (Tenn.Ct.App. Nov. 18, 1994) (grounds for divorce); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn.1988) (division of marital estate); *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn.2002) (attorney's fees); *Long v. Long*, 957 S.W.2d 825, 833-34 (Tenn.Ct.App.1997) (court costs). The trial court's findings of fact are presumed to be correct unless the evidence preponderates otherwise. Tenn.R.App.P. 13(d). We review these findings *de novo* upon the record under an abuse of discretion standard. Tenn.R.App.P. 13(d).

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn.2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn.2000). A trial court abuses its discretion only 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). The abuse of discretion 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).

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn.2001).

Mr. Hicks first argues that the trial court abused its discretion by granting the divorce to Mrs. Hicks on the grounds of inappropriate marital conduct. Inappropriate marital conduct is statutorily defined as "such cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper..." Tenn.Code Ann. § 36-4-101(11). In determining whether a party has engaged in inappropriate marital conduct, we must decide "whether either or both of the parties engaged in a course of conduct which (1) caused pain, anguish or distress to the other party and (2) rendered continued cohabitation 'improper,' 'unendurable,' 'intolerable' or 'unacceptable.'" *Burkhart v. Burkhardt*, No. M1999-02332-C0A-R3-CV, 2000 WL 1231371, at *3 (Tenn.Ct.App. Aug. 31, 2000).

Although the trial court failed to state the specific conduct upon which it based its ruling, there was ample evidence in the record which showed that Mr. Hicks engaged in conduct which was painful to Mrs. Hicks and which rendered continued cohabitation improper. Specifically, Mrs. Hicks testified that Mr. Hicks had been verbally and physically abusive to Mrs. Hicks during the marriage, including threatening to kill her if she ever chose to leave the marriage. There was also testimony that Mr. Hicks made sexual advancements towards other women during the marriage including some of Mrs. Hicks' female friends. Mrs. Hicks testified that she was both frightened and embarrassed by Mr. Hicks' conduct. In order for the Court to reverse the trial court as to this issue, we must find that the trial court abused its discretion. After reviewing the record, we cannot say that the trial court's decision to award Mrs. Hicks' the divorce amounted to such an abuse. Accordingly, we find that there is no merit to Mr. Hicks' first assignment of error.

Mr. Hicks next challenges the trial court's division of the marital estate, arguing that an equitable division of the marital property in this case required an equal division. In Tennessee, marital property is to be divided equitably, without regard to fault. Tenn.Code Ann. § 36-4-121(a)(1). However, an equitable distribution is not necessarily an equal one, and a division is not rendered inequitable simply because it is not precisely equal. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn.2002). Likewise, an equitable division does not necessitate that each party receive a share of every piece of the marital property. *King v. King*, 986 S.W.2d 216, 219 (Tenn.Ct.App.1998).

In this case, the trial court made an essentially equal division of the marital estate. Excluding the parties' personal property, Mrs. Hicks was awarded the equivalent of \$96,710 while Mr. Hicks was awarded \$91,680. The difference in the awards resulted from the trial court's decision to award Mrs. Hicks the parties' two cemetery lots, valued at \$4,390. However, as the trial court duly noted, divorced parties no longer desire to be buried next to one another and splitting the plots would greatly reduce the property's monetary value. Mr. Hicks recognized this fact during the trial where he testified:

Q. And you will split the grave plots with [Mrs. Hicks]?

A. Well. One of us can have the grave plots. There's no sense in splitting the grave plots, but.

Due to the discretion provided to the trial court in making a division of the marital estate, the burden is on the party dissatisfied with the division to show how that trial judge abused that discretion. *Nigro v. Nigro*, No. M2002-00134-COA-R3-CV, 2003 WL 21634320, at *3 (Tenn.Ct.App. Jul. 11, 2003). Mr. Hicks has failed to present any argument as to why he is entitled to a greater share of the marital estate other than to state that Mr. Hicks "needed all the cash he could realize." We find this argument entirely unpersuasive and thus affirm the trial court's division of the marital estate.

Mr. Hicks also lists in his assignments of error that the trial court erred in (1) awarding Mrs. Hicks a portion of her attorney's fees and assessing the court costs against Mr. Hicks; and (2)

exhibiting prejudice against Mr. Hicks' counsel. However, Mr. Hicks fails to properly address these issues in his brief. Tenn. R. App. P. 27(a)(7) requires that an appellant provide in his brief an argument setting forth the contentions of the appellant with respect to the issues presented, the reasons why the contentions require appellate relief, and citations to the authorities and appropriate references to the record. Although an issue may have been designated in the notice of appeal, "a party's failure to brief it ordinarily constitutes waiver or abandonment of the issue." *Rector v. Halliburton*, No. M1999-02802-COA-R3-CV, 2003 WL 535924, at *9 (Tenn.Ct.App. Feb. 26, 2003). We therefore find that Mr. Hicks waived the issues of attorney's fees, court costs, and prejudice by failing to properly brief these assignments of error.

In closing, Mrs. Hicks requests her attorney's fees for the appeal, asserting that Mr. Hicks' appeal is frivolous. "An appeal is deemed frivolous if it is devoid of merit or if it has no reasonable chance of success." *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn.Ct.App.2001). And the award of damages for the filing of a frivolous appeal lies entirely within the discretion of the Court. *Banks v. St. Francis Hosp.*, 697 S.W.2d 340, 343 (Tenn.1985). We have warned "that an Appellant who fails to cite to any authority on appeal to support a reversal of a trial court's findings, especially when even cursory research would reveal the state of the law in this state, runs the risk of having his appeal deemed frivolous by this Court." *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 548 (Tenn.Ct.App.2005). Because Mr. Hicks cites no evidence or rule of law which would entitle him to reversal or other relief, *see Wells v. Sentry Ins. Co.*, 834 S.W.2d 935, 938 (Tenn.1992), we must conclude that this appeal is frivolous and award Mrs. Hicks appropriate damages. The judgment of the trial court is affirmed. The costs of appeal, including Mrs. Hicks' attorney's fees are assessed against Mr. Hicks. The case is remanded to the trial court for determination of the amount of damages for frivolous appeal and such other matters as may be appropriate.

WILLIAM B. CAIN, JUDGE