

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 23, 2014 Session

SUSAN TAYLOR MOORE v. JOHN THOMAS TAYLOR

**Appeal from the Circuit Court for Montgomery County
No. MC CC CV DV 11-0887 Ross H. Hicks, Judge**

No. M2013-01590-COA-R3-CV - Filed June 30, 2014

This is the second appeal in this divorce action. Husband appealed from the Final Decree of Divorce in 2012, and we affirmed the trial court in all respects in an opinion filed by this court on May 30, 2013. While the appeal was pending, the parties filed several motions in the trial court regarding a variety of financial obligations arising from the Final Decree of Divorce. Following one hearing, the trial court modified the division of the marital property; however, in our opinion which was filed a week earlier, we affirmed the division of the marital estate. Wife now appeals that ruling, and she raises several issues regarding, *inter alia*, the division of marital property, alimony, attorney's fees, and civil contempt. Finding the trial court erred in modifying the division of the marital estate after we had affirmed that decision, we reverse that modification. As for all other issues raised, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part, Affirmed in Part, and Remanded

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which RICHARD H. DINKINS, and W. NEAL MCBRAYER, J.J., joined.

Susan Moore Taylor, Clarksville, Tennessee, Pro Se.

Patricia A. Rust, Clarksville, Tennessee, for the appellee, John Thomas Taylor.

OPINION

Susan Moore Taylor ("Wife") filed for divorce against John Thomas Taylor ("Husband") on April 21, 2011. Following a hearing, the trial court entered its Final Decree of Divorce on February 27, 2012, which declared the parties divorced pursuant to Tennessee Code Annotated § 36-4-129. Marital property included the marital residence, Husband's 401K, a 2009 Lincoln, and the parties' 2007 Jaguar as well as other miscellaneous assets.

The trial court ordered that the residence be sold, and awarded Wife all of the equity in the marital residence in lieu of any equity in Husband's 401K, which was awarded to Husband. Wife was awarded the 2009 Lincoln, which was encumbered. As for the 2007 Jaguar, which the couple owned but Wife had gifted to her son without Husband's consent, the trial court ordered Wife to either transfer title to Husband or pay Husband \$2,500 for his interest in the Jaguar. Additionally, the trial court awarded Wife rehabilitative alimony in the amount of \$1,000 per month for eighteen months.

Husband filed a Notice of Appeal on July 16, 2012, to challenge various financial rulings in the Final Decree of Divorce and we affirmed the trial court's judgment in all respects on May 30, 2013. *Taylor v. Taylor*, No. M2012-015500-COA-R3-CV, 2013 WL 2395030 (Tenn. Ct. App. May 30, 2013) ("*Taylor I*").

While the first appeal was pending, the parties filed several motions in the trial court involving accusations that the other party was not complying with the final decree regarding their respective financial duties. Following a hearing on June 3, 2013, which occurred a mere four days after our opinion in *Taylor I* was filed, the trial court entered an order on June 7, 2013, modifying the February 27, 2012 Final Decree of Divorce.

In the June 7, 2013 order, the trial court awarded the marital home to Husband if he could refinance the mortgage, and the court reduced Wife's award of all of the equity in the home to a specific award of \$22,000. Further, if Husband could not refinance, the court directed the marital home be listed for sale at \$135,000 and ordered that the parties would split the equity equally. Wife appealed.¹

ISSUES

Wife timely filed a notice of appeal in which she raises the following issues, which we quote verbatim from her brief:

1. Whether the trial court erred in the Order entered June 7, 2013 dividing the proceeds from the sale of the marital property, when all equity was awarded to [Wife] in the Final Decree of Divorce entered February 27, 2012, and affirmed by the Court of Appeals May 30, 2013.

¹While this second appeal was pending, Wife, acting pro se, filed with this court a Motion to Stay, requesting that we stay the sale of the marital residence until we rendered our second opinion. On September 5, 2013, we denied Wife's motion, but acknowledged the fact that Wife had been awarded the entirety of the equity in the home by the trial court originally, which award we had already affirmed.

2. Whether the trial court erred in the Order entered June 7, 2013 by not awarding an extension and/or increase of alimony awarded February 27, 2012 for eighteen months, as [Wife's] rehabilitative alimony was to end July 15, 2013.
3. Whether the trial court erred in the Order entered June 7, 2013 by not recognizing civil contempt demonstrated with [Husband's] unwillingness to sell the property, as is, at market value, ordered in the Final Decree of Divorce entered February 27, 2012.
4. Whether the trial court erred in the Final Decree of Divorce by overlooking that [Husband] underestimated his two Income and Expense Statements to fraud the trial court August 8, 2011 and January 9, 2012 which affected awarded alimony without consideration of the effects in awarding inadequate Alimony Pendente Lite, then placing financial responsibility of the 2009 Lincoln MKS solely on [Wife], that exceeded rehabilitative alimony. [Wife] also challenges the alimony payment method and Grounds for Divorce.
5. Whether the trial court erred in not recognizing [Husband] committed Aggravated Perjury, T. C. A. § 39-16-703 by hiding the [2007] Jaguar.
6. Whether the trial court erred in the Final Decree of Divorce in not awarding attorney fees for [Wife][.]

ANALYSIS

I. THE MARITAL HOME

The 2012 Final Divorce Decree awarded all of the equity in the marital home to Wife. Wife contends in this appeal that the trial court erroneously modified the Final Divorce Decree in its order entered June 7, 2013, by dividing the equity in the marital home equally between the parties. Husband concedes this issue in his brief.

We affirmed the trial court's 2012 Final Decree of Divorce in *Taylor I*, in which Wife was awarded all of the equity in the marital home; accordingly, the award of the equity in the marital home is the "law of the case," which doctrine binds the parties and the trial court on remand. The Supreme Court describes that doctrine as follows:

An appellate court's final decision in a case establishes the "law of the case" when a case is remanded for further proceedings. This "law of the case" is

binding on the trial court during the remanded proceedings and is also binding on the appellate courts should a second appeal be taken after the trial court enters a judgment in response to the remand order. *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). While the doctrine applies only to issues that were actually decided by the court, explicitly or implicitly, it does not apply to dicta. [*Id.*]; *Ladd ex rel. Ladd v. Honda Motor Co.*, 939 S.W.2d 83, 90 (Tenn. Ct. App. 1996).

Gray's Disposal Co. v. Metro. Gov't of Nashville, 318 S.W.3d 342, 348 (Tenn. 2010).

In light of the fact that the parties do not dispute this issue, as well as the “law of the case” doctrine, we reverse the trial court’s order entered June 7, 2013, to the extent it erroneously modifies the division of marital property.

II. ISSUES (2) AND (6)

In issues (2) and (6), Wife attempts to challenge the award of rehabilitative alimony and attorney’s fees in the 2012 Final Decree of Divorce. We note, however, that Wife failed to raise these issues in the first appeal. Our courts have repeatedly held that one waives an issue if they do not raise it as an issue on appeal. *Melton v. Melton*, No. M2003-01420- COA-R10-CV, 2004 WL 63437, at *2-3 (Tenn. Ct. App. Jan. 13, 2004); *Bing v. Baptist Mem’l Hosp.-Union City*, 937 S.W.2d 922, 924 (Tenn. Ct. App. 1996); *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 86 (Tenn. Ct. App. 1988); *Schoen v. J.C. Bradford & Co.*, 642 S.W.2d 420 (Tenn. Ct. App. 1982); *Independence One Mortgage Corp. v. State Auto Ins. Co.*, No. 02A01-9511-CH-00255, 1996 WL 266651, at *1 (Tenn. Ct. App. May 21, 1996). In the second *Melton* appeal, we held that the husband did not raise as an issue on the first appeal the trial court’s denial of his motion to enforce the mediation agreement. *Melton*, 2004 WL 63437, at *2-3. Thus, the husband waived his right to appellate review concerning the mediation settlement agreement by not raising it on the first appeal. *Id.* Additionally, in *Bing* this court stated that it was “constrained to note that plaintiffs [had] not raised as an issue on appeal the action of the Circuit Court of Obion County in granting [the defendant’s] motion for summary judgment based on the running of the one-year statute of limitations and the three-year statute of repose for medical malpractice actions.” *Bing*, 937 S.W.2d at 924. Accordingly, the appellate court treated the issue as having been waived. *Id.* (citing Tenn. R. App. P. 13(b); *Bank of Crockett*, 752 S.W.2d at 86).

Based on the foregoing, we find that Wife waived her right to seek appellate review concerning either alimony or attorney’s fees by not raising them on the first appeal.

III. THE REMAINING ISSUES

As to the remaining issues, we turn to the well-established principle that if an issue is not properly raised in the trial court, it cannot be raised for the first time on appeal. *Lobertini v. Brown*, No. M2006-01485-COA-R3-JV, 2008 WL 275883, at *3 (Tenn. Ct. App. Jan. 31, 2008) (citing *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *4 (Tenn. Ct. App. Sept. 3, 2003); *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)). Moreover, “[a]ppellate courts do not, as a general rule, consider issues not dealt with in the trial court and not properly developed in the proof.” *Harlan v. Hardaway*, 796 S.W.2d 953, 957 (Tenn. Ct. App. 1990) (citing *E. Sevier Cnty. Util. Dist. v. Wachovia Bank & Trust Co.*, 570 S.W.2d 850, 853-54 (Tenn. 1978)). We have concluded that Wife did not properly raise the remaining issues to the trial court judge. Therefore, these issues are without merit.

IV. FRIVOLOUS APPEAL

Husband contends this is a frivolous appeal, and he seeks to recover the attorney’s fees and costs he incurred in this appeal.

A frivolous appeal is one that is devoid of merit or has no reasonable chance of succeeding. *See Combustion Eng’g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978); *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977); *Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999); *Industrial Dev. Bd. v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995). Determining whether to award damages based on a frivolous appeal is a discretionary decision. *See Banks v. St. Francis Hosp.*, 697 S.W.2d 340, 343 (Tenn. 1985).

We have ruled in Wife’s favor on one substantive issue in this appeal, that pertaining to the erroneous modification of the division of the marital estate after we affirmed that ruling; therefore, Wife’s appeal was not without merit. Accordingly, this appeal was not frivolous.

IN CONCLUSION

The judgment of the trial court is reversed in part and affirmed in part, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed equally against the parties.

FRANK G. CLEMENT, JR., JUDGE