**IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION**
**AT JACKSON**



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| **ENNIS J. HURDLE, JR.,** | ) | Fayette County Chancery Court |
| | ) | No. 10522 |
| Plaintiff/Counter-Defendant/Appellee. | ) | |
| VS. | ) | C. A. No. 02A01-9502-CH-00025 |
| **BETTE B. HURDLE,** | ) | |
| Defendant/Counter-Plaintiff/Appellant. | ) | |

From the Chancery Court of Fayette County at Somerville.
**Honorable Dewey C. Whitenton, Chancellor**

**Wanda B. Shea**, Memphis, Tennessee
**Mitchell D. Moskovitz**, Memphis, Tennessee
Attorney for Defendant/Appellant.

**Charles M. Cary**,
DENTON AND CARY, Bolivar, Tennessee
Attorney for Plaintiff/Appellee.

OPINION FILED:

**AFFIRMED AND REMANDED**

**FARMER, J.**

**CRAWFORD, P.J., W.S.** : (Concurs)

**HIGHERS, J.** : (Concurs)

The 23 year marriage of Bette B. Hurdle (Wife) and Ennis J. Hurdle, Jr. (Husband) was dissolved by a final decree of divorce entered by the trial court on October 18, 1994. In this appeal, we are concerned only with the trial court's classification, division and/or valuation of the couple's property. Wife's issues on appeal are as follows:

> 1. Did the trial court err in failing to enforce Husband's stipulation as to the value of, and which party was to receive, the Chamber and Hancock Farm?
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> 2. Did the trial court err in valuing husband's separate property interest in Hurdle Machine Works, Inc. at $120,000?
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> 3. Did the trial court err in valuing husband's separate property interest in the real property commonly known as the Hurdle Machine Works lot at $26,700?

Husband, as appellee, presents this additional issue:

> The Trial Court erred in not awarding Mr. Hurdle a marital property interest in the Lynn Farm.

Wife's first issue concerns the trial court's alleged error in failing to enforce Husband's stipulation as to the value of, and which party was to receive, the Chamber and Hancock Farm, comprised of approximately 777 acres and located adjacent to the marital residence.[1] It is undisputed that the parties originally agreed that the value of this property was $450,000 and that it was to be awarded Wife. This is evidenced by the "division of marital property and marital indebtedness" proposals submitted by each party as well as counsel for Husband's comment during opening statement: "[t]he value of that farm is not in dispute. The fact that, I believe, it's to be awarded to the wife is not in dispute."

A stipulation is an agreement between counsel regarding business before a court. ***State v. Ford***, 725 S.W.2d 689 (Tenn. Ct. Crim. App. 1986). Stipulations are favored by the courts and are to be encouraged and enforced thereby as they expedite the business of the courts. ***Ford***, 725 S.W.2d at 691. Oral stipulations made during the course of trial are valid. ***Bearman v. Camatsos***,

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[1]The property is in Fayette County, east of Moscow, Tennessee.

385 S.W.2d 91, 93 (Tenn. 1964).

A request to withdraw from a stipulation may be granted where there is shown to exist: "(a) mutual mistake; (b) the occurrence of some facts that the stipulation did not foresee; or (c) some misrepresentation, fraud, overreaching, or similar misconduct on the part of the opposing party in making the stipulations." Lawrence A. Pivnick, Tenn. Circuit Court Practice § 10-6 (3d ed. 1991). When these circumstances are present, a prompt motion to withdraw from the stipulation should be made. ***Id***. 83 C.J.S. ***Stipulations*** § 34 (1953) also provides:

> Stipulations are under the control and subject to the direction of the court which has power to relieve the parties therefrom on proper application and a showing of sufficient cause, on such terms as will meet the justice of the particular case; but such matter rests in the sound discretion of the court and relief will be granted only where necessary to prevent injustice.

In this case, counsel for Husband moved to withdraw from the stipulation on the second day of trial which, it is important to note, occurred a month following the day it began. Counsel reasoned that the initial appraisal of this property at $450,000 by Mr. James Murdaugh, who was jointly hired by the parties, was received by counsel only the afternoon before the trial was to begin. Thus, he claimed he was incapable of reviewing a report that he had "had less than twelve hours" and that on the first day of trial, he "did not have any foundation whatsoever for any of Mr. Murdaugh's values." During the interim of the first and second day of trial, however, he professed discovery of certain "fallacies" within the report and, thus, requested a second appraisal by Mr. Ed Harris.

The trial court allowed the testimony of Harris who appraised the property at $700,000. On cross examination, he stated, as relevant here, that he made an upward adjustment for water and sewer on the property. He concluded that land with sewers was more valuable.

Amy McClure, testifying on behalf of Wife, stated that she was a former vice mayor of the City of Moscow, having left the position in 1989, and was familiar with the utilities and sewerage available there. She related that the city is currently "under a moratorium and the sewerage

is full. . . . there's no development in Moscow because they can't tie into sewerage." She maintained that no sewerage was available to the farm land in question.

Mr. Murdaugh testified that he disagreed with Harris' appraisal, reasoning:

> Mr. Harris's report is predicated on this property being used as a recreational farm with the potential for fringe residential usage. . . . based on the fact that the sewage system in Moscow has reached its capacity, based on the fact that no development is allowed within the City of Moscow to be attached to the sewer system, that until there is some improvements made in that regard, the utilities to this particular tract do not lend any value to the property.
>
> I used four sales that were located within a mile of the subject to arrive at my values. . . . They were all sold for farmland usage. Mr. Harris used five sales that were located within the Rossville area that all had utilities in place and were all available to be used. In his report his adjustment of three hundred dollars per acre is based solely on Shelby County and utilities in Shelby County.

Husband presented the testimony of the current mayor of Moscow, Eugene Oliver, who testified that there is no moratorium on the city affecting sewer connections. A letter, dated December 19, 1990, from the Tennessee Bureau of Environment, Division of Water Pollution Control, rescinding the moratorium, was then submitted into evidence. Oliver maintained that at least 5 new family homes had been built in Moscow within the last year.

Based on the foregoing, the trial court ruled as follows concerning this property:

> [Wife] also has this farm that the Court is awarding. It's to be sold because of the great discrepancy about the value and all that. The Court could not . . . even if I accept the other appraisal, I realize you object to it, there was some question of a stipulation. But we had one appraisal at some seven hundred thousand, the other, four fifty. There was such a huge discrepancy, the Court just felt like that I could not in fairness put a value on that because of the great controversy and discrepancy about whether you can build there or not build there, and the mayor's testimony, and the other person's testimony. . . .
>
> So if the parties cannot otherwise agree, it will just have to be sold. But she's due the proceeds of that just because that was, as I understand, the agreement that she was to receive that property. The only question was the value; am I right about that?
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> MR. CARY: That's correct.

On appeal, it is Wife's contention that Husband should be bound by the stipulation because Murdaugh's report never mentioned that sewage had anything to do with his appraised value and thus, the basis for the request to withdraw could not be due to any alleged error by Murdaugh. Wife cites ***Mast Advertising & Pubishing, Inc. v. Moyers***, 865 S.W.2d 900 (Tenn. 1993), which holds:

> When a party makes a concession or adopts a theory by stipulation and his cause of action is determined on this concession or theory, then that party must abide by his decision even on appeal by certiorari.
>
> These stipulations will be rigidly enforced by the courts of this State.

***Mast Advertising***, 865 S.W.2d at 903 (citations omitted).

While we agree with the foregoing principle, we find it inapplicable to the present situation. Here, counsel for Husband moved to withdraw the stipulation prior to any determination by the trial court as to the awarding of this property. We, thus, hold counsel's motion timely and within the trial court's sound discretion to consider. The question before us is whether there was an abuse of such discretion in allowing the withdrawal. Considering the evidence presented, especially that of Mr. Oliver and the two appraisers, we hold that Murdaugh was clearly mistaken as to the existence of a moratorium on the city. This is evidenced by his own testimony. It was Harris' testimony that the absence of such moratorium affects the property's value. Ever mindful of the binding effect that stipulations are generally afforded, we believe that under the present circumstances, the trial court did not abuse its discretion in allowing Husband to withdraw from the stipulation.

Wife next challenges the trial court's valuation of Husband's separate property interest in Hurdle Machine Works, Inc. (HMW). HMW builds portable sawmills. Husband testified that he began the business in 1964 in Holly Springs, Mississippi and "made [his] first [sawmill]" in 1968 or 1969 which he ultimately sold for $20,000. He then moved the business to Moscow. The couple married in 1971 and prior thereto, he sold his second sawmill for $24,000. The business was incorporated in 1977, with Husband receiving 75% of the stock and Wife, 25%. Husband described

the business as a "joint effort" with Wife and declared that she was a "big part of [HMW]." Wife was the bookkeeper for HMW from 1974 until the parties' separation in October 1993.

When asked, "[a]t the time that you got married, had you designed the type [sawmill] that you're making today?", Husband replied, "[y]es sir." The basic design is the same as when he married, although there have been refinements. His design is not patented. Husband valued the design at the time of the marriage as follows:

> My opinion is the, the first [sawmill] I made, I had some mistakes on it but the second one, I had to get right and it's basically the same thing today. Hydraulic system, everything and I sold the [sawmill] for around Twenty-four Thousand Dollars ($24,000.00) and I'd say the basic design is worth about three (3) times that.

On cross-examination, Husband admitted that he did not begin to build his own carriage (a component part of the sawmill) until 1980 and that until then he used "somebody else's design . . . on the carriage."

At the time of the marriage, Husband also "had [his] complete machine shop," which he valued at $75,000. His machinery included his purchase of the "old Dyersburg Machine Works" for $2,500 and some new machinery purchased while in business in Holly Springs. He states, "I still have some of those machines today. . . . I have four (4) lathes to start with. I still use two (2) of those . . . to this day. Two (2) of the milling machines, I still use . . . . Some of the drill presses, I use. I have improved on some, traded some off . . . ."

Wife testified that Husband designed the product which he sells today in 1969. When asked her opinion as to the value of the equipment in HMW at the time of the marriage, she replied, "I was with Mr. Hurdle when he bought what he did at Dyersburg . . . I want to say, maybe Twenty-five Hundred Dollars ($2,500.00) that he bought that equipment . . . ."

The trial court determined that the total value of the business was $1,250,000, with Husband's separate interest being $120,000. On appeal, Wife asserts that a preponderance of the evidence establishes that Husband has no separate interest in HMW. She contends that HMW is

entirely a marital asset and argues that any interest Husband may have brought into the marriage was transmuted into marital property. Husband counters that Wife stipulated that he had a separate interest in HMW. Our review of the record finds no clear agreement by Wife in this regard. Nor, however, do we find the evidence to preponderate against the trial court's classification of this property (the design and original equipment) as separate property.

Under the doctrine of transmutation, separate property becomes part of the marital estate when an intention that it become marital property is evidenced. ***Batson v. Batson***, 769 S.W.2d 849, 858 (Tenn. App. 1988). Transmutation may be accomplished, for example, by purchasing property with separate funds, but taking title in joint tenancy or by placing separate property in the names of both spouses. ***Batson***, 769 S.W.2d at 858. The rationale being that property dealt with in this manner creates a rebuttable presumption of a gift to the marital estate. ***Id***. We do not find Wife's employment in the business or her status as a shareholder in the corporation sufficient evidence of an intention by Husband to relinquish separate ownership of his design or the original equipment. We further find a preponderance of the evidence to support the trial court's valuation of this property.

Wife also alleges as error the trial court's valuation of Husband's separate property interest in the lot on which HMW is located. She does not question Husband's separate interest in the lot, only its valuation as determined by the trial court. The lot consists of 16.74 acres and was a gift to Husband from his father in 1974. The record indicates that prior to the transfer, in 1970, Husband constructed the building from which he worked on this property. Husband testified, "[Father] didn't sell me the building, no. . . . I had put the building on there. I paid for the building that was on it. . . . [Father] helped me build the building."

Husband valued the lot at the time of transfer, as did his father, at $16,700 or $1,000 an acre. Husband valued the building separately at $33,000. Husband agreed that the deed conveying the property includes the grantor's affidavit, stating a value of $8,500. The trial court placed an entire value of $240,000 on the property and valued Husband's separate interest at

$26,700.[2]

Wife argues on appeal that Husband is estopped from asserting any value for the property other than that as stated in the deed, $8,500. Estoppel by deed is said to preclude "one party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed or from denying the truth of any material facts asserted in it." ***Blevins v. Johnson County,*** 746 S.W.2d 678, 684 (Tenn. 1988) (quoting ***Duke v. Hopper***, 486 S.W.2d 784 (Tenn. App. 1992)). Under this set of circumstances, we find the doctrine inapplicable. The parties to the deed were Mr. Hurdle, Sr. and Husband, neither of whom now attempt to assert any right or title in derogation of the deed or deny any material fact as stated therein against the other. As no other evidence was presented as to the value of Husband's separate interest, we find no error in its valuation.

We further find no error by the trial court in assigning separate values to the real property and improvements thereon as contended by Wife. The proof shows that Husband had expended funds in the construction of the improvements prior to a conveyance of the land.

Lastly, we address Husband's contention that he should have been awarded a marital property interest in the Lynn Farm. The court found this particular realty "clearly separate property" of Wife and that "it was entitled to be [retained] as such." The farm or "Lynn Place," as it is referenced in the record, consists of 311 acres. Wife, the parties' two sons and Wife's sister each own an undivided equal interest in the property. Wife's interest was conveyed to her by her mother at various times beginning in December 1980.

Wife testified that neither she nor her Husband had done anything to cause the property to appreciate in value. Her mother pays the taxes on the property. When asked if she had done any work on the property, she replied, "[w]e have not." Wife stated that her undivided interest in the property had "no value." She claimed that to her knowledge the timber on the property had never been sold. On cross-examination, she stated that Husband had advised her mother in

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[2]In assessing Husband's separate interest, the trial court valued the lot at $16,700 and the building thereon at $10,000.

marketing timber on their land on one occasion.

Wife's mother, Rosa Anderson, testified that Husband never assisted her in managing the property while she owned it. She stated that her daughter had never contributed any money to the farm. She confirmed that she had sold some timber off the land.

Husband testified that he assisted Wife and her family in selling timber on their property "[b]ack in the '80s." He states, "[t]hey had some timber and they was fixing to give it away . . . I know all the [millers], . . . and I know who is honest. I helped them sell it, . . ."

Mr. Murdaugh appraised the entire property at $373,200, but stated that Wife's undivided interest had "no market value." Mr. Harris valued the entire property at $754,000 and Wife's interest at $130,832. The trial court did not value the property.

On appeal, Husband asserts that a portion of the value of the farm is marital property. He relies upon T.C.A. § 36-4-121(b)(1)(B) - (C), which states:

> "Marital property" includes income from, and any increase in value during the marriage, of property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation . . . .
>
> As used in this subjection, "substantial contribution" may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

By classifying the entire property as separate, the trial court implicitly found no substantial contribution by Husband as to its "preservation and appreciation." Based upon our review of the record, we hold a preponderance of the evidence to support this finding.

It results that the judgment of the trial court is affirmed and this cause remanded for any further proceedings necessary and consistent herewith. Costs are assessed equally against Bette B. Hurdle and Ennis J. Hurdle, Jr., for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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HIGHERS, J. (Concurs)