

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

January 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

REBA MITCHELL MURPHY) RHEA COUNTY
) 03A01-9411-CH-00402
Plaintiff - Appellee)
)
v.) HON. JEFFREY F. STEWART,
) CHANCELLOR
)
JAMES EDWARD MURPHY)
) AFFIRMED AS MODIFIED
Defendant - Appellant) and REMANDED

L. THOMAS AUSTIN OF DUNLAP FOR APPELLANT
STEPHEN T. GREER OF DUNLAP FOR APPELLEE

O P I N I O N

Goddard, P. J.

James Edward Murphy appeals a divorce decree of the Chancery Court for Rhea County. By his issues on appeal he questions the Court's division of marital property and its award of child support, alimony, and attorney fees.

At the time of the divorce Ms. Murphy was 46 years of age and Mr. Murphy 43. They had been married almost 22 years.

Two children were born of the marriage, a daughter age 16 and a son 12.

Ms. Murphy was employed as a special education teacher in the Rhea County School System where her earnings for 1993 were \$25,821. Mr. Murphy was President of a corporation owned with his father, Murphy & Sons Trucking Co., and his income for 1993 was \$40,000. At the time of the divorce he was a second-year student at the University of Tennessee Law School.

Ms. Murphy was awarded a divorce on the grounds of inappropriate marital conduct, which is not contested on appeal. The Court divided the parties' marital property and required both parties to assume certain indebtedness. He then ordered Mr. Murphy to pay as child support \$200 per week, plus one-half of the uninsured medical expenses, and as alimony \$22,000, which was the balance owing on the parties' residence, plus \$5000 in attorney fees.

We have attached an appendix to this opinion, which shows the property awarded by the Court, as well as the debts required to be assumed by the parties. It also shows the values assigned by the Court, as well as those concurred in by the parties where the Court made no specific findings. Except as to the raceway, which we conclude had no value in accordance with our determination hereinafter set out, we find that the Court's

determination as to the value of property awarded the husband and the wife is appropriate.

The appendix also lists the contentions of the parties relative to the value of the property awarded and the amount of debts required to be assumed, other than those found by the Trial Court, this Court, or concurred in by the parties.

Mr. Murphy takes strong exception to the findings as to the value of both the racing and trucking corporations. As to the former he insists, and we agree, that under the undisputed proof the amount owed by the racing corporation, which was \$35,000 secured by a deed of trust upon the corporation's only asset--real estate upon which the track was located--and an additional \$165,000 owed to the Trucking Company, renders the value of the corporate stock zero, rather than \$32,500 as found by the Trial Court.

Mr. Murphy also argues that the evidence preponderates in favor of a finding that his interest in the Trucking Company was worth at most \$29,000 rather than the \$150,000 found by the Trial Court.

The experts that testified regarding the Trucking Company's value varied from \$810,000 by Ms. Murphy's expert, to

\$158,000 by Mr. Murphy's expert. It can be seen that the value fixed by the Trial Court, \$400,000, was "within the range of competent evidence submitted." Given the presumption of correctness accorded a trial court's finding under Rule 13 of the Tennessee Rules of Appellate Procedure, we do not find the evidence preponderates against the Trial Court's finding as to the Trucking Company's value. Moreover, the value placed upon the Trucking Company by the Trial Court was within the range of the competent proof submitted. Wallace v. Wallace, 733 S.W2d 102 (Tenn. App. 1987).

The Trial Court, upon finding the Trucking Company had a value of \$400,000, deducted from that amount \$100,000, which was its value when the parties were married. Thus, the marital interest in the Trucking Company was one-half of \$300,000, or \$150,000.¹ This amount when added to the other property awarded Mr. Murphy and after deducting debts, leaves his division of the parties' property with a value of \$145,807. This compares favorably with the value of Ms. Murphy's net award, which was \$130,795.

We accordingly conclude that, given the heretofore-mentioned presumption of correctness that attaches to the Trial Court's findings of fact, he must have found, although not articulated, that the value of the items not specifically valued

¹ Mr. Murphy did not contend that the appreciated value of the Trucking Company was his separate property, as was the case in Harrison v. Harrison, an unpublished opinion of the Tennessee Supreme Court, filed in Nashville on December 18, 1995.

was such that the total received by each party was in accord with the mandates of T. C. A. 36-4-121.

It is clear from the compilation of the various values of marital property not found by the Trial Court or this Court and not agreed to by the parties, that if we accept Mr. Murphy's figures the Court's division is inequitable insofar as he is concerned. On the other hand, however, if we accept Ms. Murphy's figures it is inequitable insofar as she is concerned. In light of the fact that the Trial Court made no finding as to value as to much of the marital property, we are handicapped in our review, even though de novo, without an opportunity to evaluate the credibility of the witnesses when testifying.

As to the question of child support, Mr. Murphy contends that his income, at most, was \$35,000 per year which, according to him, under the 1989 guidelines, would require child support payments of \$697.24 per month, or \$160.90 per week. Consequently, the Trial Court's award of \$200 per week plus one-half of the uninsured medical expenses exceeded this guideline.

We first point out that there is proof in the record that Mr. Murphy's income is \$40,000 per year rather than \$35,000, and there is also proof that if in fact it is not \$40,000 he is capable of earning that amount and, consequently, this figure may be used to determine his child support obligations, Storey v. Storey, 835 S.W2d 593 (Tenn. App. 1992). Upon applying the July

1994 guidelines to the \$40,000 he is earning or is capable of earning, his monthly income would be \$3333.33 which, rounded off to the highest figure on the guideline table, would show a net income of \$2506.18, or an obligation of \$802 per month, which would be, when also rounded off, \$185 per week.

The only reason the Trial Court advanced for ordering child support in excess of the guidelines was the potential earning capacity of Mr. Murphy after he graduates from law school, passes the bar, and begins his practice. While it may be that upon the foregoing occurring Mrs. Murphy would be entitled to an increase in child support, we do not believe child support may be predicated upon potential earning capacity, and that the Court's reason for deviating from the guidelines is insufficient.

We accordingly modify the judgment rendered by the Trial Court to reduce the weekly support to \$185, effective as of July 7, 1994, the date of the judgment below.

Apropos of alimony and attorney fees, the Trial Court ordered Mr. Murphy to pay the mortgage on the residence awarded to Mrs. Murphy in the approximate amount of \$22,000, which we assume was intended to be alimony in solido. He also awarded attorney fees in the amount of \$5000.

The trial court is clothed with wide discretion in the awarding of both alimony and attorney fees, and under the record

presented we find no abuse. Threadgill v. Threadgill, 740 S.W2d 419 (Tenn. App. 1987); Mirmino v. Mirmino, 34 Tenn. App. 352, 238 S.W2d 105 (1950).

For the foregoing reasons the judgment of the Trial Court as modified is affirmed and the cause remanded for collection of costs below. Exercising our discretion, we adjudge the costs of appeal to Mr. Murphy and his surety.

Houston M Goddard, P. J.

CONCUR:

Don T. McMuray, J.

Charles D. Susano, Jr., J.

KEY: FTC (Found by Trial Court)
 NFTC (Not Found by Trial Court)
 FCA (Found by Court of Appeals)
 PC (Parties Concur)

HUSBAND S ASSETS AND DEBTS

ASSETS

| | <u>Court</u> | <u>Husband</u> | <u>Wife</u> |
|--------------------|------------------|------------------|------------------|
| Trucking Co. | \$150,000 (FTC) | \$150,000 (FTC) | \$150,000 (FTC) |
| Raceway | 0 (FCA) | 0 (FCA) | 0 (FCA) |
| Equity Townhouse | (NFC) | 1,500 | 5,000 |
| Furnishings | | | |
| Townhouse | (NFC) | 1,700 | 2,500 |
| 1991 Camero | (NFC) | 4,000 | 10,500 |
| 1972 GMCO Truck | (NFC) | 500 | 6,000 |
| Jewelry | (NFTC) | 250 | 500 |
| IRA | 25,000 (PC) | 25,000 (PC) | 25,000 (PC) |
| Country Club Stock | (NFC) | 50 | 0 |
| | <u>\$175,000</u> | <u>\$183,000</u> | <u>\$199,500</u> |

DEBTS

| | | | |
|-------------------|-------------|-------------|-------------|
| Rhea County | | | |
| National Bank | 10,000 (PC) | 10,000 (PC) | 10,000 (PC) |
| MLB Equity Credit | | | |
| Loan | 14,900 (PC) | 14,900 (PC) | 14,900 (PC) |
| Sandy Smith Loan | 2,000 (PC) | 2,000 (PC) | 2,000 (PC) |

| | | | |
|------------------------|--------|------------------------------|------------------------------|
| Aut omobile Loan | (NFC) | 3, 500 | 0 |
| Household Finance Loan | | | |
| | | <u>2, 293</u> <u>29, 193</u> | <u>2, 293</u> <u>29, 193</u> |
| | | \$145, 807 | \$170, 307 |

WIFE' S ASSETS AND DEBTS

ASSETS

| | <u>Cour t</u> | <u>Hus band</u> | <u>Wf e</u> |
|----------------------------|-------------------------|-------------------------|---------------------------------|
| Ke mmer Hi ll House & Lots | \$100, 000 (FTC) | \$100, 000 (FTC) | \$100, 000 (FTC) |
| Ki ng' s Hi ll Lots | 20, 000 (FTC) | 20, 000 (FTC) | 20, 000 (FTC) |
| Me mbership Pool Assoc. | 1, 500 (PC) | 1, 500 (PC) | 1, 500 (PC) |
| Household Furni shings | (NFC) | 57, 050 | 12, 500 |
| Jewel ry | (NFC) | 22, 500 | 700 |
| 1991 GMC Truck | (NFC) | 9, 500 | 11, 500 |
| I RA | 2, 210 (PC) | 2, 210 (PC) | 2, 210 (PC) |
| Ret irement | 7, 317 (PC) | 7, 317 (PC) | 7, 317 (PC) |
| Horse | (NFC) | 3, 500 | Wf e contends owned by children |
| Horse Trailer | (NFC) | 5, 000 | 2, 000 |
| Ri ding and Show Equipment | (NFC) | 4, 000 | Wf e contends owned by children |
| 3 Shi h Tzu Dogs | (NFC) | 750 | 0 |
| | <u>-----</u> \$131, 027 | <u>-----</u> \$233, 327 | <u>-----</u> \$157, 727 |

DEBTS

| | | | | |
|------------------|---------------------|--------------------------|--|--------------------------|
| 1991 Auto Loan | (NFC) | \$7,500 | | 9,698 |
| Credit Cards | (NFC) | 3,300 | | 11,820 |
| Loan from Mother | (NFC) | 0 | | 11,720 |
| Bandland Horns | <u>232 (PC) 232</u> | <u>232 (PC) \$10,032</u> | | <u>232 (PC) \$33,470</u> |
| | \$130,795 | \$223,295 | | \$124,257 |