



In this divorce action, the appellant, Ms. Lay, by choice, did not make an appearance in the trial court. A default judgment was granted awarding a divorce to the appellee, Mr. Lay. Some thirteen months later, the appellant filed a Rule 60.02 motion asking for relief from the judgment regarding the division of marital property. The trial court denied the motion. This appeal resulted. We affirm the judgment of the trial court.

The parties were married in 1975. Two children were born to the marriage and neither had reached majority at the time of the divorce.

Both parties worked during the marriage but, nevertheless they were experiencing financial difficulties. They entered into a Chapter 13 bankruptcy plan at some point prior to the divorce proceedings. It is apparent from Ms. Lay's testimony at trial that she was aware of the Chapter 13 proceedings and had participated at least in some small degree in the proceedings. Mr. Lay testified that the parties had an outstanding indebtedness of about \$40,000.00. The parties' income at the time of the institution of the bankruptcy proceeding is not a part of the record before us. Mr. Lay also testified that he informed the attorney who filed their bankruptcy petition that he had a pension plan that would more than cover the debt and asked if he should just cash out the

pension plan. He further testified that his attorney informed him that would not be necessary. It appears that the issue of the pension plan was not before the bankruptcy court. Apparently the bankruptcy plan was in existence for some time prior to the divorce, with Mr. Lay making a weekly payment pursuant to the plan.

Both parties testified that it was the appellant who wanted the divorce and that the appellee simply went out and obtained one. A Marital Dissolution Agreement was drawn up for the parties by an attorney employed by husband. The agreement provided for the granting of a divorce to the husband, awarding custody of the two minor children to him, and obligating him to pay all marital debt. Additionally, the judgment awarded Mr. Lay all "rights, title and interest in the parties' marital Chapter 13 assets... ." We note again that the pension plan was never mentioned in the Chapter 13 proceedings as far as we can discern from the record.

Approximately thirteen months after the entry of Final Judgment of Divorce, Mr. Lay called Ms. Lay to inform her that he was about to enjoy a new home, new car, etc. When asked by Ms. Lay how he could afford such things, he responded that he had quit his previous employment and received his retirement funds.

As a result of that conversation, Ms. Lay obtained an attorney and filed a motion pursuant to Rule 60.02, T.R.C.P., asking the court to reopen the original divorce proceedings and allow her to litigate the issue of her former husband's pension plan funds. As a basis for this motion, Ms. Lay filed her own affidavit stating, essentially, that she did not make an appearance in the original action, that she was unaware of husband's pension plan, and that, additionally, she was unaware that there were any marital assets of any value because of the bankruptcy proceedings.

The trial court heard rather extensive testimony including both parties, both children, an officer from the trust company who handles the pension plan, and an employee of husband's former employer who had knowledge of the pension plan. The court took the case under advisement and sometime later issued an order denying the motion. This appeal resulted.

Ms. Lay has raised a single issue for our review: "[t]he trial court erred in denying appellant's motion to re-open the final judgment pursuant to T.R.C.P. 60.02(5)."

Rule 60.02 reads in pertinent part as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following

reasons ... (5) any other reason justifying relief from the operation of the judgment.

Firstly, we note that a motion for relief from a judgment pursuant to this rule addresses itself to the sound discretion of the trial judge; the scope of review on appeal is whether the trial judge abused his discretion. Toney v. Mieller Company, 810 S.W2d 145 (Tenn. 1991); Underwood v. Zurich Ins. Co., 854 S.W2d 94 (Tenn. 1993).

Additionally, we note that "[t]he courts should construe this rule's requirements liberally when a party is seeking relief from a default judgment. They should also examine the moving party's proof to determine whether the default was willful and to assess the extent to which the defaulting party's conduct has prejudiced the non-defaulting party." Nelson v. Simpson, 826 S.W2d 483 (Tenn. Ct. App. 1991).

The final judgment here was a default judgment. Ms. Lay testified at the hearing on the Rule 60 motion that she wanted the divorce, that she knew about it and that she chose not to make an appearance because she did not think that there was anything of value to be obtained. She also testified that she knew of the existence of a pension plan and life insurance.

Our review of the record as a whole does not persuade us that there was a failure on the part of M. Lay to disclose a marital asset. M. Lay was aware that there was a pension and insurance plan. She made a deliberate, calculated choice to allow a default judgment to be taken against her and expressly accepted the terms of the property settlement agreement.

Further, it has not been satisfactorily demonstrated that the division of marital property was inequitable. It is well-settled law in this state that the trial court has wide discretion in adjudicating the parties' rights and interests in the marital estate, and that the trial court's findings are entitled to great weight on appeal. See e.g., Batson v. Batson, 769 S.W2d 849 (Tenn. App. 1988). It is also well-settled law that the division of marital property must merely be an equitable one and not necessarily an equal division. See T.C.A. § 36-4-121 (c). While M. Lay retained his pension plan in its entirety, he also retained 100 percent of the marital debt, including an indebtedness owed on an automobile awarded to M. Lay and the Chapter 13 plan. He also received custody of both children with M. Lay having no child support obligation being established.<sup>1</sup>

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<sup>1</sup>No issue is presented relating to child support. We, therefore, decline to address the matter.

We find no abuse of discretion. The trial court is affirmed. Costs of this appeal are taxed to the appellant. This cause is remanded to the trial court for the collection thereof.

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Don T. McMurray, J.

CONCUR:

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Herschel P. Franks, J.

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Charles D. Susano, Jr., Judge

IN THE COURT OF APPEALS

JOHN LAY,	)	CAMPBELL GENERAL SESSIONS
	)	C. A. NO. 03A01-9602-GS-00055
	)	
Plaintiff - Appellee	)	
	)	
	)	
	)	
	)	
vs.	)	HON. ROCKY YOUNG
	)	JUDGE
	)	
	)	
	)	
SHEILA LAY (JACKSON),	)	AFFIRMED AND REMANDED
	)	
Defendant - Appellant	)	

**ORDER**

This appeal came on to be heard upon the record from the General Sessions Court of Campbell County, briefs and argument of counsel. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

The trial court is affirmed. Costs of this appeal are taxed to the appellant. This cause is remanded to the trial court for the collection thereof.

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