IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JOHN RUSSELL OKERSON,

Plaintiff/Appellant,

v.

BARBARA BUHR OKERSON,

Defendant/Appellee.

Shelby Circuit No. 142325R.D.
C.A. No. 02A01-9507-CV-00147

Hon. Wyeth Chandler, Judge

FILED

March 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

CHARLES A. SEVIER, The Sevier Law Firm, Memphis, Attorney for Plaintiff/Appellant.

LARRY RICE and KENDRA H. ARMSTRONG, Rice, Rice, Smith, Bursi, Veazey, & Amundsen, L.L.P.C., Memphis, Attorneys for Defendant/Appellee.

MODIFIED IN PART AND AFFIRMED IN PART

Opinion filed:

TOMLIN, Sr. J.

These two consolidated appeals stem from a divorce action initiated by John Russell Okerson ("Plaintiff" or "Husband") against Barbara Buhr Okerson ("Defendant" or "Wife") in the Circuit Court of Shelby County. Following an abbreviated bench trial, the trial judge granted Wife a divorce on the grounds of inappropriate marital conduct, divided the party's marital property, awarded Wife custody of the two minor children and awarded temporary child support and alimony. The case was continued to a later date. During the course of that hearing, it was announced on behalf of the parties that they had reached a settlement agreement that equally divided the marital property. In addition, it was announced that the amount and method of payment of alimony by Husband to Wife had been finalized, along with the payment of child support and some attorney fees.

Following the entry of a final divorce decree (identified as "Supplemental Final Decree of Divorce"), Husband filed a petition citing Wife for contempt alleging a deprivation of visitation rights with the party's children. This petition was withdrawn by Husband prior to a hearing. Counsel for Wife petitioned the court for an award of attorney fees to Wife for work performed in defending Husband's contempt petition, as well as a request for prospective attorney fees pending appeal. The trial court ordered

Husband to pay Wife $1,000.00 toward attorney fees for services rendered in connection with the contempt petition and $4,000.00 in prospective attorney fees for handling of Wife's case on appeal. These two appeals were subsequently consolidated.

Husband has raised five issues on appeal: (1) Did the trial court err in ordering Husband to pay as alimony the sum of $117,000.00, payable in installments over a ten year period, or was it a subterfuge to provide for the payment of the college education of his two children? (2) Did Husband himself or by and through his attorney consent in full to the two orders of divorce entered in this cause? (3) Did the trial court abuse its discretion in the division of certain marital property of the parties, specifically the Northwest Airlines Pension and Prudential Annuity and the IRA at J. C. Bradford and Co.?

Husband's fourth and fifth issues on appeal stem from the post-divorce hearing pertaining to attorney fees and may be consolidated as follows: Did the trial court abuse its discretion in awarding Wife attorney fees in the amount of $1,000.00 for legal services pertaining to the contempt petition filed by Husband, and in awarding Wife $4,000.00 in prospective attorney fees for legal services in connection with her appeal? For the reasons hereinafter stated, we affirm as to all issues except the awarding of prospective attorney fees for Wife's legal services on appeal.

The basic facts are not in dispute. The parties were married in February 1977. It was Wife's first marriage and Husband's second marriage. Husband was serving in the military at the time of marriage but, subsequently left the service and was employed as an airline pilot by Northwest Airlines. Two daughters were born of the marriage: Georgina, in February 1978 and Justine, in April 1983. The record reflects that both daughters are extremely intelligent.

Husband left the family in May 1991. Some two years later he filed a complaint for divorce on the grounds of irreconcilable differences, which he later amended to allege inappropriate marital conduct. Wife filed a counter complaint for divorce on the grounds of adultery. In 1993, the last full year prior to the divorce hearing in July 1994, Husband earned $140,000.00 as an airline pilot. At that time Wife was a professor at Memphis State University, and earned in the same year $28,500.00. The

record reflects that as a result of wage negotiations between management and the pilots union, Husband's income, without potential overtime, for 1994 and the years immediately following would be in excess of $120,000.000 a year. Wife was in the process of obtaining her doctorate degree, which would bring about a slight increase in her annual income when completed.

Prior to the initial hearing, Husband stipulated that he had engaged in inappropriate marital conduct—i.e., adultery. At that hearing he admitted having adulterous affairs with three different women, during the period between separation and trial. Following a three-day hearing, the trial court granted Wife an absolute divorce on the ground of inappropriate marital conduct on the part of Husband. The court also awarded Wife the custody of the party's minor children and at the same time granted Husband liberal visitation privileges with the children.

Husband was directed to pay Wife as temporary child support the amount of $2,300.00 per month and temporary alimony in the amount of $700.00 per month, each amounts to be adjusted as to amount and length of time of payments at a subsequent hearing set by the same order to begin on August 31, 1994. The trial court also finalized an agreement reached between the parties concerning the division of the party's separate property and a portion of the party's marital property.

After the resumption of the hearing on August 31, 1994, extending into the first days of September, in open court, with the parties present, counsel for Wife announced that the parties had reached a settlement as to the matters remaining, which were financial in nature, consisting of alimony, child support, division of certain marital property and attorney fees.

In the weeks and months that followed, there were multiple exchanges of documents, including copies of correspondence written by Husband and counsel for both parties, as well as drafts and redrafts of a proposed final order, to be entitled "Supplemental Final Divorce Decree." This decree was entered in March 1995. Immediately after filing his notice of appeal, Husband filed a petition seeking to have Wife cited for contempt for being in violation of the court order giving him visitation rights. This petition was subsequently withdrawn by Husband following a conference

with the trial judge, prior to any hearing. Thereafter, counsel for Wife sought additional attorney fees for services rendered in connection with these proceedings. The trial court awarded $1,000.00 in attorney fees to Wife relative to the contempt proceedings, as well as ordering additional attorney fees for Wife in the amount of $4,000.00, prospectively, to cover in part Wife's legal expenses on appeal.

I. The Alimony Issues—Did Husband Consent and Was It Reasonable?

For the sake of brevity and judicial economy, this court will consider these two issues together. Husband's counsel on appeal did not participate in the trial of the case. From the filing of the original complaint through the entry of the supplemental final decree, Husband was at all times represented by Ms. Kathleen D. Norfleet of the Memphis Bar. On appeal, counsel for Husband strongly contends that it was unreasonable that alimony be conceived and structured for the purpose of providing a college education, or some part thereof, for the parties' two minor children. Husband contends that the structuring of alimony for this purpose was a concept developed by Wife's counsel at trial and that it was not only accepted by the trial court, but became a *cause célèbre* of the court.

A reading of this record indicates without question that Wife's counsel, early on in the first hearing, advocated that (if possible) some provision should be made for Husband to bear a substantial portion of the responsibility of educating his daughters. The record also reflects that early on the trial court would not hear of such a suggestion. However, as the hearing proceeded, the trial judge became more actively involved and from time to time clearly stated that he desired in some way to see that Husband provided for his daughters and their education.

While stating that he did not consent to such a decree as the one entered by the trial judge, Husband further states that if there was consent that he was "pressured" by the trial judge to give his consent. We will look at these two aspects one at a time. First, as to "consent" or "no consent."

The Supplemental Final Decree contains the following provisions, in part, relative to alimony to be paid by Husband:

> The Court finds that the alimony agreement reached by the parties is proper under the current circumstances and Husband shall therefore pay alimony to the Wife in the amount of One Hundred Seventeen Thousand ($117,000.00) Dollars payable in monthly installments as set forth hereinbelow. Said alimony shall be modifiable only upon a substantial change of circumstance as set forth below and shall terminate upon the death, but not the remarriage, of JOHN RUSSELL OKERSON or BARBARA BUHR OKERSON. Further, the Court found that the award of alimony to Wife shall be modified only upon a showing of a substantial unforeseen change of circumstance not contemplated by this Court. . . .
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> . . . .
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> 4. JOHN RUSSELL OKERSON shall pay to BARBARA BUHR OKERSON, One Hundred Seventeen Thousand ($117,000.00) Dollars as alimony necessary for her support as follows: Six Hundred Fifty ($650.00) Dollars per month for twenty-one (21) months beginning September, 1994 through May, 1996; One Thousand Two Hundred Fifty ($1,250.00) Dollars per month for three months beginning June, 1996, through August 1996; One Thousand Six Hundred ($1,600.00) Dollars per month for a period of thirty-six (36) months beginning September, 1996, through August, 1999; One Thousand Fifty ($1,050.00) Dollars per month for a period of thirty-six (36) months beginning September, 1999, through August, 2002; and Two Hundred Fifty ($250.00) Dollars to be made in January, 2004. Said payments shall be payable in two equal monthly payments on the 16th and 30th day of each month. Said alimony shall terminate upon the death but not the remarriage of either JOHN RUSSELL OKERSON or BARBARA BUHR OKERSON and shall be modifiable only upon the showing of a substantial change in circumstance which was not contemplated by this Court at the time of the trial as set forth in the premises hereinabove.
>
> 5. In the event that BARBARA BUHR OKERSON should die before JOHN RUSSELL OKERSON has satisfied his alimony obligation under this agreement, JOHN RUSSELL OKERSON agrees to make payments in an amount equal to his remaining alimony obligation for or on behalf of the education of the parties' two children for a period no longer than the period originally scheduled for the alimony payments or until the children have completed four years of undergraduate collegiate work, whichever occurs first. In the event that a child does not pursue her college education after BARBARA BUHR OKERSON's demise then JOHN RUSSELL OKERSON's agreement for continuing support payments to that child equal to half of the remaining alimony payments shall cease.

We note first of all that the first numerical paragraph refers to "the alimony agreement reached by the parties." That this was an agreement is initially reflected by portions of the transcript of the September 7, 1994 hearing which shows that the parties and their counsel from time to time would assemble for a discussion, outside of the presence of the court, seeking to reach some agreement:

All right. Mr. Rice, if you can, announce to the Court what the decision and/or agreement is.

. . . .

MR. RICE [Counsel for Wife]: Pursuant to the Child Support Guideline the husband will be paying support in the amount of $2,350 per month for the first two years.

He will pay alimony for the first two years of $650.00 per month.

Following that, for three years he will pay child support in the amount of $1,500 a month -- Child support will be at the rate of $1,500. Alimony for the next three years will be at $1,600.

Then alimony for the next three years will be at $1,050 per month.

Then alimony will drop for the next two years to $250 per month.

The alimony is subject to change of circumstances --

THE COURT: Well, the alimony is not subject to change of circumstances. Alimony is going to be lump sum alimony, whatever it totals up, paid at the certain rate.

MS. NORFLEET: Your Honor, that's what we agreed --

THE COURT: The child support is going to be at a certain rate.

MR. RICE: And the child support is going to be subject to modification after five years --

THE COURT: The child support is going to be subject to modification.

MS. NORFLEET: Your Honor, that's weird. We had already agreed that that would be modifiable depending on the change in circumstance.

At the time this dialogue took place, both Husband's counsel and Husband were present. At no time did Husband or his counsel ever make any statements to the court voicing any objection in general to the agreement or to any specific provision as announced by Wife's counsel. As a matter of fact, both Husband and his counsel participated in affirmative dialogue:

MR. RICE: We've got child support. We've got alimony. The J.C. Bradford account --

MS NORFLEET: Well, wait. We hadn't finished with the alimony. Larry, there was another thing about the alimony.

THE COURT: What else was there about alimony?

MS. NORFLEET: It would terminate upon her death or the death of husband or upon her remarriage.

* * * * * *

MS. NORFLEET: He [Mr. Okerson] just asked does (sic) he have to pay Barbara's estate.

THE COURT: Well, if she dies, of course, she's going to have enough insurance to give to those children to get through any school in the world.

MR. OKERSON: And the children would clearly come to me, Your Honor.

THE COURT: What's that?

MR. OKERSON: And the children would clearly come to me.

THE COURT: And they'd come to you.

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THE COURT: . . . . He can agree to pay these alimony payments under this provision as long as she is alive or until paid in full and in case she dies pay the same amount of money for or on behalf of the education of his two children in the amount scheduled in these payments until they have completed four years of undergraduate collegiate work.

Now, some way that can be put in there. We may have to draw a Marital Settlement Agreement on this thing and have all that in there. You know, for me to order to do that is a little strange. That's --

MS. NORFLEET: Your Honor, he is agreeable for that.

* * * * * *

(As to Direct Deposit of Support)
THE COURT: . . . Why not just. . . take it out of your check and [it] pays right on over.

Does that -- Does that bother you or does that --

MR. OKERSON: Yes, Your Honor, it bothers me. I will be happy to send her the check by mail.

There are other indications that while he may not have been happy about it, Husband nonetheless readily consented and agreed to the provisions of alimony and its structure for the daughters' education as encompassed in the supplemental final decree.

In the deposition of Ms. Norfleet, taken subsequent to the entry of the supplemental final decree and the notice of appeal filed by Husband, Ms. Norfleet confirms that Husband was present at all times during the August—September 1994 proceedings before the trial judge, that he was not under any disability and that she

discussed all offers and counteroffers that were made with him, and that he understood them. Furthermore, she admits that both she and Husband were present when counsel for Wife announced that an agreement had been reached and that Husband understood what took place. Following the conclusion of the September 1994 hearing, it took counsel for both parties and their clients almost six months to develop a final draft both sides could agree to.

During this time frame, counsel for Wife and counsel for Husband faxed back and forth to each other drafts of proposed final decrees encompassing their respective suggestions.

One example is in a letter written by Husband to his counsel during the course of negotiations, dated January 30, 1995, wherein he states in part:

> Barbara and I agreed to an electronic transfer of a semi-monthly child support and alimony payments [sic] to her account at a local credit union. This has been going for one full month, and works flawlessly. We each get a receipt by mail at our respective address, mine for the withdrawal and hers for the deposit.
>
> Barbara has expressed the need for consistent alimony payment amounts. I have a proposal which would accommodate her requirement for the level alimony payments, as follows:
>
> (1) pay twenty one (21) months at $650 per month (Sept 1994-May 1996),
> (2) pay ninety eight (98) months at $1044 per month (June 1996-July 2004),
> (3) pay one (1) month at $1038 per month (Aug 2004).
>
> $ 650 x 21 = $ 13,650
> $1044 x 98 = $102,312
> $1038 x 1 = $ 1,038
> $117,000 total alimony over 10 years
>
> This offer is still modifiable in the event of substantial change of circumstance and in the event either child does not pursue her college education as set out in paragraph 5 on page 7 of our proposal. This offer assures a level flow of dollars.

In her deposition, Ms. Norfleet admitted that once the supplemental final decree was entered, she never filed a motion to alter or amend the judgment or a motion to set aside the judgment. She also stated that she never advised the trial judge that her client in any way disagreed with the contents of the decree that they were seeking to formulate. Her reason for not doing so was that she was trying to carry out some type

of "damage control," and that once she realized that the court was going to order some type of alimony to help pay for the children's education, she thought it was in Husband's best interest to attempt to negotiate the terms and provisions of the decree.

There was pressure exerted on both parties by the court in an effort to bring about a settlement that the parties could live with for the benefit of all concerned. There is substantial proof in this record that the breakup of the marriage was caused principally and primarily by the actions and conduct of Husband. The record reflects that he desired and intended to marry his girlfriend once the divorce proceedings became final. He could not deny the substantial difference in the ability to acquire assets and the earning capacity of his Wife as compared to him.

In our opinion, the record supports the contention that Husband consented to the amount, form and terms of payment of the alimony in this case. This is borne out by his actions, his testimony and the testimony of his trial counsel. Furthermore, if he did not consent nor give his attorney the right to consent to this decree, and having failed to plead the presence of fraud or mistake in the negotiation of the provisions of this decree, Husband should have either attacked the decree by filing a motion to alter or amend the judgment or should have attacked the decree collaterally on whatever the grounds he felt to be compelling. This he did not do. *See* Nance v. Pankey, 880 S.W.2d 944 (Tenn. App. 1993).

In our opinion, the evidence fails to support Husband's contention that he did not consent to the terms and provisions of the final decree in this case. We are of the opinion that he did consent, both personally and by and thru his counsel. If there was an absence of consent he did not assert it. We resolve this issue in favor of Wife.

We now address the second prong of this issue—the "justification" for or the "reasonableness" of the award. The trial courts are given wide discretion in the award of alimony in domestic relations cases. Gilliam v. Gilliam, 776 S.W.2d 81, 86 (Tenn. App. 1988); Houghland v. Houghland, 844 S.W.2d 619, 621 (Tenn. App. 1992). The appellate courts will not reverse or modify an alimony award unless we find a clear abuse of discretion. Ingram v. Ingram, 721 S.W.2d 262, 264, (Tenn. App. 1986).

In determining alimony, the trial court is to consider those factors set out in T.C.A. § 36-5-101(d), which reads as follows:

> (A) The relative earning capacity, obligations, needs and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
> (B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
> (C) The duration of the marriage;
> (D) The age and mental condition of each party;
> (E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
> (F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
> (G) The separate assets of each party, both real and personal, tangible and intangible;
> (H) The provisions made with regard to the marital property as defined in § 36-4-121;
> (I) The standard of living of the parties established during the marriage;
> (J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
> (K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
> (L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

The real need of the spouse seeking support is the single most important factor in awarding support. Cranford v. Cranford, 772 S.W.2d 48 (Tenn. App. 1989). The ability of the obligor to pay spouse is the next most important factor to be considered. *Id.* In addition, the fault of the offending party is also to be considered. Storey v. Storey, 835 S.W.2d 593, 596-597 (Tenn. App. 1992).

In the case before us, the marriage—and the family—has been destroyed and uprooted by Husband's misconduct. Wife, as the party obtaining the divorce, should not be left in a worse financial condition than she was before Husband's misconduct brought about the divorce. *See* Shackleford v. Shackleford, 611 S.W.2d 598, 601 (Tenn. App. 1980). We also note that the agreement left Husband with a substantially greater proportion of the marital assets.

While apparently overlooked by both the trial court and the parties, our Supreme Court in Nash v. Mulle, 846 S.W.2d 803 (Tenn. 1993), has established clear guidelines

by which a parent with substantial income exceeding the highest amount listed in the Child Support Guidelines, could be assessed with child support by the use of an educational trust to provide funding for a college education of his or her child. As the Nash court observed:

> Given the public policy favoring higher education in Tennessee, likewise evidence by our many colleges and universities, it would be highly improper in this case to cast the burden of Melissa's higher education entirely on her mother, or on the "bounty of the state," when her father can provide for her education without unduly burdening himself.

Id. at 809.

It appears that all the factors are present that would have permitted the trial court to fashion the very same relief agreed upon, following the guidelines in Nash, had there been an absence of cooperation and a failure of consent on the part of Husband. We resolve this aspect of this issue in favor of Wife.

II. The Division of a Portion of the Marital Property.

Husband complains of the trial court's awarding 75% of Husband's Northwest Pension and Prudential Annuity to him and 25% to Wife, while at the same time awarding 83% of the J.C. Bradford and Co. IRA account, consisting of cash, to Wife and 17% to Husband.

This issue is without merit. While the trial court is required to equitably divide the marital property between the parties, this standard applies to the totality of the award. It is inappropriate to take each and every asset and seek to find an equitable division of that particular asset.

We are again faced with the issue that the divisions complained of were consented to by Husband. When the parties announced in open court that they had reached an agreement, both Husband and Husband's counsel were present. At that time, Mr. Rice, attorney for Wife, announced that the parties had agreed to a fifty/fifty division of their marital property. Regarding these two assets now in question, the division of these properties were stated to be as follows:

MR. RICE: All right. The J.C. Bradford account is going to be divided on the following basis: The wife will receive $95,500, and the husband will receive $18,949. To the extent there is more or less in that account than the numbers we've announced, the difference will be divided between the parties depending on the ratio --
THE COURT: Proportion.
MS. NORFLEET: Proportion.
THE COURT: No ratio.
MS. NORFLEET: Yes, proportion.

* * * * * *

MR. RICE: The Northwest retirement would be divided on the ratio of her receiving $36,168.49 and him receiving $108,505.45. These are present values.

And the parties through their attorneys will draft QDRO Order dividing it between them. That will be one-fourth to her and three-fourths to him.

Likewise. Northwest Prudential Annuity would be divided one-fourth and three-fourths . . .

Neither Husband nor his counsel voice any objections to these terms. During the period the final decree was being negotiated, counsel for both parties exchanged drafts. At least six drafts of the proposed final decree, as submitted to Wife's attorney by Husband's attorney, contained the exact division of these two assets as was ultimately contained in the final decree. We are of the opinion that Husband agreed to the specific divisions of these two assets. This issue is without merit.

III. The Attorney Fee Issues.

A. Husband's Contempt Proceedings.

One day after the filing of the notice of appeal Husband sought to have the court cite Wife for contempt for allegedly violating the visitation privileges granted to him in the decree. Prior to a hearing, the trial court interviewed both minor children, then sixteen and eleven. After determining that as of that time the oldest daughter wished to have nothing to do with her father, the court persuaded the Husband to dismiss his petition. By way of hindsight, at least it appears clear that father would have wound up at the same place had a hearing been held, except that his potential liability for attorney fees would be at least double, if not triple, the amount the court awarded.

The trial courts are vested with wide discretion in matters of allowing attorney

fees, and appellate courts should not interfere except upon a showing of an abuse of that discretion. Threadgill v. Threadgill, 740 S.W.2d 419, 426 (Tenn. App. 1987). An issue pertaining to parental visitation rights may probably be considered under the topic of child custody matters. Deas v. Deas, 774 S.W.2d 167, 170 (Tenn. 1989). In our opinion, the evidence does not demonstrate an abuse of discretion by the trial court in its award of attorney fees.

B. Prospective Attorney Fees.

As part of the post judgment hearing on attorney fees, which is also before this court in this consolidated appeal, Wife's counsel asked for prospective attorney fees for expenses to be incurred on appeal. The trial court responded by awarding $4,000.00.

During the year in which this hearing took place—1995—counsel for Wife had been paid approximately $42,500.00—$30,000.00 by Wife and $12,500.00 by Husband. At the hearing on the attorney fees issue in November 1995, Wife testified that she owed her counsel an amount in excess of $25,000.00. Considering what had already been paid to Wife's counsel, the cash assets awarded to Wife as part of the division of marital property, and the amount of alimony being paid to Wife, this court is of the opinion that this prospective attorney fee award was an abuse of the trial court's discretion. We accordingly resolve this issue in favor of Husband.

Lastly, Wife requests this court to make an additional award to defray the legal expenses she has incurred on appeal. The trial courts have the discretion to make awards for appellate legal expenses. Batson v. Batson, 769 S.W.2d 849, 862 (Tenn. App. 1988). On remand, the trial court is respectfully directed to address this issue and, after hearing such proof as it deems necessary, in its discretion make an additional award to Wife for her legal expenses on appeal if it determines that an additional award is justified.

The judgment of the trial court, as modified in this opinion, is affirmed. The costs on appeal are taxed three/fourths to Husband and one/fourth to Wife, for which execution, if necessary, may issue.

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TOMLIN, Sr. J.

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

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HIGHERS, J. (CONCURS)