IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

JUDITH GAIL GRIZZLE BOWERS	)	SULLIVAN COUNTY
	)	03A01-9606-CH-00193
Plaintiff-Appellee	)	
	)	
	)	
v.	)	HON. RICHARD E. LADD,
	)	CHANCELLOR
	)	
JOSEPH STANTON BOWERS, JR.	)	
	)	
Defendant-Appellant	)	AFFIRMED AND REMANDED

MELVIN J. WERNER OF KINGSPORT FOR APPELLANT

DAVID S. HAYNES OF BRISTOL FOR APPELLEE

OPINION

Goddard, P.J.

Joseph Stanton Bowers, Jr., appeals the Sullivan County Chancery Court's denial of his motion to modify support payments to his ex-wife, Judith Gail Bowers, pursuant to the parties' marital dissolution agreement. Mr. Bowers insists that the Trial Court erred in its characterization of the support payments as alimony in solido, which rendered them incapable of being modified.

The parties were married for 28 years when, on April 26, 1991, Mr. Bowers was granted a divorce on the grounds of irreconcilable differences. The divorce decree incorporated the agreed-to Marital Dissolution Agreement.

The Marital Dissolution Agreement provided that the spousal support to be paid to Ms. Bowers for 15 years would be determined by a somewhat complicated formula, authored by Mr. Bowers, which was tied to his income and the marital debts. The Agreement provided in pertinent part as follows:

> **DISTRIBUTION OF MARITAL DEBTS AND SPOUSAL SUPPORT.** Total income, using the term to mean the same as mutual income, will be defined as the Husband's income as of August 1, 1990 less federal withholding, social security, health insurance (as long as Wife is covered by such health insurance), and life insurance (as long as Wife is beneficiary). Any income which the Wife receives after September 1, 1990, and any income over the amount of August 31, 1990 that the Husband receives after September 1, 1990 shall not be included in the definition of total income or mutual income.
>
> A total of $4,000.00 (Four Thousand Dollars) shall be deducted from the total income as heretofore defined each year ($2,000.00 each) for an IRA or 401K for Husband and Wife.
>
> Husband and Wife shall share equally the total income less IRA/401K deductions as described in paragraph above, less mutual debts as hereinafter described for a period of fifteen years beginning September 1, 1990.
>
> As long as income is being divided, income tax refunds or debts incurred from the divided income shall be divided 50/50.
>
> When a mutual debt is paid off, or reduced, or if a new mutual debt is incurred, the difference between the old mutual debt total and the new mutual debt total, or the reduced payments shall be split 50/50 and added to, or subtracted from, Husband's or Wife's share of the total income as heretofore described.

The Marital Dissolution Agreement does not characterize the support as alimony in solido or alimony in futuro.

Mr. Bowers made timely support payments in conjunction with the Agreement for approximately three years until on July 15, 1994, when he filed a motion with the Sullivan County Chancery Court to modify the support payments due to alleged changed circumstances. Ms. Bowers filed a counter-claim alleging that Mr. Bowers was deficient in his payments under the Agreement.

After a hearing before the Sullivan County Chancery Court on the motion and counter-claim on June 28, 1994, the Trial Court issued an order on July 7, 1994. The Trial Court held that the support payments called for in the Marital Dissolution Agreement were alimony in solido, and thus not subject to modification. The Trial Court referred the case to a Special Master for recommendations as to the balance of the accounts between the parties as of the date of the hearing. On August 19, 1994, Mr. Bowers filed a motion for reconsideration of the judgment, which the Trial Court denied after a hearing.

After two additional hearings, concerning exceptions to the Special Master's Report, the Trial Court entered a final order on April 2, 1996. The Court held that the support payments were alimony in solido and not subject to modification. The Trial Court ordered Mr. Bowers to pay Ms. Bowers $31,806.27 per year for 15 years in 26 payments per year. The Court also ordered Mr. Bowers to pay arrearage as determined by the Special Master.

Mr. Bowers appeals the final order and raises two issues on appeal, which are interrelated. He insists that the Trial Court erred in its finding that the alimony was alimony in solido and not subject to modification. He further insists that upon its finding that the alimony was alimony in solido that the Trial Court abused its discretion in the amount of alimony and arrearage awarded to Ms. Bowers.

Mr. Bowers first argues that the evidence of the case preponderates against a finding that the alimony was in solido, and thus the finding should be reversed on appeal. A review of the record, however, shows that the Trial Court did not err in its finding that the alimony in the Marital Dissolution Agreement was alimony in solido.

The Tennessee divorce statutes allow for a court to award three different kinds of alimony to an ex-spouse, rehabilitative alimony, alimony in solido, and alimony in futuro. Mr. Bowers insists that the alimony to be paid to Ms. Bowers is alimony in futuro, not alimony in solido as the Trial Court determined.

The Tennessee courts have defined "alimony in solido" as:

> an award of a definite amount or a lump sum of money. This lump sum can be payable by installments for a definite length of time and still be classified as alimony in solido. 9 Tennessee Jurisprudence, **Divorce and Alimony**, § 33 (1983).
>
> Alimony **in solido** cannot be modified after the court's decree becomes final. The entire award must be paid in full regardless of subsequent events such as remarriage of the recipient or death of the payor.

> **Aleshire v. Aleshire**, 642 S.W.2d 729 (Tenn. Ct. App. 1981), citing **Spalding v. Spalding**, 597 S.W.2d 739, 741 (Tenn. Ct. App. 1980).

Brandt v. Brandt, an unpublished opinion of this Court, filed in Jackson on January 4, 1991. The key determination as to whether an alimony award is in solido is whether the language of the award is definite or indefinite. "If the award calls for a definite sum of money not contingent upon the happening of an event, then it is a lump sum or **in solido** award regardless of whether it was ordered to be paid in installments or one fixed amount." Brandt, citing McKee v. McKee, 655 S.W.2d 164 (Tenn.App.1983).

We must look to the language of the Marital Dissolution Agreement to determine whether the payments were definite or whether they were contingent upon the happening of a future event. It is clear from the language of the agreement that the payments would be the same certain sum for a 15-year period as a percentage of Mr. Bowers' 1990 income. The fact that the payments were not titled "alimony in solido" does not render them modifiable. Additionally, merely because some of the payments might be used in the future to pay off debts does not render the payments modifiable since the amount paid will be the same, regardless of how the payments are used. Finally, it is clear from the language of the agreement that the parties intended the payments to be definite. The Agreement states:

> A modification or waiver of any of the provisions of this agreement shall be effective only if made in

> writing and executed with the same formality as this agreement, and approved by the court if such approval is required. Failure of either party to insist upon strict performance of any of the provisions of this agreement shall not be construed as a waiver of any subsequent default of the same or similar nature.

Therefore, we conclude that the Trial Court was correct in its finding that the alimony was in solido alimony, not subject to modification.

Mr. Bowers additionally argues that even if the award were in solido alimony, the amount of in solido alimony awarded could not have exceeded the amount of the estate at the time of the divorce. He argues that he would have to pay approximately $477,000 over 15 years, an amount nearly 15 times greater than the value of the estate at the time of the divorce decree.

Assuming that Mr. Bowers is correct in his contention that the alimony in solido cannot be greater than the amount of the estate, the Court still no longer has the ability to modify the award. Generally, the contractual obligations of the Marital Dissolution Agreement would merge into the final decree. Towner v. Towner, 858 S.W.2d 888 (Tenn.1993). However, only the parts of the agreement that the court has the authority to enforce merge into the decree. The Tennessee Supreme Court stated:

> [I]t is clear that the reason for stripping the agreement of the parties of its contractual nature is the continuing statutory power of the Court to modify its terms when changed circumstances justify. **It follows, and we so hold, that only that portion of a**

> **property settlement agreement between husband and wife dealing with the legal duty of child support, or alimony over which the court has continuing statutory power to modify, loses its contractual nature when merged into a decree for divorce.** (Emphasis added).

Towner v. Towner, 858 S.W.2d 888, 890 (Tenn. 1993), quoting from Penland v. Penland, 521 S.W.2d 222 (Tenn. 1975).

Therefore, in order to have modified the support payments, Mr. Bowers would have had to appeal the final judgment within 30 days in accordance with the Tennessee Rules of Appellate Procedure. We conclude that even if Mr. Bowers is correct in his contention that the award cannot be larger than the estate, neither the Trial Court nor this Court has the power to modify the alimony award.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for such further proceedings as may be necessary and collection of the judgment and costs below. Costs of appeal are adjudged against Mr. Bowers and his surety.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.