

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

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| BARBARA JAN TEPEDINO, |) | |
| |) | Marshall County Chancery Court |
| Plaintiff/Appellee. |) | No. 8943 |
| |) | |
| VS. |) | C.A. No. 01A01-9701-CH-00035 |
| |) | |
| MICHAEL JOHN TEPEDINO, |) | |
| |) | |
| Defendant/Appellant. |) | |
| |) | |

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| FILED |
| December 30, 1997 |
| Cecil W. Crowson Appellate Court Clerk |

From the Chancery Court of Marshall County at Lewisburg.
Honorable Tyrus H. Cobb, Chancellor

Raymond W. Fraley, Jr., Fayetteville, Tennessee
Attorney for Defendant/Appellant.

Barbara G. Medley, BUSSART & MEDLEY, Lewisburg, Tennessee
Attorney for Plaintiff/Appellee.

OPINION FILED:

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

FARMER, J.

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

This is a divorce case involving the 26 year marriage of Michael John Tepedino (Husband) and Barbara Jan Tepedino (Wife). They have two adult children. The trial court granted Wife an absolute divorce on grounds of adultery,¹ made a division of the marital property, awarded Wife alimony *in futuro* in the amount of \$3,000 per month and awarded Wife her attorney's fees in the amount of \$3,650. Husband has appealed challenging these portions of the decree, as well as the trial court's denial of certain motions filed on his behalf. For the reasons expressed below, we affirm in part, reverse in part and remand.

The parties married in August 1969. They moved to Italy in order for Husband to attend medical school. He graduated in 1974. After completing his residency in 1980, they moved to Lewisberg where Husband opened his own urology practice. The practice now extends to three cities. Wife has a bachelor's degree in English, with a minor in education. She has two years teaching experience and approximately two years as a literacy coordinator. In 1991, Wife started assisting Husband in the practice as office manager and continued in this capacity even after the divorce hearing. Both parties are 49 years old and in good health. Wife filed for divorce in February 1994. The parties stipulated to the values of the marital property, with the "total" being \$843,003.28. They further stipulated that the value of the only marital debt, the mortgage on the marital home, was \$49,637.38² and that \$39,444 had been paid by the parties to the IRS for their 1995 estimated quarterly taxes.

It is not disputed that Wife kept the financial books at both home and office. She had no prior knowledge of office bookkeeping, but attended a few insurance seminars and consulted with an accountant.³ Wife earns \$15 an hour working part-time at the practice; however, another full time office worker earns only \$8.50. Wife does not consider it feasible to continue in her present employment after finalization of the divorce. Her current net monthly income is \$996.79. She lists

¹Husband stipulated to this ground and this is not a contested issue.

²The parties stipulated that the value of the "marital estate subject to division" was \$793,365.90.

³The gross income for the medical practice for years 1990-95 was \$244,209; \$248,379; \$314,063; \$297,035; \$264,085 and \$461,460, respectively. Wife testified that the last figure was a "prospective amount" based on the first ten months of 1995. She admitted that the 1995 figure might be somewhat inflated because of the fact that some of 1994's gross receipts were not actually collected until the following year.

total monthly expenses at \$4,341.06. Of this amount, \$617.63 represents the monthly mortgage. (R. 11; T.E. 60). Husband has separate property totaling approximately \$28,000.

Wife testified to various joint bank accounts: a checking (household) account in the amount of \$3,411.17; an office checking account in the amount of \$16,816.35; a savings account for \$8,823.93; and another savings account in the amount of \$12,255.93. Wife also testified to recently opening a checking account in her individual name with \$1,000 of joint funds and an individual savings account, opened with joint funds, worth approximately \$7,000.

Wife testified that from January 1 through October the “total cash available” from the business was \$392,416.02. She testified to business overhead of \$115,718.53. The ending balance as of October 31 was \$8,869.11. She disbursed checks in the amount of \$237,636.90 to herself and approximately \$24,000 to Husband. She stated that some of the disbursements to her were to reimburse her for expenditures on office or business items. She indicated that the funds used to pay personal expenses were paid with “joint funds” from either the office or household accounts. She states, “[i]t’s just a matter of where I write the check.” She explained that “[a]ll the money that comes out of the office that I put into the household account, I use to pay bills for my household, . . . expenses.” She identified certain of these items as the separate households of the parties’ two children who attend college (rent, utilities, etc.), Husband’s credit card debt and monthly country club dues, certain of Husband’s expenses when he moved from the marital residence (electric bill and telephone bill), the family’s automobile, medical and life insurance premiums and the estimated quarterly federal income taxes.

Jeffery Cashdollar, an accountant, testified on Husband’s behalf that of the approximately \$237,000 disbursed to Wife, \$50,000 “need[ed] further explanation” based on his review of the 1994-95 office journals maintained by Wife. Cashdollar estimated the parties’ annual tax estimate (self-employment) at \$117,000 and stated that of that figure, \$78,000 remained owing plus “probably some huge underestimated penalties.” Cashdollar testified that his conclusions were without benefit of all 1995 checks written by Wife. He stated, however, that he did not see anything wrong with the books as maintained by Wife.

During the course of the trial, Husband requested both personal and business checks be filed as a late exhibit. Wife's counsel argued that such was available through discovery. The court also requested that an office journal be made a late filed exhibit. The court announced that it would allow filing of the checks if the ledgers didn't reveal how the funds were actually utilized. The court commented:

I'm not accusing anybody of anything and up to this point I haven't suspected, but how am I going to make a determination?

....

I think when they furnish [Husband] copies of the checks and a copy and a summary as well as the Court, the summary. I don't necessarily need the checks if you have a summary that you'll certify jives with the checks.

A summary of what each check went for, . . . See, why I have to know what all this money went for, and I can see where a substantial amount of it is.

A substantial amount of it for these three homes. We can even concede say 75. Then you have taxes paid out of it and insurance. But still, there's a lot of money there.

According to Wife, money spent either on behalf of Husband or checks disbursed to him personally totaled \$41,562.60. She stated that the "household draw" income amounted to \$225,691.51. Wife attempted to explain as follows:

Some of the checks that . . . were disbursements in my name were not just a personal draw. . . . if I bought something for the office, or if something was paid through the household on a credit card, but it was really office expense, I would reimburse it. So I would write a check so it would go through the books, because it was overhead.

Wife was questioned several times by the court to itemize the "household draw." At the close of all proof, the court once again mentioned the late filing of the "summary of each one of those items, showing what the 260,000 went for and also furnish [opposing counsel] a copy of the checks."

The trial court entered an order on December 15, 1995 granting the divorce to Wife and expressly reserving the issues of property division and alimony "pending the court's review of the various documents and any summaries or briefs" presented by counsel "within the next twenty

days.”⁴ On December 11, Wife filed (1) a summary of 1995 expenditures from the personal checking account of the parties and (2) a checkbook register for January 1, 1995 to November 6, 1995. On December 13, Husband filed a motion for production of documents, particularly “all checking accounts” in Wife’s control. In February 1996, Husband filed a motion for additional production of documents on the basis that the post-trial documents submitted by Wife revealed several “missing” items “critical to [Husband’s] analysis of the expenditures shown by [Wife] in her late-filed exhibit.” Husband specifically requested total checkbook expenditures through December 31, 1995 as opposed to November 6, and information regarding *all* savings accounts and checking accounts (not just those provided) from January 1, 1995 through December 31, 1995. In April, Wife filed a response in opposition, essentially arguing that Husband’s motion was outside the twenty day time limit provided by the trial court for filing additional documents and that Husband was seeking post trial discovery. Wife further pointed out that the bank accounts on which Husband requested much of his information were “joint” and, therefore, accessible to him.

Before the motions could be disposed of, the trial court entered its memorandum opinion, accepting Wife’s proposed property division. The assets were distributed with Husband receiving his medical practice and other assets totaling \$439,500 and Wife receiving assets totaling \$403,503.28. Wife was awarded the marital residence and was to assume the mortgage. In addition, for each party to receive “50%,” Husband was ordered to pay Wife \$42,817.05. Wife was awarded \$3,000 per month in alimony *in futuro* and \$3,650 in attorney’s fees.⁵

In May, Husband filed a motion asking the court to “re-evaluate” its opinion and to consider pertinent additional information. In filing its memorandum opinion, the court dismissed Husband’s prior motions, then later “suspended” its opinion upon discovering that the motions had been set for hearing. Wife filed various motions in opposition. Argument was heard on May 6, with the trial court giving counsel ten days to file additional documents for the court’s consideration regarding the issues of alimony and property division. After further hearing, a final order was

⁴The trial took place on November 6, 1995.

⁵The trial judge originally awarded Wife \$16,000 in attorney’s fees, but reduced this amount after further hearing (August 5) upon learning that the difference had been paid previously by Wife with marital funds.

entered denying Husband's motions (with the exception of reducing the attorney's fee award as set forth above) and reinstating its prior opinion as to all other issues.

Husband has presented the following issues on appeal:

A. Whether the trial court inequitably divided the marital property, because of the failure to consider evidence of the extent of the marital estate.

1. Whether the trial court ultimately failed to consider the evidence presented as to all marital debts and marital property.

2. Whether the trial judge erroneously denied Michael Tepedino's motions to produce documents that were requested by the court from Wife at the 11/6/95 trial.

B. Whether the trial court erred by awarding permanent alimony, instead of rehabilitative alimony or, in the alternative, alimony *in solido*.

C. Whether the trial court erred in ordering Michael Tepedino to pay Wife's attorney's fees.

Husband's first issue concerns division of the marital estate. He submits that the trial court failed to consider three significant items when dividing the marital property: (1) the 1995 outstanding income taxes for the medical practice; (2) the "final destination of cash disbursements" made to Wife from the 1995 gross receipts; and (3) the five bank accounts created from joint funds. As to the first item, the parties stipulated that \$39,444 had been paid by the parties to the IRS for their quarterly estimated taxes for 1995. We agree with Wife that the trial court considered the proof that was presented on the issue at trial. Mr. Cashdollar's figure of \$117,000 was only an estimate and we agree that if such liability exists, it is neither unreasonable nor inequitable for the trial court to require Husband to pay the remaining amount considering his receipt of the medical practice in the division of property and his annual income therefrom. In any event, contrary to Husband's assertion that the parties' stipulation regarding the value of the marital estate did not include the "entire" estate, such as 1995 debts, cash disbursements and the non-liquid nature of the property, we find the stipulation to clearly indicate that the parties valued the "total" marital property at \$843,300.28. The record indicates one exception. At trial, Wife's counsel, without objection, explained to the trial judge that the stipulation did not include "cash" or "accounts."

It is evident that the trial court did not consider the five joint bank accounts when ruling. Wife contends that although not specifically mentioned, it was the trial court's intention that these assets be divided equally. We, however, believe it necessary to remand this cause to the trial court for its consideration of these assets which totaled approximately \$33,000 (excluding the business account) at the time of trial.

As to the allegedly "unaccounted for" cash disbursements Wife made to herself, it appears that the proof, along with Wife's late filed exhibits, were sufficient to satisfy the trial court as to the actual use of these funds. The trial court held:

The Court . . . is convinced that the property division and the . . . alimony set by the Court is an equitable division, . . . based on all of the circumstances. Now, I can understand where [Husband's counsel] is asking where she can't account for all of these cash funds or where some of the money out of this account went. But if you recall, [Husband's counsel] very rigidly cross examined her on that point about where these funds went to. And if I recall, she was, out of these funds, she was keeping up the home. Not only just supporting the home of the two adult children apparently on a, if I recall, on a very high level standard. He had no objection at trial of her managing the funds. In fact, I believe he said that she was a good manager.

The trial court generally has broad discretion in dividing the marital estate and its decision thereto is entitled to great weight on appeal. Its decision is presumed correct unless the evidence preponderates otherwise. *E.g., Wade v. Wade*, 897 S.W.2d 702, 715 (Tenn. App. 1994). We do not find the trial court's decision regarding division to constitute an inequitable distribution or an abuse of its discretion.

Husband additionally argues that the trial court should have allowed the production of certain documents requested by the court from Wife at trial. The record indicates that Wife filed two late exhibits, which were expressly considered by the court. The court noted that, other than the original motion for production of documents, Husband's motions were filed outside the 20 day time period allotted for in the December 15 order granting Wife the divorce. The record supports this finding. As to the original motion, the trial court ruled, at the August 5 hearing, that had he considered it prior to his initial ruling, he would have overruled it on the basis that such constituted

post trial discovery or information that could have been easily obtained before trial. The court further commented: “[t]hese accounts, the records, the parties both knew about the accounts.” Decisions of the trial court regarding discovery matters will not be reversed on appeal absent a clear abuse of discretion. *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992). We find no abuse of discretion by the trial court in denying the post trial motions filed by Husband.

Husband’s final arguments pertain to the award of alimony to Wife. It is well established that of the statutory factors enumerated in T.C.A. § 36-5-101(d), which are to be included in the court’s consideration when making an award of alimony, need and the ability to pay are most significant. *Loyd v. Loyd*, 860 S.W.2d 409, 412 (Tenn. App. 1993). Husband argues that the record supports Wife’s entitlement to rehabilitative alimony only, in the amount of \$3,000 per month for four years or, in the alternative, an award of alimony *in solido* commensurate with the actual total marital estate including “the 1995 taxes, unaccounted-for monies and, five bank accounts.” The record indicates that, for the most part, Wife was a housewife and mother during the marriage. She has a bachelor’s degree in English, a minor in education and approximately four years experience. She is 50 years old. She has also worked in the family medical practice as office manager and bookkeeper. For this occupation, the record indicates that she earns in excess of what is typically paid for these type services. When questioned regarding her future employment plans, she stated that she no longer has certification for teaching and, even if recertified, she did not believe she could be proficient, at her age, at teaching high school students. She has considered teaching at the junior college level, which requires a masters degree and which she could complete in one and one-half years if attending full time. Wife considered teaching at her age “almost self-defeating” since one of the benefits is retirement. The parties stipulated that the average annual salary for a high school teacher with a bachelor’s degree, just beginning to teach, was \$22,840 or approximately \$1,900 per month gross income.⁶

As far as other office work, Wife stated that she could not “hire herself out as a bookkeeper and accountant,” as she does not consider herself such, and that the skills she acquired in the family practice would not necessarily transfer to other like positions. She can do some

⁶The parties also stipulated that the average annual salary for a high school teacher with a bachelor’s degree with 25 years experience is \$30,530.

insurance, but believes she would need additional computer training regardless of the occupation chosen. Wife testified that office work would yield probably \$8.50 an hour (approximately \$18,000 annually). She listed her monthly expenses above \$4,000. The trial court apparently accepted this figure as accurate and we do not find the evidence to preponderate otherwise. *See* Rule 13(d) T.R.A.P. The record also indicates an ability to pay on Husband's behalf considering the annual income generated from his medical practice. There can be no question that there exists a large disparity in the earning capacities of these parties. Based on the record before us and considering Wife's age and employment experience, we cannot say that the evidence preponderates against the trial court's findings in regard to the award of alimony. Nor do we find an abuse of discretion by the trial court regarding its award of attorney's fees to Wife. We decline, however, to award her attorney fees incurred on this appeal.

It results that the judgment of the trial court is reversed, with respect to the division of the marital estate, only so as to allow the trial court's consideration of the parties' joint bank accounts (excluding the business' office account), and is hereby affirmed in all other respects. Costs are assessed equally against the parties.

FARMER, J.

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

LILLARD, J. (Concurs)