

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 2, 2016 Session

SIAMAK KADIVAR v. NAHID FATHIAMIRKHIZ a/k/a NANCY AMIR

**Appeal from the Chancery Court for Williamson County
No. 36924 Michael Binkley, Chancellor**

No. M2014-02352-COA-R3-CV – Filed May 13, 2016

This is a divorce case. Prior to the parties' marriage, Husband started a used car dealership with his father. Husband continued to operate the business after he and his wife were married. Husband bought his father's interest in the company after the marriage and became the sole owner. After the parties separated, the business's value continued to increase. Husband filed for divorce, citing irreconcilable differences. The trial court granted the divorce, and the parties agreed that the business was marital property at the time of the marriage. The trial court found that Wife did not substantially contribute to the business after the parties separated and that any increase in its value was Husband's separate property. We reverse the trial court's finding that the business was separate property after the parties separated, modify the judgment to reflect this reversal, and affirm in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Reversed in Part, Affirmed in Part as Modified, and Remanded

KENNY ARMSTRONG, delivered the opinion of the Court, in which RICHARD H. DINKINS and BRANDON O. GIBSON, JJ., joined.

Stephen C. Knight and Nader Baydoun, Brentwood, Tennessee, for the appellant, Nahid Fathiamirkhiz.

Rebecca K. McKelvey, Nashville, Tennessee, for the appellee, Siamak Kadivar.

OPINION

I. Background

Siamak Kadivar (“Husband” or “Appellee”) and Nahid Fathiamirkhiz (“Wife” or “Appellant”) were married in Cyprus on January 16, 1997. Both parties grew up in Iran. Husband came to the United States before he turned sixteen, and he initially worked as a mechanic. Wife did not come to the United States until after the marriage. Wife began using the name Nancy Amir after she arrived in the United States.

Sometime in 1993, before the marriage, Husband and his father started a used car dealership called Flying Wheels Auto (“Flying Auto”). Flying Auto began as a general partnership and was incorporated in 1998. At Flying Auto’s formation, Husband’s interest in the partnership was valued at approximately \$101,292. In 2003, Husband bought his father’s interest in Flying Auto and became the sole shareholder.

During the marriage, Wife initially worked as a cashier at a supermarket. She quit working when she became pregnant with the parties’ first child in 1999 and did not return to work thereafter. The parties moved into the marital residence in 2005. In 2007, the parties’ second child was born.

On October 28, 2009, Husband filed a complaint for divorce in the Chancery Court of Williamson County. Thereafter, the parties apparently reconciled and did not proceed with the divorce at that time. However, in February of 2011, following a confrontation between the parties, Husband moved out of the marital residence. On April 13, 2011, Husband filed an amended complaint for divorce alleging irreconcilable differences and inappropriate marital conduct by Wife. On April 27, 2011, Wife filed an answer and counter-complaint for divorce. That same day, Wife filed a motion to dismiss Husband’s complaint for divorce. By order of June 3, 2011, the trial court denied Wife’s motion to dismiss.

During discovery, the parties agreed to have Flying Auto valued by a court-appointed expert. On July 3, 2013, Husband filed a second amended complaint. Wife answered Husband’s second amended complaint on July 15, 2013. The divorce hearing took place on September 18-20, 2013. The trial court announced its ruling from the bench on October 29, 2013. The specific bench rulings relevant to the issues on appeal are as follows: (1) the marital estate would be divided as close to equal as possible; (2) Flying Auto’s value was roughly \$2,600,000; (3) the appreciation in Flying Auto’s value beginning on the date of the parties’ separation, which totaled roughly \$651,000, was Husband’s separate property; (4) Wife would receive \$46,777 as alimony *in solido*; and (5) of the alimony *in solido* award, \$30,000 of the award was for attorney’s fees. This ruling, however, was never reduced to a written order.

Following the ruling from the bench, Husband notified the trial court that it had used the wrong figure to calculate Flying Auto's value. Specifically, the trial court used the \$651,000 amount as marital property, rather than the \$1,948,905 amount assigned to the marital portion of the business. On January 22, 2014, the trial court entered an order granting Husband a divorce from Wife on the ground of inappropriate marital conduct but reserving the issues of child support, parenting time, and division of the marital estate.

On October 24, 2014, the trial court entered a final decree of divorce addressing all remaining issues. As is relevant to this appeal, the trial court found that both parties were responsible for paying their attorney's fees, but that Husband would pay the first \$30,000 of Wife's attorney's fees as part of her award of alimony *in solido*. The trial court awarded Husband "the business and business interest, including property, of Flying Wheels Auto...." Relying on *Keyt v. Keyt*, 244 S.W.3d 321 (Tenn. 2007) and *Herbison v. Herbison*, No. M2008-006580-COA-R3-CV, 2009 WL 1634914 (Tenn. Ct. App. June 10, 2009), the trial court concluded that the appreciation in Flying Auto's value after Husband moved out of the marital residence was Husband's separate property. The trial court found that this separate portion totaled \$675,095 and that the value of the business belonging to the marital estate totaled \$2,298,905. The trial court found it would be equitable to award Husband 60% of the marital estate and to award wife 40% of the marital estate. Accordingly, after taking into account the parties' other debts, expenses, and assets, the trial court ordered, *inter alia*, that: (1) Husband would receive the business in its entirety; (2) Wife would receive the marital residence; (3) and that Wife would receive an award of \$470,951.12 as alimony *in solido*. The trial court ordered that the first payment of this award, in the amount of \$30,000, would be for Wife's attorney's fees and expenses, and it ordered Husband to make the payment within 30 days of entry of the order. Wife appeals.

II. Issues

1. Whether the trial court erred in finding that the appreciation in Flying Wheels's value became separate property once Husband moved out of the marital residence.
2. Whether the trial court erred when it changed the division of the marital estate from 50%/50% to 60%/40% in favor of the husband based upon a new valuation of the marital estate.
3. Whether the trial court failed to effectively award Wife her attorney's fees.
4. Whether Wife is entitled to attorney's fees on appeal.

III. Standard of Review

This case was tried without a jury. Accordingly, we review the findings of fact made by the trial court *de novo*, with a presumption of correctness unless the preponderance of the evidence is to the contrary. Tenn. R. App. P. 13(d). The trial court's conclusions of law, however, are reviewed *de novo* and "are accorded no presumption of correctness." *Brunswick Acceptance Co., LLC v. MEJ, LLC*, 292 S.W.3d 638, 642 (Tenn. 2008).

IV. Analysis

A. Business Appreciation as Separate Property

Appellant argues that the trial court erred in evaluating what constituted separate and marital property with respect to the parties' interests in Flying Auto. Specifically, Appellant argues that the trial court erred when it found that the appreciation in Flying Auto's value from the date that Husband moved out of the marital residence until the date of the divorce was Husband's separate property. Appellee argues that Wife did not substantially contribute to the appreciation of Flying Auto after Husband moved out of the marital residence so as to transmute it into marital property. We note, at the outset, that Appellant has raised a narrow issue, and we need only determine whether the trial court erred in concluding that the appreciation in Flying Auto's value became Husband's separate property on the date that he moved out of the marital residence.

"Division of the [marital] estate begins with the identification of all property interests." *Keyt v. Keyt*, 244 S.W.3d 321, 328 (Tenn. 2007). "The classification of property as either marital or separate is next." *Id.* Marital property includes "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce." Tenn. Code Ann. § 36-4-121(b)(1)(A). "Because the courts do not have the authority to make an equitable distribution of separate property, whether separate property should be considered marital is a threshold matter." *Id.* (citing *Cutsinger v. Cutsinger*, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995)).

The trial court heard expert testimony concerning Flying Auto's value. In the final decree of divorce, the trial court found that, at the time Husband moved out of the marital home in February of 2011, Flying Auto's value was \$2,298,905. The trial court found that Wife did not make a "substantial contribution to the business... after the parties' separation in February 2011." The trial court held that "the amount of appreciation of [Flying Auto] from the bookkeeping date closest to the date of the parties' separation until the date of this trial shall be, and is hereby, segregated from the marital estate and subtracted from the gross marital value of the business for purposes of the overall property division." In reaching this conclusion, the trial court primarily relied on the cases of *Keyt v. Keyt* and *Herbison v.*

Herbison.

In ***Keyt***, the husband had been given restricted stock in his parents' company prior to his marriage. ***Keyt v. Keyt***, 244 S.W.3d 321, 324 (Tenn. 2007). The trial court in ***Keyt*** found that the increase in value of those stocks was marital property. ***Id.*** at 332. The trial court in ***Keyt*** also found that the husband had not substantially contributed to the increase in value of the stocks. ***Id.*** at 336. On appeal to the Tennessee Supreme Court, the husband challenged the finding that the stocks were marital property, arguing that he did not make a substantial contribution to the increase in value of those stocks. ***Id.*** at 326-27. Specifically, the husband argued that his work in the corporation was that of a low or mid-level employee, and thus he did not substantially contribute. ***Id.*** Our supreme court noted that both "a husband and wife [must contribute] to the preservation and appreciation of separate property before an increase in value may be considered as a part of the marital estate...." ***Id.*** at 329. Because the trial court in ***Keyt*** found that the husband had not "substantially contributed" to the increase in value of his stocks, the ***Keyt*** Court concluded that the stocks were not marital property. ***Id.*** at 332.

In ***Herbison***, Mr. Herbison started a medical equipment company prior to his marriage. ***Herbison v. Herbison***, No. M2008-006580-COA-R3-CV, 2009 WL 1634914, at *1 (Tenn. Ct. App. June 10, 2009). Ms. Herbison did work at the company; however, her duties were that of a low or mid-level employee, and the trial court found that she did not substantially contribute to the increase in the company's value. ***Id.*** at *3. Because the trial court found that Ms. Herbison did not substantially contribute to the company, the ***Herbison*** Court affirmed the trial court's finding that the company was separate property. ***Id.*** at *6.

We conclude the trial court's reliance on both ***Keyt*** and ***Herbison*** is misplaced. Those cases addressed whether business interests that were held separately by one spouse may become marital property. Here, the trial court found that Flying Auto, a marital asset, became separate property when Husband moved out of the marital residence.¹ The facts presented in this case are the inverse of the facts presented in ***Keyt*** and ***Herbison***, and, accordingly, those cases are not determinative of the outcome in this case.

We must undertake to determine whether marital property may become separate property when a spouse moves out of the marital residence. This Court addressed a similar issue in ***Goodwin v. Goodwin***, No. E2009-01085-COA-R3-CV, 2010 WL 669244 (Tenn. Ct. App. Feb. 25, 2010). In ***Goodwin***, the husband and wife were the sole shareholders of a steel

¹ The trial court found that Flying Auto was marital property, and neither party challenges this finding on appeal. The only issue before this Court is whether the trial court was correct to classify the appreciation in Flying Auto's value as separate property from the day that Husband moved out of the marital residence.

fabrication company. *Goodwin*, at *1-2. Soon after the husband in *Goodwin* filed his complaint for divorce, he terminated the wife's employment with the company. *Id.* at *1. The trial court found that the company was a marital asset, and both parties presented expert testimony concerning the company's value. *Id.* The parties' respective experts presented two different valuations of the business. *Id.* at *6-7. The husband's expert valued the company at the time that wife's employment was terminated on March 31, 2007. *Id.* at *7. The wife's expert valued the company as of December 31, 2008. *Id.* at *7. The divorce hearing took place in March and April of 2009. *Id.* at *1. The husband in *Goodwin* argued "that it is purely a matter of equity to award him alone any increase in value that occurred after he fired Wife because she did not contribute to any such increase." *Id.* at *8. The *Goodwin* Court rejected this argument and concluded that the wife's expert's testimony "was more in line with the statutory requirements, i.e., that [the company] be 'valued as of a date as near as reasonably possible to the final divorce hearing date.'" *Id.* at 9 (quoting Tenn. Code Ann. § 36-4-121(b)(1)(A)).

We find the *Goodwin* case instructive. The *Goodwin* Court rejected applying the "substantial contribution" analysis used in *Keyt* and, instead, concluded that the marital value of the estate would be determined from the date of the divorce hearing even though wife did not substantially contribute to the company after her employment was terminated. In this regard, the facts in the instant case are similar to *Goodwin*. Therefore, applying the reasoning of the *Goodwin* Court, we conclude that the trial court erred in determining that the appreciation in Flying Auto's value became separate property after Husband moved out of the marital residence. Rather, the appreciation in Flying Auto's value during the parties' separation was part of the marital estate. Accordingly, we modify the judgment of the trial court to award Wife an additional \$270,038, which represents 40% of the \$675,095 that should have been included in the marital estate.

B. Equitable Division of Property

Appellant contends that the trial court erred because it divided the marital estate based on the total value of the estate instead of the equities between the parties. Specifically, Appellant argues that the trial court originally planned to divide the marital estate equally between the parties; however, after Husband notified the trial court that it had used the wrong figure to value Flying Auto, the trial court awarded Husband 60% of the marital estate. Appellant argues that the trial court may not consider the size of the marital estate in determining an equitable division. Appellee contends that the trial court made an equitable division of the marital estate.

"Once the parties' marital property has been classified and valued, the trial court's goal is to divide the marital property in an essentially equitable manner." *Owens v. Owens*, 241 S.W.3d 478, 489-90 (Tenn. Ct. App. 2007) (citing Tenn. Code Ann. § 36-4-121(a)(1);

Miller v. Miller 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001)). “A division of marital property is not rendered inequitable simply because it is not precisely equal, or because each party did not receive a share of every piece of marital property.” *Id.* at 490 (internal citations omitted). “The approach to dividing a marital estate should not be mechanical, but rather should entail carefully weighing the relevant factors in Tenn. Code Ann. § 36-4-121(c) in light of the evidence that the parties have presented.” *Id.* “Trial courts have broad discretion in fashioning an equitable division of marital property, and appellate courts must accord great weight to a trial court’s division of the marital property.” *Id.* (internal citations omitted). “Accordingly, it is not our role to tweak the manner in which a trial court has divided the marital property.” *Id.* “Rather, our role is to determine whether the trial court applied the correct legal standards, whether the manner in which the trial court weighed the factors in Tenn. Code Ann. § 36-4-121(c) is consistent with logic and reason, and whether the trial court’s division of the marital property is equitable.” *Id.* (internal citations omitted).

Turning to the record, there is no order stating the trial court’s intent to divide the marital estate equally between the parties. On October 29, 2013, the trial court, in an oral ruling, stated several times that it intended to “make a distribution as close to 50/50 as possible.” It did not, however, explicitly state that it would be dividing the estate equally between the parties. More importantly, the bench ruling was never reduced to a written order. “No principle is better known than that which states that a Court speaks through its orders and decrees entered upon the minutes of the Court.” *Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977). “It is well settled...that a court speaks through its orders and not through the transcript.” *Alexander v. JB Partners*, 380 S.W.3d 772, 777 (Tenn. Ct. App. 2011). In the trial court’s only order regarding the division of the estate, the trial court stated:

In light of the case law applicable to the facts and circumstances of this case and as cited herein, and in light of the factors of property division found in Tennessee Code Annotated § 36-4-121, the Court finds that it would be inequitable to divide the net marital estate equally between the parties, and instead that it shall be, and is hereby, equitable and appropriate to divide the net marital estate in such a way so that Mr. Kadivar receives 60% of the net marital estate and Ms. Amir receives 40% of the net marital estate.

The trial court’s order, not its oral statements, is dispositive. In its order, the trial court clearly considered the statutory factors in dividing the marital estate and divided the estate in a manner it considered equitable. After reviewing the record, we cannot conclude that the trial court abused its discretion in dividing the marital estate as it did. Accordingly, we affirm the trial court’s division of the marital estate.

C. Attorney’s Fees at Trial

Appellant argues that the trial court erred when it ordered that Husband's first alimony payment of \$30,000 would be for Wife's attorney's fees. Specifically, Appellant argues that the trial court intended to award her an additional \$30,000 for attorney's fees and that the structure of the judgment negates that award. Appellant urges us, under a *de novo* standard of review, to reverse this portion of the trial court's order and remand the case with instructions for the trial court to award her an additional \$30,000. Appellee argues that attorney's fees may be included in an award of alimony *in solido* and that the trial court structured the judgment as it intended.

In the final decree of divorce, the trial court found that "[e]ach party shall be, and is hereby, responsible for paying his or her own attorney fees except that the first \$30,000.00 of the Judgment Mr. Kadivar is obligated to Ms. Amir...[is] to partially reimburse Ms. Amir for her attorney fees and expenses...." The trial court found that "this designated amount is appropriate based on [Wife's] need and [Husband's] ability to pay, as well as the factors set forth in Tennessee Code Annotated § 36-5-121." After awarding Wife an "equalization payment" in the form of a judgment for \$470,951.12 as alimony *in solido*, the trial court stated that the "first \$30,000 of this Judgment shall be paid...up front and within thirty (30) days after entry of the final Decree of Divorce." The trial court further stated that the \$30,000 payment "shall be, and is hereby, considered alimony *in solido* for the benefit of [Wife] and is for the purpose of reimbursing Ms. Amir for her attorney fees and expenses...."

"It is well-settled that an award of attorney's fees in a divorce case constitutes alimony *in solido*." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 113 (Tenn. 2011) (citing Tenn. Code Ann. § 36-5-121(h)(1)). "The decision to award attorney's fees is within the sound discretion of the trial court." *Id.* "A spouse with adequate property and income is not entitled to an award of alimony to pay attorney's fees and expenses." *Id.* (citing *Umstot v. Umstot*, 968 S.W.2d 819, 824 (Tenn. Ct. App. 1997)). "Such awards are appropriate only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, or the spouse would be required to deplete his or her resources in order to pay them." *Id.*

We find nothing in the record to suggest that the trial court intended to structure the alimony award any differently than what is presented in the final decree of divorce. Furthermore, we note that Wife received a total alimony award of \$470,951.12, and we conclude that, from this award, Wife had sufficient funds to pay her own legal expenses. We, therefore, affirm the trial court's structuring of the alimony award to include Wife's legal fees as the first payment.

D. Attorney's Fees on Appeal

Both parties argue that they are entitled to attorney's fees on appeal. Appellant argues

that she is entitled to attorney's fees based on need and ability to pay. Appellee argues that Appellant has money saved from when she was receiving *pendente lite* support and that she has the ability to pay her own fees. Appellee also argues that he is entitled to attorney's fees on appeal. "Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court." *Luplow v. Luplow* 450 S.W.3d 105, 120 (Tenn. Ct. App. 2014) (quoting *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *5 (Tenn. Ct. App. Dec. 16, 2007)). "In determining whether an award is appropriate, we take into consideration the 'ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered.'" *Id.* (citing *Hill*, at *6). Taking these factors into account, we decline to award either party attorney's fees on appeal.

V. Conclusion

For the foregoing reasons, the judgment of the trial court is modified to reflect that Flying Auto was marital property until the day of the divorce hearing. Of the \$675,095 the trial court designated as separate property, \$270,038 shall be awarded to Wife, reflecting the 40% of the value of Flying Auto that was not included in the marital estate. Husband is entitled to \$405,057 of that portion, reflecting 60% of Flying Auto that was not included in the marital estate. The judgment of the trial court is affirmed in all other respects, and the case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of this appeal are assessed one-half to the Appellant, Nahid Fathiamirkhiz and her surety, and one-half to the Appellee, Siamak Kadivar, for all of which execution may issue if necessary.

KENNY ARMSTRONG, JUDGE