IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 22, 2013 Session

KENDRA KUEBLER VACHON v. CLAUDE VACHON

Appeal from the Chancery Court for Williamson County
No. 39486 Robbie T. Beal, Chancellor

No. M2013-00952-COA-R3-CV - Filed February 27, 2014

This is a divorce appeal. Husband appeals the classification, valuation, and division of certain items in the marital estate, the award of alimony in futuro, and the requirement that he pay a portion an expert witness fee. We vacate the classification and valuation of the furniture which is at issue, vacate the valuation of the stock and the 401(k), and remand those matters for further consideration. We affirm the court's decision to award alimony, but vacate the award of alimony in futuro and remand for further consideration of the type, amount and duration of the award. We affirm the court's ruling in all other respects.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, M. S., P. J., and ANDY D. BENNETT, J., joined.

Robert E. Lee Davies, Franklin, Tennessee, for the appellant, Claude Vachon.

Rose Palermo, Nashville, Tennessee, for the appellee, Kendra Kuebler Vachon.

OPINION

I. FACTS AND PROCEDURAL BACKGROUND

Kendra Vachon ("Wife") and Claude Vachon ("Husband") were married in 1995; three children were born of the marriage. On March 1, 2011, Wife filed a complaint seeking a divorce. The parties entered into an Agreed Order of Reconciliation, and six months later the court entered an agreed order revoking the order. Wife thereafter amended her complaint, which Husband duly answered and filed a counterclaim.

By agreed order Husband, an anesthesiologist, placed the proceeds of the sale of his interest in the medical group in which he practiced into the Court[1]; the court also entered orders requiring Husband to pay Wife $10,000 per month in temporary support, setting a temporary residential schedule for the children, and, on Husband's motion, appointing Dr. Joseph LaBarbera, a psychologist, to perform a "custodial/psychological evaluation" of the parties and the children.

In due course, the parties entered a stipulation that Wife was entitled to a divorce, that Husband's counterclaim would be dismissed, and that they would enter into a Permanent Parenting Plan "along the parameters set out in the Parenting Plan which was made an exhibit to the deposition of [Wife]." A hearing on the remaining issues was held, and the trial court entered a final decree of divorce granting Wife an absolute divorce; entering a permanent parenting plan; classifying, valuing, and dividing the marital property; awarding Wife alimony in futuro in the amount of $7,500 per month for 120 months; ordering Husband to pay 92% and Wife to pay 8% of Dr. LaBarbera's fees; ordering the parties to pay their own attorneys' fees; and dividing costs equally.

Husband appeals, articulating the following issues:

1. Whether the Trial Court erred in classifying and dividing the marital estate.
    a) Whether Trial Court erred in classifying a marital account (ING-College Fund) as Wife's separate property based solely on Wife's testimony that Husband agreed for this account to be Wife's separate property.
    b) Whether the Court erred by failing properly to consider the tax consequences of awarding Husband his entire 401K retirement account when the Court intended to make an equal division of the marital property.
    c) Whether the Trial Court erred in failing to take into account the proper amount of taxes to be deducted from the stock in PhyMed which Husband received.
    d) Whether the Trial Court erred in arriving at values for the furniture which were outside of either party's values.

[1] Husband was a partner in his medical practice. While the divorce was pending, the practice was purchased by PhyMed, a private equity firm; Husband testified that he received $1.6 million for his interest in the medical group and that $382,000 of the purchase price was in PhyMed stock. After the sale, Husband worked for PhyMed as a salaried anesthesiologist.

2. Whether the Trial Court erred in awarding Wife alimony *in futuro* for ten years in the amount of $7,500 a month.
3. Whether the Trial Court erred by requiring Husband to pay Wife's expert witness when Husband was the prevailing party on the issue of the parenting plan.

Wife requests her attorney fees on appeal.

II. CLASSIFICATION, VALUATION, AND DIVISION OF PROPERTY

"Tennessee is a 'dual property' state because its domestic relations law recognizes both 'marital property' and 'separate property.'" *Larsen-Ball v. Ball*, 301 S.W.3d 228, 231 (Tenn. 2010) (citing *Snodgrass v. Snodgrass*, 295 S.W.3d 240, 246 (Tenn. 2009); Tenn. Code Ann. § 36-4-121). The division of the parties' marital estate begins with the classification of the property as separate or marital; separate property is not part of the marital estate and, therefore, is not subject to division. *Id.* Either spouse can give an interest in marital property to the other spouse, making it separate property. *Lewis v. Frances*, No. M1998-00946-COA-R3-CV, 2001 WL 219662 (Tenn. Ct. App. Mar. 7, 2001) (citing *Mose v. Mose*, No. 01A01-9508-CH-00337, 1996 WL 76321, at *7 (Tenn. Ct. App. Feb. 23, 1996)). "The classification of property as separate or marital presents a question of fact which must be determined in light of all the relevant circumstances." *Welch v. Welch*, No. M2013-01025-COA-R3-CV, 2014 WL 107982 (Tenn. Ct. App. Jan. 10, 2014).

Once property has been classified as marital property, the court is to place a reasonable value on property that is subject to division. *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003). The parties have the burden to provide competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998). When evidence is conflicting, the court may place a value on the property that is within the range of the values presented. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997). Decisions regarding the value of marital property are questions of fact. *Kinard*, 986 S.W.2d at 231.

Once the marital property has been valued, the court is to divide the marital property in an equitable manner. 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 in an equitable manner does not require that the property be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c). *Kinard*, 986 S.W.2d at 230.

We review a trial court's factual findings *de novo* on the record, affording the trial court's findings a presumption of correctness, and we will not reverse the trial court's findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d); *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000). Questions of law are reviewed *de novo* without the presumption of correctness. *See Langschmidt v. Langschmidt*, 81 S.W.3d 741, 745 (Tenn. 2002).

A. Classification of the ING Account

Husband contends that the trial court erred in finding that the parties agreed to use marital funds to replenish withdrawals from a bank account which had been established as Wife's separate property (the "ING account") and in classifying the account as Wife's separate property.

Wife testified that she established the ING account, which was in her name, with a $107,000 inheritance she received following her father's death in 2006. During the marriage, Wife periodically made withdrawals which caused the account to reach a low of $8,200 in 2010; at the time of trial, the account contained approximately $95,000. Wife testified that she and Husband agreed to replenish the account with marital funds up to the original amount of her inheritance and that the account would remain her separate property.[2] Wife also entered into evidence Husband's interrogatory answers which listed "Father's inheritance with ING" in response to a question which asked which property he considered to be Wife's separate property. In his testimony, Husband denied agreeing to replenish Wife's inheritance with marital funds and stated that at the time he responded to the interrogatories he was unaware that Wife had spent the funds in the account and replaced them with marital funds.

In discussing the ING account, the court stated:

> [T]his is the account that the wife believes was her replenished inheritance. Just very quickly, it's really agreed to by the parties that upon the initial disbursement of those inherited funds that whatever funds there were, they were commingled.

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[2] Providing context to their agreement, Wife testified:

> [W]hen my sister moved here, she was talking about putting her -- she was very concerned about commingling her inheritance with her husband's in a joint checking account, because she was worried about something just like this.
>
> And my husband specifically said, That's ridiculous. Who would take your inheritance? Your husband would never do that to you. I think that's ridiculous.

> [Husband's counsel] did a good job, as far as showing to the Court that the wife may not have the specific recollection of where those funds went or when those funds were even specifically disbursed. However, the Court has listened to the testimony. I believe . . . that the wife is credible with regard to her statements that there was an agreement, that that was the wife's separate property, and it should ultimately be replenished.
>
> And when there was an agreement to replenish otherwise commingled funds, the Court stands by that agreement, again, if I find that testimony credible. I find that testimony credible. The Court believes that the ING . . . account with $95,000 is replenished inherited funds, which are the separate property of the wife.

As defined by statute, separate property includes "[p]roperty acquired by a spouse at any time by gift, bequest, devise or descent." Tenn. Code Ann. § 36-4-121(b)(2). This Court has held that where a spouse agrees to give his or her interest in marital property to the other spouse, such property becomes separate property. *Mose v. Mose*, No. 01A01-9508-CH-00337, 1996 WL 76321, at *7 (Tenn. Ct. App. Feb. 23, 1996); *see also Lewis*, 2001 WL 219662, at * 5. In *Mose*, the wife deposited her salary into a separate savings account during the marriage by agreement with the husband. *Mose*, 1996 WL 76321, at *7. Although the husband attempted to claim the savings account as marital property during the divorce proceedings, we affirmed the trial court's finding that the account constituted separate property, stating:

> The $10,000 savings account should ordinarily be determined to be marital property since the Wife acquired this money during the marriage by saving her payroll checks while employed outside the home. However, the Husband consented to her treating this account as her own property. This, in effect, was a gift from Husband to Wife. Thus, it was never the intention of either party that this account be jointly held.

Id.

The court heard conflicting testimony as to whether the parties, in fact, agreed that the account could be replenished and specifically found Mother's testimony to be credible in that respect. "Because trial courts are in a far better position than this Court to observe the demeanor of the witnesses, the weight, faith, and credit to be given witnesses' testimony lies in the first instance with the trial court." *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007). "Consequently, where issues of credibility and weight of testimony are involved, this Court will accord considerable deference to the trial court's factual findings." *Id.* Giving deference to the trial court's credibility determination, we affirm the trial court's finding that

Husband agreed that Wife could replenish the account with marital funds and retain the account as her separate property. As in *Mose*, the agreement was effectively a gift of marital property and supports the classification of the account as Wife's separate property.

B. Furniture and Furnishings

During the pendency of the divorce, Husband and Wife maintained separate residences; prior to the final hearing, they had the furniture and furnishings in their respective residences appraised. There was no dispute at trial as to the appraisal values of the individual items of furniture, but rather there was a dispute as to whether certain items should be classified as marital property.[3] The court awarded each party the furniture in their possession, stating:

> As to the furniture that the parties maintain . . . the Court appreciates the fact that the parties went to the trouble of getting an appraisal. The Court's going to - - obviously, property is a hard thing to sell or get rid of if, in fact, it is necessary to be counted as an asset. The Court's going to find the Concord property is valued at $25,000 and assigns that to the wife. The Araby Drive, $10,000, assigns that to the husband.[[4]]

The court did not explain further the basis of its valuation of the furniture and furnishings or which items were included in the total.[5]

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[3] Wife testified that a hanging fixture, a painting by her son, a painting of a cow, an old world globe, a white metal platter, a wine cabinet, a stereo, a computer, a jewelry stand, the kitchen appliances, and the patio furniture should be removed from the inventory of marital property because they were gifts from Husband or others, had been previously removed from the house by Husband and were no longer in her possession, or were fixtures that were included in the price of the home.

[4] It is clear from the context that the court was discussing the values of the furniture and furnishings at each address, and not the values of the real property. The "Concord property" was the marital residence where Wife resided and the "Araby Drive" property was the property where Husband resided.

[5] In ruling from the bench, the court made the following statements:

> I rounded some of these figures around just a little bit. If at some point somebody wishes to review this order and plug in more exact figures, they're welcome to. . . . Some of the figures the Court has may be a little off from the specific figures presented to it, just for the parties' purposes.
> * * *
> That makes an equal division of approximately $900,000 to each, according to my math. Obviously, I expect y'all each to go back and do your math as necessary. And if I'm off, y'all can let me know.

Husband contends that the trial court erred in its valuation of the furniture as a whole because the values established by the court were outside the evidence presented.[6] The actual dispute at trial, however, was whether certain items should be included as marital or separate property; although the determination complained of by Husband impacted the total value of furniture awarded, we do not consider this to be an issue of valuation, but rather one of classification. Inasmuch as the trial court did not list which items were included in its division of marital furniture or resolve the dispute over classification of the individual items of furniture, we cannot resolve this issue; rather, it is necessary to remand the case for further consideration as hereinafter set forth.

C. Consideration of Tax Consequences

Husband next contends that the trial court failed to properly consider the tax consequences of awarding the PhyMed stock and the Fidelity 401(k) to him. In his testimony, Husband gave a value for both the stock and the 401(k); in valuing and dividing the assets, the court reduced the value of both assets the for the "purposes of taxes." Husband argues that the reduction was insufficient and resulted in an inequitable division of marital property. Wife contends that the court erred in taking any tax consequences into account because Husband did not present evidence that he intended to dispose of either asset.

"This Court has previously held that transfer costs and fees are not proper deductions when the record contains no evidence that a party intends to sell an asset; unless the trial court contemplates the sale of property as part of the division of the marital estate, the value of the property should be based on its present value without deducting costs that might be incurred if the property were sold." *Watson v. Watson*, W2004-01014-COA-R3-CV, 2005 WL 1882413 (Tenn. Ct. App. Aug. 9, 2005) (citing *Waits v. Waits*, No. 01-A-01-9207-CV-00288, 1993 WL 49564, at *9–10, 1993 WL 49564 (Tenn. Ct. App. Feb.26, 1993). Where there is no proof that a party intends to dispose of an asset in the near future, exactly when the assets will be subject to income taxation and the amount of taxes that will be due are matters of speculation. *Jekot v. Jekot*, 232 S.W.3d 744, 749 (Tenn. Ct. App. 2007) (citing *Hasty v. Hasty*, No. 01-A-01-9504-CH00176, 1995 WL 567313, at *3 (Tenn. Ct. App. Sept. 27, 1995).

The parties did not challenge the award of furniture during the court's ruling from the bench or in a post-trial motion.

[6] Wife valued marital furniture in her possession at $31,520 and valued the marital furniture in Husband's possession at $12,030. In contrast, Husband valued the marital furniture in Wife's possession at $35,980 and valued the marital furniture in his possession at $11,180.

1. PhyMed Stock

On his assets and liabilities statement, Husband listed the value of the PhyMed stock as $382,914, the tax liability on the stock as $90,916, and the final value of the stock after subtracting the tax liability as $291,998. In awarding the stock to Husband, the court reduced the value to $300,000 and stated that the reduced value was "what it believes to be a reasonable figure, for the purposes of taxes."

With respect to the tax consequences of receiving the stock, Husband testified:

Q: Have you paid any taxes on the stock that you're going to receive?
A: There was no taxes paid on that, no, sir.
Q: And have you computed the taxes on that stock that you'll have to pay?
A: I've computed what it will be in this year's tax code.
Q: Okay. So that reduced the net value of that stock, and you've shown that, on your asset list . . . going out?
A: Yes, sir.
Q: So - - and that's stock, of course, which you can't give to Ms. Vachon?
A: No. Part of the transaction was that you have to be employed by PhyMed in order to own stock.
Q: Okay. So that's something you have to keep?
A: Yes, sir.

As quoted, Husband testified that he had to keep the stock; there was no proof that he intended to sell it. Further, there is no evidence that he would incur any tax consequences due to the stock's transfer to him as part of the sale price of his interest in his medical group. Without evidence that Husband would incur tax liability in the near future, the stock should have been valued in accordance with the testimony.[7] Accordingly, we vacate this portion of the final decree.

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[7] Wife testified that the value the stock was $382,914. During her cross-examination, Husband's counsel asked Wife whether she was aware that Husband would incur taxes on the stock at the time of the stock's transfer to Husband. Wife replied that she was not aware that Husband was liable for any taxes on the stock before it was sold. Although this question implies that Husband would have some present tax liability on the transfer of the stock, there is no evidence to support Husband's counsel's assertion. "An attorney's statements during a trial are not evidence to be considered by the court." *Shedd v. Cmty. Health Sys., Inc.*, W2010-02140-COA-R3-CV, 2010 WL 4629020, at * (Tenn. Ct. App. Nov. 12, 2010) (quoting *Houston v. Houston*, No. W2002-02022-COA-R3-CV, 2003 WL 22326970, at *10 (Tenn. Ct. App. May 29, 2003)).

2. Fidelity 401(k)

The court awarded Husband the Fidelity 401(k), stating:

> There's a Fidelity 401(k) in the husband's name. The Court has a current value of what the Court believes to be $440,000. The Court's going to award that to the husband in total. However, I am going to deduct for some tax implications on that and award an amount of $330,000. So he'll receive the entire 401(k) in his name, but for purposes of the division of property, I valued it at 330,000.

There was no proof that Husband intended to dispose of the 401(k) account. While Husband proposed that the court should divide the 401(k) equally, the court awarded the entire account to him; thus, he does not have to liquidate the account as a result of the court's division of marital property. For the same reason we held that the trial court erred in its valuation of the stock, we hold that the trial court erred in reducing the value of the 401(k) awarded to Husband to account for future tax consequences; we vacate that portion of the final decree.

For the foregoing reasons, we respectfully vacate the classification and valuation of the parties' furniture, and the valuation of the PhyMed stock, and the Fidelity 401(k); we remand the case for further consideration. With respect to the furniture, the court is to classify the items in dispute and assign the appropriate values to the items awarded to each party; further, the court is to assign values to the stock and the 401(k) without a reduction for taxes. On the basis of the adjusted classification and valuation, the court is to reconsider the division of marital property.

III. ALIMONY

Trial courts have broad discretion to determine whether spousal support is needed. *Dodd v. Dodd*, M2012-00153-COA-R3-CV, 2013 WL 126194 (Tenn. Ct. App. Jan. 9, 2013). Alimony decisions require a careful balancing of the factors in Tenn. Code Ann. § 36-5-121(i); the two most important factors are the need of the disadvantaged spouse and the obligor's ability to pay. *Id.* Once the trial court has determined that alimony is appropriate, it must determine the nature, amount, and duration of the award. The court may award rehabilitative alimony, alimony *in futuro*, transitional alimony, alimony *in solido* or a combination of these. Tenn. Code Ann. § 36-5-121(d)(1). Our legislature has stated a public

policy preference for temporary, rehabilitative spousal support over long-term support.[8] Tenn. Code Ann. § 36-5-121(d)(2).

Appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless the decision is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). In *Gonsewski*, our Supreme Court stated that the role of appellate courts in reviewing an award of alimony is "to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable." *Gonsewski*, 350 S.W.3d at 105 (citing *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006)). When the trial court has set forth its factual findings in the record, we will presume the correctness of those findings so long as the evidence does not preponderate against them. Tenn. R. App. P. 13(d); *Bogan*, 60 S.W.3d at 727; *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000).

The parties, who were 41 and 42 years old at time of trial, were married for seventeen years and had three children, ages twelve, ten, and eight. The parties married after they both had obtained college degrees; Wife worked as a school teacher while Husband obtained his medical degree, and Husband supported Wife when she obtained her master's degree in education. The court found that Wife "was supportive of her husband in his career as a doctor . . . and the parties obviously made a joint decision that [Wife] should focus her attention on parenting their three children and become a full-time homemaker."

With respect to the award of alimony, the court stated:

> The Court's required to consider specific factors with regard to alimony. I'm going to do so very quickly.

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[8] "[A]limony *in futuro* is intended to provide support on a long-term basis . . . where 'the court finds that there is relative economic disadvantage and that rehabilitation is not feasible.'" *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 107–08 (Tenn. 2011) (quoting Tenn. Code Ann. § 36–5–121(f)(1)). Our legislature has defined rehabilitation by statute:

> To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code. Ann. § 36-5-121(d)(2).

The relative earning capacity of each and the financial resources of each party. The earning capacity of the husband is well above the earning capacity of the wife.

The financial resources. Luckily, the parties really don't have much obligations. The one obligation that the wife has is a voluntary obligation, the home. The financial resources of the parties are fairly significant. Although, it does need to be noted that the husband maintains the ability to increase his financial resources significantly while the wife does not have that same capacity.

The parties are both well educated. The husband's education - - with all due respect to the wife, the husband's education is a bit more financially valuable than the wife's education - - let me just say significantly more financially valuable than the wife's education. The Court did find, and I've already stated earlier, that both parties contributed to the education of the other.

Again, it's expected that the husband will be able to make more of a financial benefit from his - - from his doctor's degree, as opposed to the wife.

This is a long-term marriage of 17 years. The parties were relatively young when married. The parties are young now.

The wife is already - - again, kudos to her - - has already gone out and secured employment, which the Court appreciates. There doesn't appear to be any physical reason, as to age and mental condition, that would factor into this Court's decision. The wife still is capable of making a living. I mean, she's not at retirement age, obviously. She's still capable of making a living. The physical condition of each party is in all regards apparently excellent.

There is no reason, due now to the age of the children, especially the wife's occupation, that it would be undesirable for her to have employment outside the home.

I've already spoken a bit about the separate assets of the parties. Obviously, again, the wife has received a significant lump-sum amount with regard to the business interest that was sold. So both have - - well, both have significant separate assets at this time. The husband has more retirement accounts.

I think that goes into the next criteria with regard to the provisions made of the marital property. The parties have a remarkably high standard of living, commensurate with their earning abilities.

That will be difficult for the parties to maintain. It will be difficult for the wife to maintain, especially in later years. There's really no way for the Court to equalize that standard of living. But they did maintain a high standard of living.

> I've already remarked upon the contributions made by each party. There's really no reason for me to make a decision as to who was the primary homemaker or otherwise.
>
> The fact is that the mother devoted considerable time to her homemaker contributions, allowing her husband to have time to develop a very successful practice. And the parties have made contributions to each with regard to the education. The husband, no doubt, has significant earning power, due in no small part to the contributions of the wife.
>
> The Court appreciates this, as well. The husband has gone ahead and admitted the fault in the divorce. Again, the Court appreciates him, to use the term, "manning up" and basically accepting that responsibility.
>
> The Court has considered the fault to some degree. I can't say that it was a huge factor in the decision-making of the Court. But, I mean, he's at fault, and ultimately the responsibility for the divorce rests upon his shoulders in the act of adultery.
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> Again, the Court doesn't kid itself to believe that it was completely the husband's fault without any contribution of the other party. Obviously, the marriage was having difficulties for some time. But that was the proverbial straw that broke the camel's back. The Court has to consider that fault. Again, I can't say I considered it to any significant degree.
>
> Having said all of that, when you look at the income of the parties, the Court does not believe that any type of transitional or rehabilitative alimony would be appropriate in this case.
>
> I do believe there should be an alimony in futuro award. I do not believe that that should be until death or remarriage alone. I think that the alimony in futuro award should have a specific time limit. The Court's going to set that at 120 months, ten years. The Court's going to award alimony for the period of 120 months, ten years. That alimony amount will be $7500 per month. $7,500 per month for a period of ten years.

Husband does not contest the factual findings of the court or argue that Wife was not entitled to any award of alimony; instead he contends that the trial court erred by reaching an "illogical conclusion . . . concerning the amount and nature or length of alimony which resulted in an injustice to Husband." Husband argues that the trial court applied an incorrect legal standard by not finding that "economic rehabilitation was not feasible or that long term support was necessary, as required by *Gonsewski*."[9]

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[9] Although Husband does not contest the court's findings of fact, we have independently reviewed the record and find that the evidence does not preponderate against the court's findings.

In making the award of alimony, the court did not discuss Wife's need or Husband's ability to pay which, as discussed above, are the two most significant factors in making an award of alimony. The record does, however, include evidence of Wife's need and Husband's ability to pay. According to her income and expense statement, Wife's monthly expenses totaled $16,472 per month and her monthly income was $2,665 after taxes. On cross-examination, Wife admitted that several expenses listed were not her personal expenses, but were instead for the children's benefit.[10] Without the expenses for the children's benefit, Wife's monthly expenses totaled $13,293, of which $6,313 were related to maintaining her residence.[11] Husband's income and expense statement listed his monthly expenses as $7,760 and his monthly income totaled $26,101.84 after taxes. The evidence shows that Wife has a need and that Husband has the ability to pay and, accordingly, supports the determination that an award of alimony is appropriate.

We are, however, unable to affirm the nature, amount, or duration of the alimony awarded by the trial court. Although the court's ruling included language regarding the possibility of rehabilitation—in that the court considered Wife's potential post-divorce standard of living—the court did not make a finding that long-term support was necessary as required by *Gonsewski*. *See Gonsewski*, 350 S.W.3d at 109 (stating that "alimony in futuro should be awarded only when the court finds that economic rehabilitation is not feasible and long-term support is necessary"). The court's ruling does not indicate why rehabilitative or transitional alimony may have been inappropriate in this case; further, the court does not provide a basis for the amount of the award or the duration of the award.[12] Without sufficient clarity as to the factual and legal basis, we cannot affirm the nature, amount, or duration of the alimony award to Wife. Consequently, we respectfully vacate the award and remand the case for reconsideration and entry of an order setting forth the factual and legal basis for the type and amount of alimony to be awarded to Mother.

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[10] Wife's income and expense statement lists the following monthly expenses as specifically for the children: Clothing for children—$680; Childcare—$210; School Activities for children—$126; School Supplies—$25; School Fees—$100; School Lunches—$225; Miscellaneous (Includes children's YMCA dues, piano lessons, gymnastics, basketball, baseball fees, drama, and flag football)—$525; Children's Haircuts—$105; Counseling for children—$800; Religious Education—$25; Children's Summer Camps—$358.

[11] The expenses Wife identified incident to her remaining in the marital residence included: Mortgage, Property Taxes, Home Insurance, and Neighborhood Association Fees—$4,406; Utilities—$609; Home Maintenance—$500; and Incidental Expenditures (housekeeper services, lawn care, pest control, alarm service, and sprinklers)—$801.

[12] For instance, the court noted that Wife's decision to remain in the marital residence after the divorce was a "voluntary obligation", a consideration which bears on the amount and duration of her need for alimony.

IV. EXPERT WITNESS FEE

Husband contends that the court erred in ordering him to pay a pro rata share of Dr. LaBarbera's expert witness fee. Husband argues that because the court ultimately adopted the parenting plan as stipulated, this made him the prevailing party and he should not have been ordered to pay any portion of the fee.

Prior to trial, the parties stipulated to the general framework of a parenting plan which established a unique visitation schedule to accommodate Husband's schedule as an anesthesiologist.[13] On the morning of trial, a disagreement arose when Mother indicated she was going to call Dr. LaBarbera as an expert witness to opine as to the best interest of the children. It became apparent that the parties disagreed as to the meaning of certain provisions of the stipulation, specifically as to whether Husband was required to exercise his parenting time during his twelve weeks of vacation each year. Husband objected to Dr. LaBarbera being called as an expert witness on the basis that the parties had an existing agreement as to the parenting plan. Wife offered to admit Dr. LaBarbera's report in lieu of his testimony, but Husband objected to the admission of the report as well.

In ruling on Husband's objection, the court stated that it was the court's obligation to consider the children's best interest notwithstanding the stipulation. Further, the court pointed out that it was Husband who moved to have the court appoint Dr. LaBarbera to evaluate the parties. The court, accordingly, overruled Husband's objection and permitted Dr. LaBarbera to testify. Dr. LaBarbera proceeded to testify regarding his psychological evaluation of Wife, Husband, and the children. Dr. LaBarbera testified that the children would benefit from counseling, that Wife would serve best as primary decision-maker, and that the children did not wish to be cared for by a nanny during Husband's parenting time due to his work schedule. Dr. LaBarbera also prepared a parenting plan that was submitted to the court.

There were four parenting plans considered by the court. The court determined that the Ferrell plan was generally in the children's best interest and used that plan as the framework for the plan ultimately ordered by the court. The court declined to adopt Dr. LaBarbera's plan, but stated that it "took seriously Dr. LaBarbera." Husband and Wife each

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[13] The parties' stipulation stated that they agreed "to enter into a Permanent Parenting Plan along the parameters set out in the Parenting Plan which was made an exhibit to the deposition of [Wife]." An excerpt of Wife's deposition is in the record, but does not include a copy of the document as an exhibit or specifically state what the document was. However, at the hearing the parties testified at length regarding the "Ferrell Plan," which was a parenting plan developed for one of Husband's medical partners who was also an anesthesiologist and which was developed to accommodate his unique work schedule; the Ferrell Plan, which was made an exhibit at trial, appears to be the framework referred to in the stipulation.

presented plans as well and proposed that the parties would exercise joint decision-making; the parties differed as to whether Husband would exercise his parenting time during his weeks of vacation; the court determined that Wife would have the "final say" with regard to major decisions regarding each child and, although the court stated that Wife's concern about when Husband would exercise his parenting time was valid and "backed up by Dr. LaBarbera," the court did not require Husband to spend his weeks of vacation time with his children.

Tenn. R. Civ. P. 54.04(2) empowers the trial courts to award the prevailing party certain litigation expenses including "reasonable and necessary expert witness fees for depositions or trials." When discretionary costs are awarded in divorce cases, they are generally awarded to the spouse who is granted the divorce. *Owens v. Owens*, 241 S.W.3d 478, 496–97 (Tenn. Ct. App. 2007) (citing *Buchanan v. Buchanan*, No. E2002-00915-COA-R3-CV, 2003 WL 465571, at *3 (Tenn. Ct. App. Feb. 25, 2003); *Galligan v. Galligan*, No. M2001-00619-COA-R3-CV, 2002 WL 773059, at *11 (Tenn. Ct. App. Apr. 30, 2002)). Awarding costs in accordance with Tenn. R. Civ. P. 54.04(2), is within the trial court's reasonable discretion. *Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn. 1992). Accordingly, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable and reasonable minds can disagree about its correctness. *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

The court has a duty to independently evaluate whether a proposed parenting plan is in the children's best interest.[14] The court weighed Dr. LaBarbera's testimony in crafting a plan that the court determined to be in the children's best interest and as to which neither party raises an objection. Even though Dr. LaBarbera was called as a witness by Wife, we note that Husband initially requested that Dr. LaBarbera be appointed by the court to evaluate the parties and children. We give great deference to the trial court's discretionary decisions, and we find nothing in the record to hold that the court abused its discretion in ordering Husband to pay a portion of Dr. LaBarbera's fee.

V. ATTORNEY FEES ON APPEAL

Wife requests that she be granted attorney fees on appeal. This appeal has been resolved partially in favor of Husband and partially in favor of Wife. An award of attorney fees on appeal is inappropriate when both parties to the appeal are partially successful. *See Storey v. Storey*, 835 S.W.2d 593, 598 (Tenn. Ct. App. 1992) (citing *Baggett v. Baggett*, 512

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[14] "[I]t is well established that parents cannot bind the court with an agreement affecting the best interest of their children." *Tuetken v. Tuetken*, 320 S.W.3d 262, 272 (Tenn. 2010).

S.W.2d 292, 294 (Tenn. Ct. App. 1973)). Further, Wife has the ability to pay her own fees. In our discretion, Wife's request for attorney fees on appeal is denied.

V. CONCLUSION

For the foregoing reasons, we vacate the court's award of marital furniture and remand for a determination of classification and valuation of the items awarded and vacate the court's valuation of the PhyMed stock and the 401(k) awarded to Husband and remand for a valuation thereof consistent with this opinion. Furthermore, we affirm the court's decision to award alimony, but vacate and remand the type and amount of the award. We affirm the court's ruling in all other respects.

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RICHARD H. DINKINS, JUDGE