135C 1913

FILED

1987 OCT -5 PM 2:05

GEORGE L. GEXER CLERK

BY

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

ELAINE S. HOWELL,
Plaintiff

vs.

BILLY HUGH HOWELL, JR.,
Defendant

No. 86D-2165

74-60

FINAL DECREE

This cause came on the be heard before the Honorable Matthew J. Sweeney, III, Judge of the Third Circuit Court for Davidson County, Tennessee on the 23rd day of April, 1987, and the 30th day of June, 1987, upon Plaintiff's Complaint for Divorce, the Answer and Counter-Complaint filed by the Defendant, the various motions filed by both parties, the testimony of the parties and their witnesses in open Court and upon the entire record from all of which the Court finds as follows:

The parties married in 1970 and they have two children ages 11 and 15. Ms. Howell, now age 35, worked for approximately six months prior to the parties' marriage. She has not been employed since and has no developed marketable employment skills. Mr. Howell, age 38, is a licensed real estate agent and appraiser. He is part owner with his brother of George P. Howell and Son, Inc. He is also a member of the Board of Directors of Nashville City Bank (now Dominion Bank).

GROUNDS FOR DIVORCE

The evidence clearly established that during 1986 and 1987 Mr. Howell engaged in an open and notorious affair with another woman. When confronted by his wife, Mr. Howell admitted this relationship; however, he was less than candid in telling her of its nature and scope. Furthermore, the relationship continued even after Mr.

RECEIVED THIS 29
DAY OF Sept, 1987

Howell told his wife that it had ended. The ground of cruel and inhuman treatment, therefore is established a divorce may be granted on that basis. Farrar v. Farrar, 553 S.W.2d 741, 744 (Tenn. 1977).

Ms. Howell has not requested an absolute divorce. However, the Court in its discretion may grant an absolute divorce rather than one from bed and board where it finds that statutory grounds for an absolute divorce have been proved and there is no reasonable expectation that the parties will reconcile. Lingner v. Lingner, 165 Tenn. 525, 532-533, 56 S.W.2d 749 (1932). The pleadings and evidence satisfied the statutory grounds for absolute divorce. The Court in its discretion grants an absolute divorce upon the finding that the marriage relationship is irretrievably broken and that there is no reasonable expectation of reconciliation.

Mr. Howell in his cross petition prayed for an absolute divorce on grounds of cruel and inhuman treatment. However, he introduced no credible proof in support of his petition. His petition, therefore, is denied.

DIVISION OF PROPERTY

T.C.A. Section 36-4-121 mandates that when an absolute divorce is granted that the Court make an equitable division of the jointly held property. The division need not be equal, but merely equitable under the circumstances attending.

Based upon the evidence presented, the Court finds that the following assets are jointly owned by the parties:

The 3 acre property and improvements located at 2122 Neelys Bend Road, Davidson County, Tennessee (the home)

The furniture and furnishings in the home

Mr. Howell's 51% interest in George P. Howell and Son, Inc.

The flex bus

Life insurance policies on Mr. Howell of which Ms. Howell is beneficiary

Ms. Howell's 1981 Eldorado automobile

The evidence presented on the value of the home is at variance. An expert witness who testified on behalf of the plaintiff valued the home at $280,000. Mr. Howell, a licensed real estate agent and appraiser, valued the property at $185,000. The Court finds that the plaintiff's expert was effectively impeached and that the value assigned by him is overstated. Mr. Howell's opinion is supported by a financial statement which he submitted to Third National Bank in Nashville on January 14, 1987 where he assigned the same value to the home (Tr. Ex. 20) However, he also assigned that same value to the property in a financial statement submitted to that bank on September 4, 1985. (Tr. Ex. 22) The Court is not bound to accept either opinion and may make its own determination of value. Chambers v. Bradley County, 53 Tenn. App. 455, 384 S.W.2d 43, 45 (1964). The homeplace consists of 3 acres. The property includes a 3,200 square foot house, a swimming pool and a small family graveyard. The home is split level and was built in 1974. The most significant difference between the property values assigned by the two witnesses was the per square foot value each witness assigned to the home. Mr. Boyd's value was approximately $65 per square foot (Tr. Ex. 52). Mr. Howell's value was $40 per square foot (Tr. Ex. 53) The

Court assigns a value of $50 per square foot. The Court finds that the improved property is worth $210,000.

The home is encumbered by two mortgages. The first mortgage is approximately $46,000 and is held by Fidelty Federal Savings and Loan Association. The second mortgage, held by Third National Bank, which was incurred for business purposes by Mr. Howell, is approximately $86,000.

Both parties presented a list of their personal property. This property consists of furniture, furnishings, farm equipment and jewelry. Mr. Howell did not value the home furniture and furnishings Ms. Howell valued them at $14,185. (Tr. Ex. 45) Mr. Howell did not contest this value. The farm equipment was valued by the parties at $15,000. Ms. Howell valued the parties' jewelry at $25,670.

The flex bus is a large mobile home. Mr. Howell bought it in 1982. It is worth approximately $80,000. It is encumbered by a lien of approximately $36,000.

Mr. Howell owns 51% of Geo. P. Howell and Son, Inc., a real estate and appraisal firm. No evidence was presented as to the value of the business as a growing concern or event as to its goodwill. Evidence was presented that the value of the assets are approximately $23,000 with a depreciated value of approximately $15,000. Mr. Howell and his brother bought the business from their father's estate in 1980 for $80,000. In 1981, it incurred a small loss. Losses increased dramatically from 1982 through 1984 totaling approximately $600,000 by the end of that year. These losses, however, did not result from operations, but rather from loans incurred by the business and then paid

out to the principals as income or other forms of compensation. The company noted financial improvement in 1985 and 1986. All company bank notes have been paid. However, Mr. Howell has incurred substantial personal debt in order to make loans to the company; this "business debt" is now $106,000. In turn the company owes Mr. Howell $187,000. Since 1980, Mr. Howell has earned a minimum of $60,000 annually from the company.

Mr. Howell maintains insurance policies on his life with face values totaling $250,000. The total cash value of his policies equals $4,664. Ms. Howell is the beneficiary under those policies.

ALLOCATION

The Court makes the following distribution of the parties' marital property.

The Home. Ms. Howell is awarded the parties' home. She shall be responsible for the $46,000 mortgage on the property held by Fidelity Federal Savings and Loan Association, the $16,000 home improvement loan held by Third National Bank, and the pool note in the approximate amount of $3,452. She shall hold Mr. Howell harmless from these obligations. Mr. Howell shall hold Ms. Howell harmless from the second mortgage on the house held by Third National Bank in Nashville (except to the extent of the amount of the home improvement loan) and shall cause said lien to be removed from the property not later than January 1, 1989. Should Mr. Howell fail or refuse to remove the lien by January 1, 198 or should Mr. Howell fail to pay said indebtedness, causing the bank to foreclose on the property on that date, Mr. Howell shall pay to Ms. Howell the sum of $100,000 on January 15, 1989.

Furniture and Furnishings. The Court will not at this time make a specific division of the furniture and furnishings of the home and of the farm equipment. The parties are given until September 14, 1987 to submit an agreed order to the Court regarding such division. If the parties cannot reach an agreement by that date, each shall submit a specific written proposal to the Court by September 21, 1987; responses thereto shall be filed by September 28th. The Court will then make an allocation. Each party shall keep the jewelry which each presently has in his or her possession.

Flex Bus. Mr. Howell will receive the flex bus. He shall also be responsible for paying the debt related to the vehicle in the approximate amount of $36,000.

The Company. Mr. Howell shall also receive his interest in Geo. P. Howell and Son, Inc. He shall be responsible for all business debts whether incurred in the name of the business or incurred personally and then loaned to the business by Mr. Howell. Mr. Howell shall hold Ms. Howell harmless from all such business indebtedness of any nature whatsoever. Mr. Howell shall also be entitled to receive all sums due from the company for monies which he loaned it.

Life Insurance. Mr. Howell shall continue to own the life insurance policies with face values totaling $250,000. However, he may not borrow against the cash value of said policies for so long as his potential liability for the support of his wife and children exceeds $250,000; thereafter he may borrow against the cash value to the extent that the face value, less borrowed cash value, remains equal to or greater than the obligations owed. Ms. Howell shall remain the

beneficiary under these policies until Mr. Howell's obligations under this decree are satisfied in full.

Automobile. Ms. Howell shall continue to own the 1981 Eldorado. She shall be responsible for paying the debt on the car in the approximate amount of $7,300.

In making this division of property, the Court has considered each of the factors set forth in T.C.A. Section 36-4-121(c). The parties have been married for fifteen years. Ms. Howell has worked at home and has been supportive of her husband's business activities. She assumed the primary role in raising the parties' children. She has no developed marketable skills and, without rehabilitation, likely would earn only minimum wage. Mr. Howell has a professional and an ongoing business. Ms. Howell has no substantial separate property, while that owned by Mr. Howell, as discussed below, is substantial. Finally, the parties have enjoyed a very comfortable standard of living, which this division will protect to Ms. Howell.

SEPARATE PROPERTY

Mr. Howell is the beneficiary under two estates. The first is the trust under the will of his father. That will established two trusts, one of which Mr. Howell's mother is beneficiary and the other of which Mr. Howell and his brother are beneficiaries. Mr. Howell's interest is vested, but he has no right to the income from the trust until his mother's death. At age 40, Mr. Howell is entitled to receive his prinicpal from the trust. Mr. Howell has valued this interest variably from 1982 through 1987 as follows:

DATE	SOURCE	VALUE
12-8-82	Third National Bank Financial Statement (Tr. Ex. 24)	$900,000
6-30-84	Third National Bank Financial Statement (Tr. Ex. 23)	$700,000
9-4-85	Third National Bank Financial Statement (Tr. Ex. 22)	$700,000
1-14-87	Third National Bank Financial Statement (Tr. Ex. 20)	$500,000

At trial, he testified that the interest was worth $215,000. The court finds that this interest is worth at least $500,000.

The second interest is of property inherited from his grandmother. He owns a 40% interest. The estate has not been closed and the proeprty has not been distributed. Mr. Howell claims that his interest is worth $188,000, the value of the property as earlier established for estate tax purposes. (See Tr. Ex. 49 and 20). Mr. Howell's mother owns a 20% interest in those property which she valued in July, 1986 at $142,000. (Tr. Ex. 49). The Court finds that Mr. Howell's interset in the property is worth at least $285,000.

Mr. Howell's separate property is worth at least $785,000. He shall continue to own this separate property. T.C.A. Section 36-4-121.

ALIMONY, CHILD SUPPORT AND CUSTODY

Ms. Howell has requested that she be awarded custody of the partis' children. Mr. Howell has not contested that request. The Court finds that Ms. Howell should be awarded custody. Mr. Howell is awarded liberal rights of visitation.

Ms. Howell has requested an award of support in the amount of $4,864.50 per month for herself and her two children. (Tr. Ex. 10). The Court finds some of those expenses to be excessive under the circumstances (i.e., maid service, unallocated credit card expenses, and clothing expenses). However, the requested support does not take into account payment of the home improvement loan, the car note or the cost of borrowing against the equity of the home for the costs of rehabilitative education and/or training. Mr. Howell has been providing support in the approximate amount of $3,00 since the date of separation (Tr. Ex. 18). Ms. Howell has had to borrow additional money from her family to cover expenses.

The Court will order support and alimony at the rate of $3,500 per month. (This award is made on the assumption that the trust established for the benefit of the parties' children will continue to pay for their private school tuition. Should this change, the Court will further consider the award of child support.) This is allocated $1,500 to periodic alimony and $2,000 for support. Alimony shall be paid for a period of 84 months or until the death or remarriage of Ms. Howell, whichever occurs first. The child support shall be paid until the last child reaches 18 or completes high school, whichever comes later.

The Court finds that the parties have enjoyed a standard of living substantially beyond Mr. Howell's income. This standard was achieved by borrowing upon the expectation of Mr. Howell receiving his inheritance. The Court finds that the expectation was reasonable.

The Court finds that Mr. Howell can and should maintain this standard for his wife and children.

Mr. Howell shall also be required to provide major medical insurance coverage for the parties' children. All medical costs for any treatment exceed $30 which is not paid by insurance shall be borne equally by the parties. Expenses for any single treatment costing $30 or less shall be paid by Ms. Howell.

Throughout this opinion, the Court has identified certain debts and allocated responsibility for their payment. Ms. Howell shall also be solely responsible for all debts incurred by her for her benefit or the benefit of the children since the date of separation; she shall hold Mr. Howell harmless from these obligations. Mr. Howell shall be liable for all other debts, obligations or liabilities of the parties of any nature whatsoever, which has not been allocated to Ms. Howell in this opinion.

ATTORNEY'S FEES

Counsel for Ms. Howell has submitted an affidavit requesting fees at the rate of $85 per hour for 158.65 hours, plus trial time on 6-30 and 7-1-87. (Tr. Ex. 55) The affidavit has not been contested. The Court finds the rate and the hours incurred to be reasonable. The Court further finds that Ms. Howell does not have the resources with which to pay for the services provided and that it is appropriate for such fees to be paid by Mr. Howell. The Court awards to Ms. Howell as alimony in solido for the purpose of paying attorney's fees $14,335.00. Said sum shall be paid within 60 days of the date of the final order. If not paid by that date, execution may issue.

Costs of this caused are taxed to the Defendant for which execution may issue if necessary.

Entered this _____ day of _____, 1987.

JUDGE

7766 02/16 0101 03CHECK 33.00

APPROVED FOR ENTRY:

LARRY H. SNEDEKER

BILLIE JEAN TUNE
Attorneys for Plaintiff

RUSH

FEB 16 1 13 PM '89

09440

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed to Jack Norman, Jr., Attorney for Defendant, 213 Third Avenue North, Nashville, Tenn. 37201, this 24 day of September, 1987.

LARRY H. SNEDEKER

STATE OF TENNESSEE

I, **GEORGE L. ROOKER,** *Clerk of the Circuit Court for Davidson County, in the State aforesaid, do hereby certify that the foregoing is a true and correct copy of the Order heretofore entered in the* Third *Circuit Court for Davidson County, Tennessee, on the* 23rd *day of* April, *19* 87, *in Case Number* 86D-2165 *between* Elaine S. Howell *Plaintiff, and* Billy Hugh Howell, Jr. *Defendant, as same remains of record in Book* 133C, *Page* 1913 *of the Minutes of said Court.*

IN TESTIMONY WHEREOF, *I hereunto subscribe my name and affix the seal of said Court, at office, in Nashville, the* 16th *day of* February *in the year one thousand nine hundred and* 89 *and in the* 213 *year of American Independence.*

GEORGE L. ROOKER, *Clerk,*

By _____, *D.C.*

Form #GR-117