FILED
JAN 22 1993
A. B. NEIL, JR., CLERK

BOOK 8865 PAGE 392

IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION
AT NASHVILLE

MARY ANN BALDWIN MARCHETTI,	)	No. 01A01-9206-CV-00251
Plaintiff/Counter-Defendant/ Appellant,	)	HON. HAMILTON GAYDEN, JUDGE
VS.	)	**AFFIRMED AS MODIFIED AND REMANDED**
JOHN AMERICO MARCHETTI,	)	OPINION FILED: JAN 21 1992
Defendant/Counter-Plaintiff/ Appellee.	)	

HELEN S. ROGERS, Nashville,
For Plaintiff/Counter-Defendant/Appellant.

ROBERT L. JACKSON, Nashville,
DAVID W. GARRETT, Nashville,
Attorneys For Defendant/Counter-Plaintiff/Appellee.

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MEMORANDUM OPINION[1]

FARMER, J.

Wife was awarded a divorce from bed and board. She appeals from the trial court's distribution of marital property and the amount of alimony awarded and requests this Court to grant her additional attorney's fees for this appeal. Husband contends that he should have been awarded an absolute divorce and cites error on the part of the trial court in requiring him to pay Wife's attorney's fees.

The parties married in 1953. At the time of divorce, wife was 58 and husband 56 years of age. Both of the children are adults.

[1]Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

The trial court awarded Wife the marital residence known as Deerwood Drive and the house and lot known as Aubrey Court. In addition she was awarded various bank accounts, an automobile and personal property. Husband was awarded the real estate known as Sanborn Drive, a duplex in which he was living in one side, ten acres of raw land and a vacation spot in North Carolina. He was further awarded various accounts, vehicles and personal property. The values of the various properties were essentially undisputed and Husband contends that the distribution resulted in Wife receiving approximately $184,000 and he approximately $153,000, a fifty-five/forty-five percent (55/45%) split in favor of Wife. Wife contends that $27,000 of the property awarded her was her separate property consisting of a $15,000 inheritance and a $12,000 gift from her Husband which accumulated at the rate of $200 per month which was deducted from his paycheck for a period of time. She further contends that Husband has vested retirement benefits after 38 years in the National Guard which will allow him, at age 60, to receive $382 per month and which she values at some $68,000. This, she contends, results in Husband receiving a much greater share of the distribution of marital property.

Husband counters that the $200 per month was not a gift and that these funds, along with Wife's $15,000 inheritance, were comingled with marital assets and thus became marital property. We find evidence that Wife did in fact place her inheritance in a joint account. When those funds became comingled with marital funds those funds became marital property. With respect to the $12,000, Wife contends that Husband gifted to her this amount at the rate of $200 per month. Husband denies that he intended this to be a gift. The trial court did not make a specific finding as to this issue, but apparently treated it as marital property in arriving at the distribution. It is incumbent on the trial court to classify the property, to give each party their separate property, and then to divide the marital property equitably. *Batson v.*

Batson, 769 S.W.2d 849, 856 (Tenn. App. 1988). Since the trial court did not designate any separate property, it is apparent that he found none. We defer to the trial court on this issue of credibility.

Husband's retirement benefit with the Tennessee Air National Guard is vested and constitutes marital property. T.C.A. 36-4-121(b)(1)(A). Presently, he would receive $342 per month upon obtaining age 60. This amount increases approximately $10 per year. If he remains in the Guard, at age 60 he would be entitled to approximately $382 per month. However, marital property does not include the value of pension or retirement benefits accruing after the dissolution of the marriage. Wife has not directed us to any evidence in this record, nor has our search disclosed evidence of the present value of Husband's Guard pension.

T.C.A. § 36-4-121(c) directs the trial court to consider all relevant factors, including those set forth in the statute, in distributing marital property. In examining those factors pertinent to this matter, we note this was a marriage of 38 years duration. Wife is without question totally disabled and was found by the trial court to be incapable of earning income. Husband is apparently in good health. He is gainfully employed on a full time basis and, as heretofore noted, has accrued retirement benefits. Wife has not accumulated sufficient quarters to qualify for Social Security. The record reveals that Mrs. Marchetti has not worked enough quarters to be eligible to draw Social Security. She will be able to draw on her husband beginning January 1997 in the amount of $434 per month. She would be able to draw sooner as a disabled widow at his death. She would not be eligible for SSI benefits as she had income of more than $407 per month or resources of more than $2000.

The trial court has wide discretion in adjusting and adjudicating the party's rights and interest in the jointly owned property. *Fisher v. Fisher*, 648 S.W.2d 244 (Tenn. 1983). The trial court's division of the marital estate is entitled to great weight on appeal, *Edwards v. Edwards*, 501 S.W.2d 283 (Tenn. App. 1973), and should be presumed to be proper unless the evidence preponderates otherwise. *Lancaster v. Lancaster*, 671 S.W.2d 501 (Tenn. App. 1984). We affirm the trial court's distribution, which weighs in Wife's favor.

Wife contends that the $450 per month alimony awarded by the trial court is not sufficient. She demonstrates a need of $937 per month and her only source of income is interest payments of $200. The $450 monthly alimony payment leaves a shortage of approximately $287. The record reveals that the Deerwood property, the marital residence, could rent for between $600 to $700 per month. Wife has indicated that she did not desire to continue to live in that home because of the size and expense of upkeep. Wife presented evidence that estimated repairs on the Deerwood Drive property to be $8,300. Husband testified that, in his opinion, the cost of repairs would be $3,000 to $4,000. Husband contends that his monthly income exceeds only slightly his monthly expenses and that he is therefore unable to pay additional monthly alimony.

Having reviewed this record, we believe that an equitable result may be reached by awarding Wife a lump sum of *alimony in solido* in the amount of $8,000. This would allow her to repair the Deerwood property and derive the rental income therefrom. The decree is therefore modified accordingly. Husband has sufficient liquid assets with which to meet this award.

Wife contends that she should be awarded additional attorney's fees for this appeal. Husband presents the issue that

the trial court erred in awarding Wife $6,000 attorney's fees. We find both issues to be without merit.

Husband further contends that the trial court erred in not awarding him an absolute divorce pursuant to T.C.A. § 36-4-101(12) which provides grounds for a divorce from the bonds of matrimony where, for a continuous period of two or more years, both parties have lived in separate residences, have not cohabited as man and wife during such period, and there are no minor children of the parties. Wife testified that the parties had cohabited as man and wife within a two year period and Husband's testimony was to the contrary. On this issue of credibility, we defer to the trial court.

The judgment of the trial court is affirmed, except as modified. The costs of this appeal are taxed to the parties in equal shares, for which execution may issue if necessary.

FARMER, J.

CRAWFORD, J. (Concurs)

HIGHERS, J. (Concurs)

I, A. B. Neil, Jr., Clerk, hereby certify that this is a true and exact copy of the original Court of Appeals Memorandum Opinion filed in this cause.
This 12th day of Feb., 1993.
A. B. NEIL, JR., CLERK OF COURT
By: Anita Parr D.C.

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IDENTIFICATION REFERENCE

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FELIX Z. WILSON REGISTER DAVIDSON COUNTY, TN