

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 7, 2007 Session

TRINA GREER, ET AL. v. JAMES L. BAKER

**A Direct Appeal from the Chancery Court for Chester County
No. 9844 The Honorable Allen Wallace, Chancellor**

No. W2007-00340-COA-R3-CV - Filed April 9, 2008

This is a divorce case. Appellee/Husband and Wife were granted a divorce, but the division of marital property was held over. Before the property could be divided, Wife died, and her two daughters, the Appellants herein, were substituted as parties. Subsequently, Wife's estate was opened, and added as a party. Appellants appeal the trial court's valuation and division of certain property, and raise issues concerning the admissibility of certain testimony, and whether Appellants are proper parties to this case. Finding no error, we affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

W. FRANK CRAWFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S. and HOLLY M. KIRBY, J., joined.

David W. Camp of Jackson, Tennessee for Appellants, Trina Greer, Anita Macadoo, and the Estate of Georgia Faye Baker

Douglas Thompson Bates, III of Centerville, Tennessee for Appellee, James L. Baker

OPINION

Georgia Faye Baker and James L. Baker ("Defendant," or "Appellee") were married on October 11, 1980. This was Mrs. Baker's third marriage, and Mr. Baker's second. No children were born to the marriage; however, Mrs. Baker has two children from her previous marriage, Trina Greer and Anita MacAdoo (together with the Estate of Georgia Faye Baker, "Plaintiffs," or "Appellants").

On February 22, 2002, Mrs. Baker filed a complaint for divorce against Mr. Baker. Mr. Baker filed an answer and counter-complaint for divorce on May 31, 2002. Mrs. Baker answered the counter-complaint on June 6, 2002. Following a hearing on April 10, 2003, the trial court entered an "Interim Decree" on April 22, 2003. This "Interim Decree" grants the divorce, but reserves all other issues (including division of marital property). By Order of June 16, 2004, the

Chief Justice assigned the case to Senior Judge Allen Wallace because of Chancellor Morris's death.

Mrs. Baker died on June 22, 2004. By Order of December 13, 2005, the trial court substituted Mrs. Baker's children, Trina Greer and Anita MacAdoo, as parties. There is no objection in the record to this substitution of parties. Finally, on May 10, 2006, the pending issue of division of property was tried to the court, sitting without a jury. On July 20, 2006, the trial court entered its "Judgment." By this Judgment, Ms. Greer and Ms. MacAdoo received \$678,431.00 in property. Mr. Baker received \$466,514.00 in property. Because of the \$211,917.00 difference between the awards, Mr. Baker was also awarded one-half of that difference, or \$105,958.50, against Ms. Greer and Ms. MacAdoo. Ms. Greer and Ms. MacAdoo were also ordered to return the ring containing stones from Mr. Baker's mother's ring. At the time of this hearing on the division of property, no estate had been opened on behalf of Mrs. Baker. However, the Estate of Georgia Faye Baker (the "Estate") was opened shortly thereafter, with Ms. Greer being appointed as personal representative.

On August 16, 2006, Ms. Greer and Ms. MacAdoo, as next friends of Mrs. Baker, filed a Tenn. R. Civ. P. 59 motion to alter or amend the judgment. This motion was heard on January 4, 2007. At that hearing, the Estate was added as a party. By Order of February 5, 2007, the motion to alter or amend was denied. This Order lists "Trina Greer and Anita MacAdoo, Next Friends of Georgia Faye Baker and the Estate of Georgia Faye Baker" as Plaintiffs.

On February 14, 2007, Ms. Greer and Ms. MacAdoo, as next friends of Mrs. Baker, and the Estate filed their Notice of Appeal. The Appellants raise five issues for review, as stated in their brief:

1. Did the trial court err in entering a judgment against the heirs of wife when no attempt was made to establish an estate.
2. Did the trial court err in characterizing gifts from a Husband to a Wife as marital property and using testimony in conflict with the dead man statute in so doing.
3. Did the trial court err in allowing the Missing Witness Rule to override evidence presented at the trial as to the amount of a retirement account, especially where the parties had previously stipulated to the balance of said account.
4. Did the trial court err in its consideration of the testimony of Husband's daughter whose testimony of a conversation[] between the daughter and the deceased Plaintiff only came to light after the Wife's death.
5. Did the trial court err in assessing no value to inventory gathered for a personal business during the marriage despite the admission of

the party of value and the presence of an estimate taken for tax purposes near the time of the divorce stating otherwise.

Upon review of the appellate record, this Court determined that the April 4, 2003 “Interim Decree” and the July 20, 2006 “Judgment” did not constitute a final judgment appealable as of right because the issues of Mrs. Baker’s attorney fees and Mr. Baker’s request for alimony were not adjudicated. By Order of November 7, 2007, the parties were given twenty-five days in which to procure a final judgment. A “Supplemental Final Decree of Divorce” was entered in the trial court on December 13, 2007, and was filed with the appellate record on December 18, 2007.

We first note that this Court reviews findings of fact made by a trial court, sitting without a jury, under a *de novo* standard with a presumption of correctness for those findings, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d) (2007). This Court reviews a trial court’s conclusions of law *de novo* with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn.Ct.App.1989)). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn.Ct.App.1997). The weight, faith, and credit to be given to any witness’s testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *See id.*; *see also Walton v. Young*, 950 S.W.2d 956, 959 (Tenn.1997).

Proper Party

On appeal, Ms. Greer and Ms. MacAdoo first assert that the trial court erred in entering a judgment against them because the Estate of Mrs. Baker is the real party in interest. In the first instance, the record before us reveals that the first objection lodged by counsel for the Appellants concerning the substitution of Ms. Greer and Ms. MacAdoo as parties was at the hearing on the motion to alter or amend the judgment. Because Ms. Greer and Ms. MacAdoo proceeded through this matter without objecting to their being parties to same, they cannot be heard to complain on appeal.

However, even if we assume, *arguendo* (which we do not), that the issue of parties was properly raised in the trial court, we, nonetheless, conclude that whether Mrs. Baker’s heirs-at-law, or her estate, is the proper party has no bearing on the division of property in this case. Moreover, following the hearing on the motion to alter or amend, the trial court added Mrs. Baker’s Estate as a party. Consequently, any alleged error in parties was ultimately corrected by the trial court.

Jewelry

Throughout the course of these proceedings, it has been Mr. Baker’s contention that the

jewelry purchased for Mrs. Baker, during the marriage, was marital property because same was procured for “investment purposes.” Appellants contend that this jewelry was a gift to Mrs. Baker during the marriage and, as such, should be construed as separate property. Although Mrs. Baker testified during the first hearing on April 10, 2003, she gave no testimony concerning the jewelry. At the hearing on the division of property on May 10, 2006, Mrs. Baker was deceased. At that hearing, Mr. Baker testified that the value of the jewelry was \$49,621. In its judgment, the trial court adopted Mr. Baker’s value, and divided the property accordingly. On appeal, Appellants assert that the trial court erred in relying on Mr. Baker’s testimony because the Dead man’s statute, T.C.A. §24-1-203, precludes his testimony concerning any discussion he and Mrs. Baker had as to the purpose of the jewelry purchase.¹ In the first instance, at the time of the hearing, there was no estate and, consequently, no executor, administrator, or guardian; therefore, the Dead man’s statute would not be triggered. However, even if we assume, *arguendo*, that Mr. Baker’s testimony might have been precluded under this statute, a review of the record show that Appellants lodged no objection to his testimony during the hearing. The first mention of alleged inadmissibility of Mr. Baker’s testimony, under the Dead man’s statute, was raised at the hearing on the motion to alter or amend. Having not put the objection in record, Appellants cannot be heard to complain about this testimony on appeal. From our review of the record, the evidence does not preponderate against the trial court’s determinations concerning the jewelry. Tenn. R. App. P. 13(d).

Value of Retirement Account

_____ There are two pieces of evidence in record concerning the value of Mrs. Baker’s retirement account. First, trial Exhibit A-5, which is Mrs. Baker’s Balance Sheet. This Exhibit values Mrs. Baker’s IRA at \$21,000, and values her deferred compensations at \$44,819 (for a total of \$65,819). In addition, Mrs. Greer testified at her deposition that the value of her mother’s retirement account was approximately \$70,000. Although Appellants now contend that the trial court’s placing a value of \$70,000 on the IRA was error, at no time during the hearing (although Ms. Greer was present) did Mrs. Greer, or her sister, offer any rebuttal to the deposition testimony. As correctly noted by the trial court, it was within the power of Appellants, who had the documentation and/or actual knowledge, to prove the value of Mrs. Baker’s IRA. Having failed to provide this information, the Appellants must rely on the record as it now stands. From the valuations that are in record, *supra*, we conclude that a value of \$70,000 is within the reasonable bounds, as supported by the evidence. Because the evidence in record does not preponderate against the trial court’s finding on this issue, we affirm.

Testimony of Kathy Davis

On appeal, Appellants contend that the trial court erred in relying upon the testimony of

¹ The Dead man’s statute reads, in relevant part, as follows: “In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party....”

Mr. Baker's daughter, Kathy Davis. The substance of Ms. Davis's testimony was that she had been told by Mrs. Baker, in a telephone conversation, that Mrs. Baker had removed some \$30,000 in cash from the lockbox in order to keep Mr. Baker from using same to fund a bowling alley venture. We first note that Ms. Davis is not a party to this suit; therefore, the Dead man's statute would not preclude her testimony. *See, supra*, fn. 1. Nonetheless, we concede that Ms. Davis's testimony is wrought with hearsay. However, Appellant's attorney did not object to this testimony at the hearing. Again, because Appellants did not secure their objection in the record, they cannot be heard to complain on appeal. From the record as it stands, we cannot conclude that the evidence preponderates against the trial court's findings concerning the contents of the lockbox, or the division thereof.

Business Inventory

The testimony is undisputed that Mr. Baker and his son-in-law, Bill Greer, were in business together from approximately 1996 until 1999. Mr. Baker testified that, as of January 1, 2000, he "turned the business over" to Mr. Greer. When Mr. Baker left the business, he took his portion of the accounts receivable, but no inventory. Mr. Greer testified that the estimated value of this inventory was \$20,000. However, both Mr. Baker and Mr. Tim Clayton testified that the inventory was worth little or nothing as it consisted of scrap materials. From the evidence, the trial court concluded that the inventory had no value, and Appellants appeal this determination. From our review of the record, there is much dispute as to the value of this inventory. Mr. Greer's tax statement indicates that the inventory was worth up to \$40,000 (although what portion of this inventory existed at the time of the divorce is unknown). However, there is also indication that Mr. Baker would have paid someone to carry the inventory off because it was worth nothing. Consequently, according to the evidence, a reasonable valuation of this property could be anywhere from \$40,000 to \$0. The trial court's valuation of this inventory is not outside the reasonable possibilities under the facts. As set out above, this Court will review findings of fact with a presumption of correctness. Furthermore, where determination of the issue depends upon the credibility of witnesses, we will defer to the trial court. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995). Under these guidelines, we cannot conclude that the trial court erred in its valuation of the inventory.

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are assessed one-third to each of the Appellants, Trina Greer, Anita MacAdoo, the Estate of Georgia Faye Baker, and their respective sureties.

W. FRANK CRAWFORD, JUDGE