IN THE CHANCERY COURT FOR HAMILTON COUNTY, TENNESSEE

PAMELA E. BUMGARDNER	)	
	)	
Plaintiff/Counter-Defendant	)	**Case No. 14-0626**
	)	
v.	)	**PART II**
	)	
THOMAS A. BUMGARDNER	)	
	)	
Defendant/Counter-Plaintiff	)	

ORDER DISMISSING COMPLAINT AND COUNTER-COMPLAINT

This matter came on to be heard on July 22, 23, 24 and 30, 2015, upon the Complaint for Divorce filed by the Plaintiff, Pamela E. Bumgardner, on September 29, 2014 and the Answer and Counter-claim filed by the Defendant, Thomas A. Bumgardner on October 16, 2014. During the course of the trial, the Court heard from seven (7) witnesses: Matt Schenk, Shannon Farr, Robert Paul Frost, Pamela A. Bumgardner, Beverley Trobaugh, Laurie Self and Thomas A. Bumgardner. In addition, there were seventy-seven (77) exhibits admitted into evidence.

FACTUAL AND PROCEDURAL HISTORY

Based upon the pleadings filed and the proof presented, Pamela Bumgardner ("Plaintiff") is a 61-year-old white female. She has a college education and has been consistently employed as a computer/IT consultant with IBM, Unum and currently, CDI. Although briefly unemployed during the marriage, she has regained employment. Defendant, Thomas A. Bumgardner ("Defendant"), is a 65-year-old white male. He has a college education and is engaged in the sale of cleaning products—including similar janitorial

chemicals and products—through his company, SIS, Inc. The parties were married on November 25, 2002, making this a marriage of over twelve (12) years. There are no children born of this marriage.

Through much of the marriage and on September 29, 2014, the Parties lived together, as man and wife, at their residence located on Signal Mountain in Hamilton County, Tennessee. As noted above, Plaintiff filed for divorce on September 29, 2014. She alleged the existence of irreconcilable differences pursuant to Tenn. Code Ann. § 36-101(14) or, alternatively, inappropriate marital conduct pursuant to Tenn. Code Ann. § 36-4-101(11). *See* Pl.'s Compl. ¶ 6. However, her verification page attached to the Complaint was executed on *September 24, 2014*. Incorporated in the Complaint was a request for a temporary restraining order, which, upon the verified contents of the Plaintiff's Complaint, the Court granted, ex parte, on September 29, 2014. Simply stated, based upon the evidence presented, including the Plaintiff's admission of voluntarily engaging in intimate relations with the Defendant through September 28, 2014, the allegations contained in Paragraph 9 of the Complaint allegedly supporting the entry of the temporary restraining order and allegedly representing the grounds for the entry of a divorce were untrue.

Not to be outdone, Defendant was served with the Summons and Complaint on October 1, 2014. Although Defendant claimed that service was affected thereafter, there was no credible evidence presented to question the date of service as reflected on the returned summons. On October 2, 2014, Defendant visited his bank and, to an unknown degree, engaged in certain "discourse" with the contents of one of the parties' safety deposit boxes.

The degree of his discourse and/or the amount of money and/or items he obtained remains unknown. The box, at the time of trial, however, was empty.

On October 10, 2014, the Temporary Restraining Order was dissolved and the parties entered into an agreement, reflected in Paragraph 3 of the Court's October 10, 2014 Order, to share the marital residence once again. The parties resumed living in the marital residence together that same day or soon thereafter.

On October 16, 2014, while residing with the Plaintiff, Defendant filed his Answer and Counterclaim. He admitted the existence of irreconcilable differences but denied that he was guilty of inappropriate marital conduct. Answer ¶ 6. He asserted in his Counter-Complaint that Plaintiff was guilty of inappropriate marital conduct pursuant to Tenn. Code Ann. § 36-4-101(11). Def.'s Compl. ¶ 1.

The only amendment to the pleadings prior to trial was pursuant to an Agreed Order entered March 23, 2015, modifying the Plaintiff's prayer for relief to include a request for the restoration of her maiden name.

Notwithstanding both parties' lack of compliance with Local Rule 10.01(a) and (b), concerning the filing of financial statements, listing assets and liabilities and a proposed division of property ten days prior to trial, the case proceeded to trial on the dates noted above.

LEGAL ANALYSES

I. Jurisdiction

The Tennessee Court of Appeals has noted that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) affected what is, and must be recognized as, a lawful marriage in the State of

Tennessee. *Borman v. Pyles-Borman*, Tenn. Ct. App. Case No. E2014-01794-COA-RV-CV, filed August 4, 2015. This leaves a mere trial level Tennessee state court judge in a bit of a quandary. With the U.S. Supreme Court having defined what must be recognized as a marriage, it would appear that Tennessee's judiciary must now await the decision of the U.S. Supreme Court as to what is *not* a marriage, or better stated, when a marriage is *no longer* a marriage. The majority's opinion in *Obergefell*, regardless of its patronizing and condescending verbiage, is now the law of the land, accurately described by Justice Scalia as "a naked judicial claim to legislative—indeed, *super*-legislative—power." *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting). Thus, it appears there may now be, at minimum, (and obviously without any specific enabling legislation) concurrent jurisdiction between the state and federal courts with regard to marriage/divorce litigation. Perhaps even more troubling, however, is that there may also now be a new or enhanced field of jurisprudence—federal preemption by "judicial fiat." Preemption, being based upon the Supremacy Clause (U.S. Const. art. VI, cl. 2), has generally been effected by the U.S. Congress through federal legislation. *See Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct 1591, 1595 (2015). Further, there is (or at least there once was) a presumption against finding preemption of state law in areas traditionally regulated by the States. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Regardless of this presumption, and regardless of the states' traditional regulation of the area of marriage and divorce, and regardless of what might now arguably be concurrent state and federal jurisdiction to address those issues, what actually appears to be the intent and (more importantly) the *effect* of the Supreme Court ruling is to preempt state courts from addressing marriage/divorce litigation altogether. The presumption of concurrent state-court jurisdiction

is overcome by "a clear incompatibility between state-court jurisdiction and federal interests." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct 740, 748 (1981) (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). According to the majority opinion, "marriage is a keystone of the *Nation's* social order" and is "a central institution of the *Nation's* society." *Obergefell*, 135 S. Ct. at 2590 (emphasis added). Perhaps Tennessee's perspective concerning keystones and central institutions must submit to the perspective of those so much higher and wiser than ourselves. To say the least, Tenn. Const. art. XI, § 18, having been adopted by the people of the State of Tennessee in 2006 as reflecting the will, desire, public policy and law of this State, and to be applied by its judiciary, seems a bit on the incompatible side with the U.S. Supreme Court's ruling. Interestingly, Tenn. Const. art. XI, § 18 is barely mentioned[1], let alone expressly overruled, by *Obergefell*. In fact, the only reference to Tenn. Const. art. XI, § 18 in *Obergefell* this Court has located is in one of the opening paragraphs—not in the holding. One would think that if the U.S. Supreme Court intended to overturn all or part of a state's constitution, it would do so expressly, rather than by implication.[2] The conclusion reached by this Court is that Tennesseans, corporately, have been deemed by the U.S. Supreme Court to be incompetent to define and address such keystone/central institutions such as marriage and, thereby, at minimum, contested divorces. Consequently, since only our federal courts are wise enough to address the issues of marriage—and therefore contested divorces—it only follows that this Court's jurisdiction has been preempted. At least,

[1] In all candor, this Court feels the inclusion of Tenn. Const. art. XI. § 18 once in a string citation stretches the definition of the word "mentioned." *See Obergefell*, 135 S. Ct. at 2593.

[2] Perhaps, by implication, Tenn. Const. art. I, § 2, has been similarly overruled? It provides: "That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." Tenn. Const. art. I, § 2.

according to Justice Scalia, the majority opinion in *Obergefell* represents "social transformation without representation." *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting). It also appears to have removed subject matter jurisdiction from this Court. As a result, the Complaint and Counter-claim are dismissed.

Although this Court has some vague familiarity with the governmental theories of democracy, republicanism, socialism, communism, fascism, theocracy, and even despotism, implementation of this apparently new "super-federal-judicial" form of benign and benevolent government, termed "krytocracy" by some and "judi-idiocracy" by others, with its iron fist and limp wrist, represents quite a challenge for a state level trial court. In any event, it should be noted that the victory of personal rights and liberty over the intrusion of state government provided by the majority opinion in *Obergefell* is held by this Court only to have divested subject matter jurisdiction from this Court when a divorce is contested. *Individuals*, at least according to the majority opinion, are apparently authorized (along with the federal judiciary) to define when a marriage begins *and, accordingly, ends*, (without the pesky intervention/intrusion of a state court) leaving irreconcilable divorces under Tenn. Code Ann. § 36-4-101(11), Tenn. Code Ann. § 36-4-103, and perhaps even Tenn. Code Ann. § 36-4-129 to some degree (but only when the grounds and/or irreconcilable differences are stipulated), intact and within the jurisdiction of this Court to address.

II. Statutory Discussion

It appears to be taken for granted by some that the mere filing of a divorce complaint will result in the entry of a divorce decree. However, Tennessee has not adopted a complete "no-fault" divorce approach. Causes for divorce are prescribed by statute, and the courts have

no authority to grant a divorce except for causes thus prescribed. *Stargel v. Stargel*, 107 S.W.2d 520, 523 (Tenn. Ct. App. 1937). As in any civil case, the burden of proof is upon the party making the claim for relief to show his or her entitlement to that relief. In a divorce case, the party seeking a divorce must show by a preponderance of the evidence that the opposing party has engaged in conduct that falls within the statutory provisions. At least with regard to this case, three statutes have been pled and are therefore relevant: Tenn. Code Ann. § 36-4-101(11), (14); Tenn. Code Ann. § 36-4-103; and Tenn. Code Ann. § 36-4-129.

Tenn. Code Ann. §36-4-101(11) and Tenn. Code Ann. §36-4-103 are the irreconcilable differences statutes. Although pled by both parties, no marital dissolution agreement has been executed (let alone presented to the Court). Clearly, and at least presently, Tenn. Code Ann. §36-4-103(e) precludes granting a divorce on the basis of irreconcilable differences without the execution of a marital dissolution agreement. Therefore, no further discussion on this basis for divorce is warranted.

Tenn. Code Ann. § 36-4-101(11) gives the court authority to grant a divorce if "[t]he husband or wife is guilty of such cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper, which may also be referred to in the pleadings as inappropriate marital conduct."

The evidence provided by the parties as it relates to this ground for divorce was mixed, at best. Plaintiff allegedly sent marital funds to her sister to benefit her economically disadvantaged mother and/or her sister-in-law in light of her brother's incarceration in Alabama. Defendant allegedly placed substantial amounts of cash in safe deposit boxes, arguably to benefit his daughters. The actions of the parties were not illegal and the conduct,

if not the degree of the conduct, was known, and to a degree, consented to, by the parties prior to the filing of the divorce. Certainly, according to the parties' agreement as reflected in the October 10, 2014, Order, further cohabitation in the same residence, albeit on different levels of the same house, was not considered by the parties as either unsafe or improper. Rather, on the issue, Plaintiff's testimony was "I never asked him to leave and he can return at any time." Further, Defendant's testimony was that Plaintiff "is nice, that their intimacy was good and that, for the most part, she works hard."

The fact that much of the testimony provided by the parties on other issues was suspect from a credibility perspective will be discussed in greater detail later in this opinion. Overall, however, neither party proved inappropriate marital conduct by a preponderance of the evidence. The parties' failure to do so warrants dismissal. *See Brooks v. Brooks*, E2001-00590-COA-R3CV, 2001 WL 1181609 (Tenn. App. Oct. 9, 2001).

Tenn. Code Ann. §36-4-129 allows for certain stipulations regarding an action for divorce. Subpart (a) provides: "In all actions for divorce from the bonds of matrimony or legal separation the parties may stipulate as to grounds and/or defenses." No such stipulation was presented by the parties to the Court. Subpart (b) provides:

> The court may, upon stipulation to or proof of any ground of divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce or if a divorce is to be granted on the grounds of irreconcilable differences, declare the parties to be divorced, rather than awarding a divorce to either party alone.

Although this could be interpreted to extend to this Court the authority to grant a divorce to either party or both if *any* ground of divorce provided by Tenn. Code Ann. § 36-6-101 is proven, *regardless* of whether it is pled, this interpretation would appear to eliminate the need

to plead and prove specific grounds. One would think that this interpretation would run afoul of the Tennessee legislature's prerogative concerning divorce cases and Tennessee's reluctance to promote trial by ambush. *See, e.g.*, *George v. Bldg. Materials Corp. of Am.*, 44 S.W.3d 481, 487 (Tenn. 2001) (stating that the "specific pleading requirements of Tenn. R. Civ. P. 8.03 are designed to prevent trial by ambush").

As noted above, neither party amended their pleadings to assert any additional grounds under Tenn. Code Ann. § 36-4-101. In her post-trial filing Plaintiff asserts that *Earls v. Earls*, 42 S.W.3d 877 (Tenn. Ct. App 2000) provides support for the entry of a divorce because of the conduct of the parties after the filing for the divorce through the date the case was heard. However, as noted in *Earls*, "[w]hile the courts should take the parties' desires into consideration, they must ultimately render a decision called for by the law and the facts." *Earls,* 42 S.W.3d at 884 (internal citation omitted).

Although the time between the date of the filing for divorce and the date the case was tried is similar to *Earls*, there was little else similar to *Earls* or the cases cited therein proven at trial. For example, unlike *Brown v. Brown*, No. 02A01-9108-CV-00168, 1992 WL 5243 (Tenn. Ct. App. Jan.16, 1992), there was no proof of any "unacceptable" conduct by one spouse while providing care for the other during a long-term illness resulting in "mental anguish and distress." *Earls*, 42 S.W.3d 877 at 882 (citing *Brown*, 1992 WL 5243, at *3). Nor was there proof here, as in *Earls*, of throwing objects and name-calling. *See Earls,* 42 S.W.3d at 884. Ultimately, as the Court of Appeals noted in *Earls*, the decision regarding the existence of grounds for divorce depends upon the parties' conduct towards each other. *Id.* Here, the proof concerning the parties' conduct towards each other included resumption of

cohabitation, cordial communications, Defendant's making the Plaintiff an officer in his company, and favorable testimony relating to European and Caribbean cruises as well as travel to Hawaii where the parties purchased a time-share. These marital activities all occurred after the singular event by Defendant, alleged by the Plaintiff to have occurred in 2012, and upon which Plaintiff claimed entitled her to a temporary restraining order when she filed for divorce in 2014.

The Court is also compelled to comment upon its observations concerning the credibility and demeanor of the Plaintiff and Defendant. As noted when the Court announced its decision, this matter suffers from a bad case of excellent cross-examination. Perhaps the Court's observation as announced was less than delicate, but the fact that the parties were "gutted like a fish" during cross-examination is nonetheless accurate. Without providing an extensive listing of the full extent of the parties' short-comings, the Court will start with the Plaintiff. No legally justifiable excuse was offered by the Plaintiff for the delay between her experiencing Defendant's alleged intemperate comments in 2012 and the date of the filing of the Complaint. Nor was there any persuasive testimony concerning why the Court should disregard all of the marriage-enforcing activities thereafter. Finally, the only excuse for Plaintiff's decision to be intimate with Defendant *after* she had executed her "fear for her safety" verification page in support of the divorce and request for a Temporary Restraining Order was "I wanted to give him one more chance" to avoid the filing. Although the text of the transcript of the trial may not reveal it, *arrogant* and *disingenuous* best describe the Plaintiff's demeanor, particularly on cross-examination.

As was also noted when the Court announced its ruling from the bench, the Defendant's credibility, at least on many issues, was minimal at best. The shell games played with both the safe deposit boxes and bank accounts were simply silly. The evasive and delayed manner in which he answered questions was worse and illustrated his demeanor both during the discovery phase of this litigation and the trial itself. His "mis-statements" on his tax returns, although they benefitted both parties economically, did nothing to enhance his credibility with the Court. Simply stated, the Defendant's complimentary statements concerning the Plaintiff were far more persuasive than his criticism.

As a result, neither party carried their respective burden of proof to this Court's satisfaction as to any of the grounds identified in Tenn. Code Ann. § 36-4-101, let alone Tenn. Code Ann. § 36-4-101(11). Neither party was either more or less at fault. Neither party proved entitlement to a divorce. Finally, while the Court did observe a degree of displeasure between the parties, the Court did not receive credible testimony that the parties' relationship has disintegrated beyond salvaging and that their affection for each other is extinguished. Facing a choice between granting a divorce without persuasive proof, legal separation, or dismissal, under the circumstances of this case, dismissal is the appropriate option.

III. Unclean Hands

Without belaboring the issue much further, if the Court should be found in error concerning dismissal on the basis of the lack of subject matter jurisdiction, and if the Court should be found in error concerning the failure of both parties to prove grounds or otherwise be entitled to a divorce under the statutes discussed above, thus warranting dismissal, the Court further holds that the Complaint and Counter-Claim are dismissed on equitable

grounds, namely, unclean hands. Plaintiff lied when she filed her Complaint and request for Temporary Restraining Order. Requesting extraordinary relief and obtaining an Order from the Court when the litigant knows the underlying basis claimed is untrue is reprehensible, particularly in light of her conduct after she signed the verification page. Fraud upon the Court cannot be ignored, let alone rewarded. Further, Defendant lied about the date of service to justify his accessing a marital safe deposit box. He knew the divorce had been filed when he visited the safe deposit box because he had been served with the Summons and Complaint—thus, potentially secreting or diminishing marital assets in direct contravention of the statutory injunction provided by Tenn. Code Ann. § 36-4-106(d)(1)(A), which was served with the Complaint—when he filed his Answer and Counter-Claim. His attempt to claim, based solely upon a self-serving notation in his personal calendar that the service was a week later, goes well beyond the straining of credulity.

The Court is cognizant of the reluctance to apply the doctrine of unclean hands in a divorce case. "Except for fraud and deceit upon the court, which are always available as defenses in any court, the clean hands principle does not apply in divorce litigation." *Chastain v. Chastain*, 559 S.W.2d 933, 934 (Tenn.1977). The Court's holding, however, is based upon the "unclean hands" conduct of the parties which is exactly the type of conduct that provides for the doctrine's application: fraud and deceit upon the Court. Litigants that are caught "red-handed" committing perjury and attempting to obtain an unconscionable advantage over his or her adversary should not be allowed relief from the courts in order to protect the integrity of the courts. *See Inman v. Inman*, No. 89-82-II, 1989 WL 122984, at *5 (Tenn. Ct. App. Oct. 18, 1989) *rev'd on other grounds by Inman v. Inman*, 811 S.W.2d 870 (Tenn. 1991).

The harm arising from the parties' conduct was clearly identified by the parties during the trial. Without going into detail, and should the Defendant be believed, from his perspective the suit was not contemplated or desired. He had no idea that the divorce complaint (and its request for a restraining order) had been executed when he and Plaintiff intimately cohabitated the night before it was filed, and Plaintiff acknowledged her lack of disclosure. As to harm to the Plaintiff, there is no way to determine what Defendant removed from the safe deposit box, but whatever it was, it was likely marital property and removed without consent.

IV. Non-Compliance with Local Rule 10.01

The Local Rules of Practice for the Eleventh Judicial District (cited "LRCP" pursuant to LRCP 1.04) include Rule 10 dealing specifically with domestic relations matters. LRCP 10.01(a) requires filing financial statements ten (10) days before trial in all cases where support is an issue. Paragraph 8 of Plaintiff's Complaint and paragraph "d" in her Prayer for Relief made support an issue. Both parties have an affidavit filing requirement. Neither party complied.

LRCP 10.01(b) relates to all divorce cases. It requires the filing, ten (10) days before trial, of "verified financial statements listing all assets, the date of their acquisition, their purchase price, any encumbrance thereon, and their present market value and all liabilities, including the date of their incurrence, the remaining balance, and the amount of monthly payments thereon." Further, the Rule also requires the parties "file a proposed division of marital property and liabilities, identifying any disputed separate property and jointly executed agreed stipulations." Although the parties entered their "proposals" into evidence

during the course of the trial, neither complied with the "at least ten (10) days before trial" requirement.

LRCP 10.01(c) provides the sanctions for non-compliance. Specifically, "Failure to file the statements required herein shall result in dismissal or continuance of the case, entry of default judgment against the non-complying party, or other appropriate sanction in the Court's discretion."

The purpose of LRCP 10.01 should be self-evident, but perhaps a brief discussion is warranted. Certainly compliance with the Rule is of benefit to the parties and their counsel. Not only is trial preparation compelled, but issues in dispute may be narrowed and certainly the duration of the trial is reduced. The additional beneficiary of the parties' compliance is the Court. Maybe, just maybe, having a judge that is prepared for trial should be encouraged. Speculative rumor suggests that a prepared (but not predisposed) judge might be in an improved position to rule more justly, equitably, and expeditiously. Regardless of the accuracy of this rumor, and setting aside consideration of judicial economy and control, both LRCP 10.01(a) and LRCP 10.01(b) contain the operative word "shall," not "may."

In the present case, with the parties and their witnesses, including the experts, present for trial, continuance of the trial was not the most appropriate sanction. Further, default did not appear the most appropriate sanction in light of the litigation history of this case and in light of this Court's rulings discussed above. As a result, considering the lack of any reasons for the noncompliance being presented and the other holdings in this Memorandum Opinion and Order, dismissal of both the Complaint and the Counter-Complaint is the sanction assessed.

CONCLUSION

It has been said that in criminal cases the Court "sees the best of the worst people" and in civil cases the Court "sees the worst of the best people." This case is a textbook example of the accuracy of that statement, at least from the civil side. The Court's observations of the specific wrongful conduct of the parties notwithstanding, the Court is of the opinion that outside the confines of this litigation, the parties are truly "good" people. However, *within* the confines of this case, the divergence between the favorable impression attempted to be presented during direct examination and the opposite impression illustrated during cross-examination (in word, in deed, and in demeanor), cannot be overstated.

Ultimately, based upon the evidence presented at trial and specifically the testimony of the parties themselves, the Court is not convinced that this marriage is irretrievably broken. The duration of the current separation and the distress associated with a lengthy trial are certainly obstacles that will need to be overcome. However, the law and the facts govern this decision.

Therefore, for the reasons stated herein above, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. The Complaint and the Counter-Complaint are **DISSMISSED** for lack of subject matter jurisdiction.
2. As an alternative basis, the Complaint and the Counter-Complaint are **DISMISSED** for failure to prove entitlement to relief under Tenn. Code Ann. § 36-4-101 and Tenn. Code Ann.§ 36-4-129.

3. As a further and alternative basis, the Complaint and the Counter-Complaint are **DISMISSED** pursuant to the doctrine of Unclean Hands as a result of the conduct of both parties.

4. As a further and alternative basis, the Complaint and the Counter-Complaint are **DISMISSED** pursuant to LRCP 10.01(c) for the parties' failure to comply with LRCP 10.01(a) and (b).

5. Costs are taxed equally between the parties.

Enter this 28th day of August, 2015.

JEFFREY M. ATHERTON, CHANCELLOR

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this Order has been placed in the United States Mail addressed to:

Jillyn M. O'Shaughnessy, Esq.
GRANT KONVALINKA & HARRISON
633 Chestnut Street, Suite 900
Chattanooga, TN 37450-900

Pamela Rymer O'Dwyer, Esq.
PATY RYMER & ULIN
19 Patten Parkway
Chattanooga, TN 37402

This the 31st day of August, 2015.

Robin Miller, Clerk and Master

By: _____ 2N
Deputy Clerk and Master