

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

November 18, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

RHONDA REAGAN,

Appellee,

v.

JOHN REAGAN,

Appellant.

) C/ A NO. 03A01-9605-CV-00179
)
) BLOUNT LAW
)
) HON. W DALE YOUNG,
) JUDGE
)
) AFFIRMED AS
) MODIFIED

MARTHA MEARES, Maryville, and JOHN E. McDONALD, JOYCE,
MEREDITH, FLITCROFT & NORMAND, Oak Ridge, for Appellee.

ROBERT N. GODDARD, GODDARD & GAMBLE, Maryville, for Appellant.

O P I N I O N

Franks. J.

In this divorce action, the husband questions the nature and extent of the alimony awards made to the wife.

The parties were married in 1975. At the time of their marriage, the wife had a son, and a son was born to the parties. At the time of the divorce, the child of the marriage was 19, the husband 41, and the wife 39.

The husband is employed by Lockheed Martin and had a net income of \$2,972.49 per month. The wife is employed by

Maryville College. She went from part-time to full-time work after the parties separated. Her net income is \$910.00 per month. Her job allows her sons to attend college without paying tuition and she is also eligible for that program

The Trial Court found that the husband was not credible regarding the nature of his relationship with a co-worker and had been guilty of inappropriate marital conduct. The Judge concluded that the wife will be "dramatically economically disadvantaged relative to the husband" and that the wife can not be rehabilitated due to her age and other factors. While both parties were high school graduates, the training and experience of the husband were far superior to that of the wife.

The parties' assets and liabilities were divided in the following manner: the marital residence with equity of \$119,000.00 was awarded to the wife. Both parties were required to continue to pay the \$64,000.00 mortgage in the amount of \$734.00 per month. The husband's retirement of \$872.74 per month, payable at age 65, was divided between the parties. The husband is required to pay a K-25 loan in the amount of \$4,300.00, and a Master Card account in the amount of \$3,600.00. The wife is to pay a Sears charge account of \$1,000.00.

The Trial Court set periodic alimony at \$850 per month, to terminate upon remarriage, or the death of either party.¹ When the husband begins receiving his retirement, the

¹The Trial Court inappropriately added a provision that the alimony would not exceed the wife's life expectancy of 36 years, since the award is for alimony *in futuro*. On remand, this limitation will be deleted.

periodic alimony will be reduced by the amount of the retirement account payment to the wife. The Court made further provision to increase the alimony award at the end of each five years by the amount of increase in the Consumer Price Index.

The husband urges the Court to examine the wife's monthly expenses, as listed in her affidavit and modified by testimony showing that some expenses were for the parties' son. These expenses total \$1,126.70. It is urged that since the periodic alimony was set at \$850.00, the award is excessive.

The husband also argues that the marital residence is much larger than the wife needs. The marital residence is a home of 3,000 square feet with four bedrooms and two baths. It is located on 6.8 acres in Blount County. He notes that although their son lives with her, the son is not a minor for whom he is obligated to provide any support. He would have the Court order the property sold. Even if the majority of the equity was awarded to the wife, he argues that he would prefer this result to being burdened with the mortgage payment.

Alimony is determined upon consideration of the factors in T. C. A. §36-5-101.² The Trial Court's award of

²(A) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
(B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
(C) The duration of the marriage;
(D) The age and mental condition of the party;
(E) The physical condition of each party; including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
(F) The extent to which it would be undesirable for a party to seek

alimony will not be disturbed on appeal, absent an abuse of discretion. *Crouch v. Crouch*, 385 S.W2d 288, 53 Tenn. App. 594 (1964).

Taking into account the factors set forth in the statute, the evidence does not preponderate against the Trial Court's finding that the wife will be dramatically economically disadvantaged. T.R.A.P. Rule 13(d). The record shows that she is working in a secretarial position with little chance for advancement because of her lack of computer skills. Although her tuition would be waived at Maryville College, the College does not offer vocational training and is in the process of closing its evening school. In addition, she suffers from health problems which affect her stamina. The Trial Court did not err by not making the alimony rehabilitative. *Cranford v. Cranford*, 772 S.W2d 48 (Tenn. App. 1989).

The Court did not err in assessing alimony *in futuro*. The wife's affidavit is a very conservative estimate of her expenses. The award of alimony brings the parties closer to the financial positions they held during the

employment outside the home because such party will be custodian of a minor child of the marriage;

(G) The separate assets of each party, both real and personal, tangible and intangible;

(H) The provisions made with regard to the marital property as defined in 36-4-121;

(I) The standard of living of the parties established during the marriage;

(J) The extent to which each party has made such tangible or intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased power of the other party;

(K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

(L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

marriage.³ The husband has the ability to pay, *Kincaid v. Kincaid*, 912 S.W2d 140 (Tenn. App. 1995). The award of alimony *in futuro* is justified, both as to accommodate her needs and to assure that her standard of living does not drastically drop. *Aaron v. Aaron*, 909 S.W2d 408 (Tenn. 1995).

In the well-reasoned opinion of *Cranford*, Judge Koch summarized the basis and rationale for an alimony award thus:

There are no hard and fast rules for determining the extent of a person's obligation to support a former spouse. *Stone v. Stone*, 56 Tenn. App. 607, 615-16 409 S.W2d 388, 392-93 (1966); *Waldon v. Walden*, 13 Tenn. App. 337, 344 (1930). The decision is factually driven and calls for a careful balancing of numerous factors, including those listed in Tenn. Code Ann. §36-5-101(d) (Supp. 1988). Accordingly, appellate courts give wide latitude to a trial court's alimony and maintenance decisions.

. . .

While Tenn. Code Ann. §36-5-101(d) authorizes the courts to consider many factors, the real need of the spouse seeking the support is the single most important factor. *Lancaster v. Lancaster*, 671 S.W2d 501, 503 (Tenn. Ct. App. 1984). In addition to the need of the disadvantaged spouse, the courts most often consider the ability of the obligor spouse to provide support. *Fisher v. Fisher*, 648 S.W2d 244, 246-47 (Tenn. 1983); *Barker v. Barker*, 671 S.W2d 843, 847 (Tenn. Ct. App. 1984); *Aleshire v. Aleshire*, 642 S.W2d 729, 733 (Tenn. Ct. App. 1981).

We do conclude, however, the Court abused its discretion in requiring the husband to pay one-half of the house payments, under the theory that one-half of the equity

³Under the court order, the wife will be going from a monthly joint income of almost \$3,500.00 to a single income of \$910.00. With alimony set at \$850.00, she will have an income of \$1,760.00 per month, which approximates the situation she was in during their marriage. Appellant husband goes from a monthly joint income of \$3,500.00 to a single income of almost \$3,000.00.

in the house was awarded as a property settlement, and the other half as alimony *in solido*. The effect of the Judge's action is a fee simple award of the marital residence to the wife, and we conclude that she should have the responsibility for paying the entire mortgage thereon, and the ordered payment in the nature of alimony would render the total alimony award excessive.

There is a paucity of authority on the issue of any increase in the cost of living impact on alimony awards. In *Parker v. Parker*, 497 S.W2d 572 (Tenn. 1973), the Chancellor had set child support at \$225.00 a month, with an increase every July of \$3.75. This increase was to reflect the cost of living. The Supreme Court rejected the cost of living increases, saying:

Since the court under the express authority of Section 36-820, T.C.A., may increase or decrease the allowance on cause being shown, the annual increases provided in the decree should not now be ordered. The court cannot at this time know or with accuracy predict whether the cost of living will increase or the amount of increase that may occur.

The law requires that alimony be set at some definite amount or amounts to be paid in monthly, semi-monthly or weekly installments. . . .? T.C.A. §36-5-101(a)(2)(A). *Franklin v. Franklin*, 746 S.W2d 715 (Tenn. 1987). The statute also states that the court may decree an increase or decrease of such allowance only upon a showing of a substantial and material change of circumstances.? T.C.A. §36-5-101(a)(1).

We conclude it was inappropriate for the Trial Judge to award a cost of living payment *in futuro*.

We affirm the judgment of the Trial Court as

modified herein, and remand with the cost of the appeal
assessed one-half to each party.

Herschel P. Franks, J.

CONCUR:

Charles D. Susano, Jr., J.

William H. Inman, Sr. J.