

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 2, 2016 Session

MARGARET MCCLAIN SNEED WILLS v. DAVID KYLE WILLS

**Direct Appeal from the Circuit Court for Sumner County
No. 2014-CV-737 Joe Thompson, Judge**

No. M2015-01639-COA-R3-CV- Filed May 16, 2016

This is an appeal of the trial court's award of alimony. Husband appeals the trial court's decision to award alimony *in futuro* as well as the amount of alimony awarded. We vacate both the trial court's award of alimony *in futuro* and the amount awarded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in part, Vacated in part, and Remanded

BRANDON O. GIBSON, J., delivered the opinion of the court, in which RICHARD H. DINKINS and KENNY ARMSTRONG, JJ., joined.

Lawrence James Kamm, Siew-Ling Shea, and Helen Sfikas Rogers, Nashville, Tennessee, for the appellant(s), David Kyle Wills.

Curtis Madden Lincoln, Hendersonville, Tennessee, for the appellee, Margaret McClain Sneed Wills.

OPINION

Background & Procedure

David Kyle Wills ("Husband") married Margaret McClain Sneed Wills ("Wife") on January 7, 1992. The Wills were married twenty-two years. Wife filed her complaint for divorce on July 9, 2014. On August 11, 2014, Husband filed an Answer to the Complaint for the Divorce. On September 30, 2014, the trial court entered an Agreed Order awarding Wife *pendente lite* alimony in the amount of \$2,950 per month and child support in the amount of \$2,100 per month.¹ The trial court heard testimony from Husband and Wife on July 1, 2015 and issued a memorandum opinion and final order

¹By the time of trial, the Wills' children were of the age of majority.

granting the divorce on July 13, 2015.

Husband, a 46 year old financial advisor, testified that he made \$424,363 in 2014 and that, at the time of trial, his 2015 net pay was \$118,193. Wife, who is 43 years old, has a high school education and once worked part-time as a receptionist in her father's real estate office. At the time of trial, Wife was attending cosmetology school and believed she could make about \$15,000 per year after finishing school and passing her state board examination. In addition to testifying regarding the parties' general finances, Husband testified about a number of the parties' investments and retirement accounts and stated that he made all the financial decisions during the parties' marriage.

With respect to spousal support, Husband stated that he believes Wife is "entitled to some support" and also that "the current level of support² for three years in transitional³ alimony" seemed reasonable based on his expectation that it would take Wife "a few years to build up a client base." Wife, on the other hand, requested long-term alimony in the amount of \$8,500 per month and stated that she did not believe she could get by on less than \$6,500 per month. She expressed a desire to maintain a similar lifestyle to the one she had pre-divorce, which included going on trips and eating at restaurants "a lot." Wife also provided the court with an income and expense statement, detailing her expected financial needs. She reported that she expected her post-divorce total monthly expenses to be somewhere between \$4,714.08 and \$5,041.08, depending on the cost of her rent or mortgage payment.

The trial court found that the "testimony established that [Wife's] work [outside the home] was sporadic and that relative to Husband's financial contributions, Wife's contributions were negligible." During the marriage, Wife was the primary caregiver for the children and the primary homemaker. With respect to the parties' ability to earn a living, the trial court found that Husband's "most recent pay record reveals that his rate of pay is in excess of \$430,000 annually" and that "[n]othing in the proof at trial indicates that there is any reason to believe that Husband's income will change significantly in the near future." The court also found that Wife "credibly testified that she anticipates earning approximately \$15,000 annually until her clientele is established."

The trial court then made its division of the parties' marital debts and personal property, assigning the majority of both to Husband. Next, the court then weighed the relevant factors⁴ with respect to alimony under Tennessee Code Annotated § 36-5-121(i)

²Presumably, Husband was referring to the \$2,950 per month *pendente lite* support.

³Husband used the term "transitional alimony" after affirmatively answering a question regarding whether he believed Wife would have a need for "rehabilitative alimony." Our review of the record indicates that it was simply Husband's position that Wife not be awarded long-term alimony.

⁴The court specifically considered the following factors of § 36-5-121(i):

and reasoned that

Given the astronomical disparity in earning capabilities between the Husband and the Wife, the court finds that the Wife is at an economic disadvantage and has a need for alimony. Further, the Husband has the ability to pay alimony. The court takes the allocation of marital property and debt into account in making the following award of alimony, and specifically the cash sums awarded to Wife as division of the marital estate. Finally, given the Wife's age and limited education and work experience, the court finds that this is a case for support on a long-term basis.

The court then awarded Wife alimony *in futuro* in the amount of \$5,400 per month until the death of either of the parties, or remarriage of the Wife, whichever occurred first. Additionally, the court awarded Wife her reasonable attorney's fees as alimony *in solido*. Husband appealed.

Issues Presented

Husband presents the following issues on appeal, which we have slightly reworded:

- I. Whether the trial court erred in ordering Husband to pay Wife alimony *in futuro*.
- II. Whether the amount of alimony awarded to Wife was unreasonable and unsupported by the evidence.

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- (1) 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;
 - (2) 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 earnings capacity to a reasonable level;
 - (3) The duration of the marriage;
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 - (8) The provisions made with regard to marital property, as defined in § 36-4-121;
 - (9) The standard of living of the parties established during the marriage;
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 - (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
 - (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Discussion

We first address Husband's argument that the trial court erred in awarding Wife alimony *in futuro*, rather than awarding her some form of short-term alimony. The Tennessee Supreme Court recently articulated the standard of review applicable to a trial court's decision on matters of alimony:

For well over a century, Tennessee law has recognized that trial courts should be accorded wide discretion in determining matters of spousal support. *See Robinson v. Robinson*, 26 Tenn. (7 Hum.) 440, 443 (1846) ("Upon a divorce . . . the wife is entitled to a fair portion of her husband's estate for her support, and the amount thus to be appropriated is a matter within the legal discretion of the chancellor . . ."). This well-established principle still holds true today, with this Court repeatedly and recently observing that trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of the award. *See, e.g., Bratton v. Bratton*, 136 S.W.3d 595, 606 (Tenn. 2004); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000).

Equally well-established is the proposition that a trial court's decision regarding spousal support is factually driven and involves the careful balancing of many factors. *Kinard v. Kinard*, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998); *see also Burlew*, 40 S.W.3d at 470; *Robertson v. Robertson*, 76 S.W.3d 337, 340–41 (Tenn. 2012). As a result, "[a]ppellate courts are generally disinclined to second-guess a trial judge's spousal support decision." *Kinard*, 986 S.W.2d at 234. Rather, "[t]he role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable." *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006). Appellate courts decline to second-guess a trial court's decision absent an abuse of discretion. *Robertson*, 76 S.W.3d at 343. An abuse of discretion occurs when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes and injustice. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010). This standard does not permit an appellate court to substitute its judgment for that of the trial court, but "reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives" and thus "envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision

will be reversed on appeal.” *Henderson*, 318 S.W.3d at 335 (quoting *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). Consequently, when reviewing a discretionary decision by the trial court, such as an alimony determination, the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision. *Wright*, 337 S.W.3d at 176; *Henderson*, 318 S.W.3d at 335.

Gonsewski v. Gonsewski, 350 S.W.3d 99, 105-06 (Tenn. 2011) (footnote omitted).

The *Gonsewski* court then discussed the different kinds of alimony available under Tennessee law. “[A]limony *in futuro*, also known as periodic alimony, is intended to provide support on a long-term basis or until the death or remarriage of the recipient.” *Gonsewski*, 350 S.W.3d at 107 (citing Tenn. Code Ann. § 36-5-121(f)(1)).

Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that the disadvantaged spouse is unable to achieve, with reasonable effort, an earning capacity that will permit the spouse’s standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(f)(1). However, an award of alimony *in futuro* is “not a guarantee that the recipient spouse will forever be able to enjoy a lifestyle equal to that of the obligor spouse.” *Gonsewski*, 350 S.W.3d at 108 (citing *Riggs v. Riggs*, 250 S.W.3d 453, 456 n.2 (Tenn. Ct. App. 2007)). “While enabling the spouse with less income ‘to maintain the pre-divorce lifestyle is a laudable goal,’ the reality is that ‘[t]wo persons living separately incur more expenses than two persons living together.’” *Gonsewski*, 350 S.W.3d at 108 (citing *Kinard*, 986 S.W.2d at 234). The Court also noted that “[i]n most divorce cases, it is unlikely that both parties will be able to maintain their pre-divorce lifestyle.” *Id.* Therefore, “[i]t is not surprising . . . that ‘the prior concept of alimony as lifelong support enabling the disadvantaged spouse to maintain the standard of living established during the marriage has been superseded by the legislature’s establishment of a preference for rehabilitative alimony.’” *Id.* (quoting *Robertson*, 76 S.W.3d at 340).

In contrast to alimony *in futuro*, rehabilitative and transitional alimony are short-term types of spousal support. Rehabilitative alimony is “intended to assist an economically disadvantaged spouse in acquiring additional education or training which

will enable the spouse to achieve a standard of living comparable to the standard of living that existed during the marriage or the post-divorce standard of living expected to be available to the other spouse.” *Gonsewski*, 350 S.W.3d at 108; *see* Tenn. Code Ann. § 36-5-121(e)(1); *see also* *Robertson*, 76 S.W.3d at 340-41; *Riggs*, 250 S.W.3d at 456 n.4. Transitional alimony, on the other hand, “is appropriate when the court finds that rehabilitation is not required but that that the economically disadvantaged spouse needs financial assistance in adjusting to the economic consequences of the divorce.” *Gonsewski*, 350 S.W.3d at 109 (*citing* Tenn. Code Ann. § 36-6-121(d)(4), (g)(1); *Riggs*, 250 S.W.3d at 456 n.5.

As noted in *Gonsewski*, “[t]he statutory framework for spousal support reflects a legislative preference favoring short-term spousal support over long-term spousal support, with the aim being to rehabilitate a spouse who is economically disadvantaged relative to the other spouse” *Gonsewski*, 350 S.W.3d at 109. Indeed, Tennessee Code Annotated section 36-5-121(d)(2) states that “[i]t is the intent of the general assembly that a spouse, who is economically disadvantaged relative to the other spouse, be rehabilitated, wherever possible, by the granting of an order for payment of rehabilitative alimony.” However, as this Court recently noted in *Owens v. Owens*, No. M2012-01186-COA-R3-CV, 2013 WL 3964793, at *3 (Tenn. Ct. App. July 30, 2013), and reiterated in *Barnes v. Barnes*, No. 2012-02085-COA-R3CV, 2014 WL 1413931, at *29 (Tenn. Ct. App. Apr. 10, 2014), *perm. app. denied* (Tenn. Sept. 18, 2014), “[i]n determining how to measure a former spouse’s economic rehabilitation, or its feasibility, it is important to note that the legislature has supplied the definition courts are to use[.]” According to the statute,

To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse’s standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(d)(2). Thus, as stated in *Barnes*, “[t]he basic question, then, is whether Wife can generate enough income to provide a pre-divorce standard of living, or one comparable to Husband’s post-divorce standard of living.” *Barnes*, 2014 WL 1413931, at *29; *see also* *Owens*, 2013 WL 3964793, at *3.

Husband argues that the trial court did not make any specific factual findings that Wife “could not achieve self-sufficiency and that economic rehabilitation was not feasible.” However, as this Court noted in *Salvucci v. Salvucci*, No. W2013-01967-COA-R3-CV, 2014 WL 4201441, at *8 n.4 (Tenn. Ct. App. Aug. 26, 2014), the old

standard of self-sufficiency, as popularized by *Crabtree v. Crabtree*, 16 S.W.3d 356 (Tenn. 2004), “has been largely legislatively abrogated.” *Salvucci*, 2014 WL 4201441, at *8 n.4 (citing *Wiser v. Wiser*, 330 S.W.3d 1, 16-17 (Tenn. Ct. App. 2010), *perm. app. denied* (Tenn. Feb. 16, 2011)). Indeed, the term “self-sufficient” is found nowhere in the statute. Rather, we are to be guided by the legislature’s definition of rehabilitation, which “explicitly emphasizes consideration of the parties’ pre-divorce and post-divorce standard of living” *Salvucci*, 2014 WL 4201441, at *8 n.4. On the other hand, Husband is correct that the trial court’s order does not explicitly find that economic rehabilitation is not feasible. Before a trial court can make an award of alimony *in futuro*, it must make a finding that “economic rehabilitation is not feasible and long-term support is necessary.” *Gonsewski*, 350 S.W.3d at 109 (citing *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Robertson v. Robertson*, 76 S.W.3d 337, 341-42 (Tenn. 2002)). Entirely absent from the trial court’s order is any finding regarding economic rehabilitation or analysis of whether Wife is a candidate for rehabilitative or transitional alimony or temporary alimony *in solido*. Accordingly, we vacate the trial court’s order with respect to its award of alimony *in futuro* and remand for the court to make additional findings and reconsider its award of alimony in light of those findings.

Next, Husband argues that the amount of alimony awarded to Wife is unreasonable and unsupported by the evidence. In determining the amount of spousal support, courts must consider all relevant factors listed in Tennessee Code Annotated section 36-5-121(i), however “the two that are considered the most important are the disadvantaged spouse’s need and the obligor spouse’s ability to pay.” *Gonsewski*, 350 S.W.3d at 110 (citations omitted). In his brief, Husband specifically argues that his average monthly expenses of \$12,510 per month (including the *pendente lite* support) exceed his 2015 net monthly income of \$9,866 and that the trial court’s award of \$5,400 per month would result in Husband’s monthly expenses totaling about \$14,960 per month, “leaving him with an even larger deficit to pay his monthly mortgage/rent” First, we note that Husband drastically understates his monthly income in his appellate brief. The record actually shows that Husband earns \$35,925 per month and \$16,131 in total net monthly income. Thus, the trial court’s award of \$5,400 per month remains within Husband’s ability to pay.

Husband also argues that Wife was awarded more alimony than her demonstrated need. We agree. Wife’s income and expense statement revealed total expenses between \$4,714.08 and \$5,041.08, depending on Wife’s anticipated rent and/or mortgage payments. Husband was ordered to pay Wife’s \$357 automobile loan in the final decree of divorce, which reduces her stated need. Although we are “generally disinclined to second-guess a trial judge’s spousal support decision,” *Kinard v. Kinard*, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998), here the evidence preponderates against the trial court’s award of \$5,400 per month. Although Husband has the ability to pay, the trial court’s

award exceeds even Wife's highest estimate of her own expenses. Therefore, we vacate the order of the trial court only with respect to the amount of alimony awarded and remand for the trial court to make an award consistent with the Wife's actual need.

Conclusion

For the foregoing reasons, the judgment of the trial court is vacated and remanded to the trial court for additional proceedings consistent with this opinion. Costs of this appeal are taxed to the Appellant, David Kyle Wills, and his surety, for which execution may issue if necessary.

BRANDON O. GIBSON, JUDGE