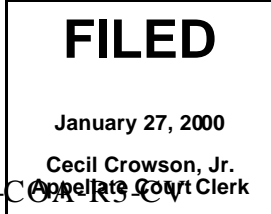


IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE



PATSY KAY REYNOLDS,

Plaintiff-Appellee,

vs.

JAMES LEE REYNOLDS,

Defendant-Appellant.

) C/A NO. E1999-00380-COAR-10
)
)
) HON. JACQUELINE SCHULTEN,
) JUDGE
)
)
) AFFIRMED AS
) MODIFIED

SANDRA J. BOTT, Chattanooga, for Plaintiff-Appellee.

PHILLIP C. LAWRENCE, LAWRENCE, LAWRENCE & GERBITZ, PLLC,
Chattanooga, for Defendant-Appellant.

OPINION

Franks, J.

On appeal, the husband questions the award of child support, and the Trial Court's awarding attorney's fees to the wife.

The parties were married in 1977, and three children were born to the marriage. When the parties separated in 1997, the older child resided with the husband, and the two younger children remained in the home with the mother.

The Trial Judge, in arriving at the amount of child support awarded from the wife, based the amount on the husband's earning capacity, and deviated upward from the child support guidelines. The husband insists that defendant's actual earnings should be the basis for awarding child support, and the Trial Judge also failed to make written findings that the deviation was appropriate.

At the time of the divorce, both parties were 43 years of age. The wife was the director of Undergraduate Admissions at the University of Tennessee at Chattanooga, with a salary of approximately \$49,500.00.

The husband had two sources of income. He worked for Radio of Chattanooga, WGOW FM, on the air from 6:00 am through 10:00 am, and his annual salary from Radio of Chattanooga is \$26,000.00. Additionally, he owns J. R. Sports Productions, through which he broadcasts the "Chattanooga Mocs" football and basketball games, and does a coach's show on both radio and television.

The husband has broadcast UTC games since 1980, originally working for WGOW AM. After about 13 years, the station sold the contract for the games to husband, who broadcast the games through J. R. Sports Productions for three seasons. After this time, Creative Resources, Inc. ("CRI"), started a new venture called Mocs Marketing under the CRI umbrella, and asked the husband to bring the radio rights to the new venture and become an employee of CRI. After being employed by CRI for three seasons, CRI and the University decided to end their contract, and Mocs Marketing ceased to operate in March of 1998. The husband then negotiated and signed a contract with the University to broadcast the games through his own business.

While employed by CRI, the husband's income from that contract was approximately \$27,000.00 per year. He estimated at the time of trial that anticipated profit for 1998 through June 1999 was \$15,665.00. However, he also stated that his earnings from J. R. Sports during the previous time he had independently contracted to broadcast the games had been comparable to his earnings from CRI.

Our review regarding the Trial Court's fact finding is *de novo* accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.R.A.P. Rule 13(d).

The Trial court awarded child support to the wife in the amount of \$936.00 per month for the care, maintenance and support of the two children residing with her. The award, as stated in the final judgment "represents \$836.00 pursuant to the Tennessee Department of Human Services Guidelines plus \$100.00 per month additional support." The Trial Court found the husband had the "earning ability, the capacity to earn \$50,000.00 a year," and the Court used that figure to set child support.

In this case, the husband could not supply a concrete figure as to his income for the year of trial. Because he had just switched to broadcasting the games through his own company, he could offer not more than a prediction as to his income for that year from J. R. Sports Productions. The Trial Court looked at his salary in the past, including that earned by the husband when he broadcast through his own company before joining with CRI, and determined that the husband's income had been, and would likely return to, a combined total of around \$50,000.00 for both jobs. We find no abuse of discretion by the Trial Judge, who properly assigned a concrete figure

to an otherwise potentially variable income, and it is well settled that earning capacity is a proper basis to make the award.

The Trial Court awarded \$100 additional child support, due to the Court's finding that the husband did not have the two children with him for the time contemplated by the Child Support Guidelines. Tenn. Comp. R. and Reg. Title 10, Ch. 1240-2-4.02(6) states:

These guidelines are designed to apply to situations where children are living primarily with one parent but stay overnight with the other parent at least as often as every other weekend from Friday to Sunday, two weeks in the summer and two weeks during holidays throughout the year.

If the visitation differs from the standard amount, a trial court may make an upward or downward deviation in child support based on the actual time spent with the children.

The parenting plan adopted by the Court provided that two of the three children would reside with the wife, but the Husband would have the two girls after school on Tuesdays and Thursdays until 8:00 pm and every other weekend from after school Friday through 6:00 pm on Sunday. The schedule would remain the same through the summer and holidays. However, the husband's employment as the radio announcer for the Mocs football and basketball games require his traveling out of town many weekends during the year. The wife testified that from "the first of August through March, he was primarily gone." The husband agreed that his employment included "out-of-town obligations."

Husband argues the additional \$100 was inappropriate because the Judge did not make written findings indicating that the application of the guidelines would be

unjust or inappropriate, citing T.C.A. § 36-5-101(e)(1).

The husband's argument fails because the Trial Judge stated in her Final Judgment that the findings of fact and conclusions of law contained in her Memorandum Opinion, are "incorporated by reference into this final judgment as completely as if copied verbatim herein." In the bench opinion the Trial Judge said:

I do believe based upon the proof, at least as it exists today, . . . that you are having less than what's anticipated in the guidelines in terms of setting support, in terms of visitation or parenting time or whatever you want to call it, so I'm increasing the child support obligation by \$100 per month.

The foregoing satisfies the intent of the Statute. We have previously addressed these particular circumstances for requisite "written findings". In *Koch v. Koch*, 874 S.W.2d 571 (Tenn. Ct. App. 1993), the Western Section said:

The trial court deviated from the child support guidelines and stated for the transcribed record that the deviation was due to the enlarged visitation schedule he painstakingly prepared. The evidence does not preponderate against the trial court's finding that a deviation should be made and that the deviation made was proper. Although the trial court properly should have made a written finding concerning the reason for the deviation, the oral pronouncement by the court subsequently transcribed should suffice in this instance rather than sending this prolonged, hotly contested case back to the trial court solely for the purpose of written findings.

Koch, 874 at 578.

The evidence does not preponderate against the Trial Judge's findings that a deviation from the guidelines was appropriate. T.R.A.P. Rule 13(d).

Finally, the husband argues that the Trial Court's award of \$2,500.00 plus expenses, to the wife was not appropriate.

In divorce actions, awards of attorney's fees are treated as alimony. *Gilliam v. Gilliam*, 776 S.W.2d 81, 86 (Tenn. Ct. App.1988). In determining whether to award attorney's fees, the trial court should consider the relevant factors in T.C.A. §36-5-101(d)(1), which factors govern the award of alimony. *Houghland v. Houghland*, 844 S.W.2d 619, 623 (Tenn. Ct. App.1992). If a spouse is financially unable to afford counsel, and the other spouse has the ability to pay, the court may properly order the other spouse to pay attorney's fees. *Harwell v. Harwell*, 612 S.W.2d 182, 185 (Tenn. Ct. App.1980). The husband insists that because the relative earning capacity of and the property awarded to each party was relatively equal, the award of attorney's fees as alimony was an abuse of discretion.

As a general rule, if a spouse is possessed of adequate property and income to pay for legal services, the award of attorney's fees is inappropriate. *Wade v. Wade*, 897 S.W.2d 702, 719 (Tenn. Ct. App. 1994); *Barnhill v. Barnhill*, 826 S.W.2d 443, 456 (Tenn. Ct. App.1991); *Duncan v. Duncan*, 686 S.W.2d 568, 573 (Tenn. Ct. App.1984).

The wife counters that she does not have the capacity to pay her attorney's fees because she did not receive any liquid assets, whereas the husband received cash assets. The evidence does not support her contention. Both parties have roughly equivalent incomes, and both parties received primarily non-cash assets, including investment accounts and tangible property. Moreover, as a result of a miscalculation on the part of the Trial Judge, the wife is due to receive an additional \$5,368.00 from the husband pursuant to the Amended Decree. The record establishes

the wife can afford her own legal representation.

As the wife contends, the relative income and ability to pay are only a few factors to be considered in awarding attorney's fees. The Court may also consider the relative fault of the parties. *See Massey v. Massey*, 621 S.W.2d 728 (Tenn. 1981). In this case, the Trial Judge focused on the husband's "flagrant transgressions during the marriage [that] impeded the normal progression of settlement negotiations between the parties as to all issues, including shared parenting." In *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992), the Court addressed the question of which factors should be considered in a decision regarding attorney's fees:

[T]he appellate courts have not necessarily been consistent in identifying the considerations on which these discretionary decisions should be made. Some panels follow the criteria used to award legal expenses in divorce proceedings and refuse to approve awards in the absence of proof that the party requesting the fees is unable to pay his or her lawyer. *Johnson v. Johnson*, App. No. 01-A-01-9103-CV-00107, slip op. at 13, 16 T.A.M. 39-10, 1991 WL 169568 (Tenn.Ct.App. Sept. 4, 1991) (citing *Fox v. Fox*, 657 S.W.2d 747 (Tenn.1983)). Others have approved awards even in the absence of proof of inability to pay and have pointed out that ability to pay is not a prerequisite for awarding legal expenses under Tenn.Code Ann. § 36-5-103(c).

...

Sherrod at 785.

The *Sherrod* Court held that while it is a factor to be considered, the trial courts may award attorney's fees without proof that the requesting party is unable to pay them as long as the award is just and equitable under the facts of the case. The purpose of these awards is to protect the children's, not the custodial parent's, legal remedies. Accordingly, requiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to

be unwarranted is appropriate as a matter of policy.

Sherrod, at 785.

In this case, the Trial Judge based the attorney's fees award on the marital misconduct of the Husband and stated this misconduct impeded the negotiations process. However, the evidence preponderates against this finding. T.R.A.P. Rule 13(d). While the husband admitted the transgressions during the marriage, there is little evidence that this had a significant adverse effect on negotiations beyond those that would be normally found in a contested divorce. The Trial Judge commended the parties on being able to resolve the issue of parenting in four or five hours of mediation, and also commended the parties and their respective attorneys on their conduct throughout the proceedings.

We conclude on the evidence that it was inappropriate to award attorney's fees to the wife in this case.

The wife also argues that she should be awarded costs and attorney's fees on appeal. We find this request to be without merit.

The judgment of the Trial Court is affirmed, as modified, with costs of the appeal assessed one-half to each party.

Herschel P. Franks, J.

CONCUR:

Charles D. Susano, Jr., J.

D. Michael Swiney, J.