

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

GEORGIA "SUE" PARKEY,

Plaintiff-Appellant,

Vs.

Sumner Circuit No. 17315-C

C.A. No. M1999-00015-COA-R3-CV

LAMONT G. PARKEY,

Defendant-Appellee.

FROM THE SUMNER COUNTY CIRCUIT COURT
THE HONORABLE THOMAS GOODALL, JUDGE February 11, 2000

FILED
Cecil Crowson, Jr.
Appellate Court Clerk

Robert G. Ingrum; Phillips & Ingrum of Gallatin
For Appellant

Wayne Detring of Hendersonville
For Appellee

AFFIRMED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This is a divorce case. Plaintiff, Georgia Sue Parkey (Wife), appeals the decree of the trial court awarding divorce to defendant, Lamont G. Parkey (Husband), and *inter alia* awarding Wife \$500.00 per month rehabilitative alimony.

The parties were married on September 19, 1979. There were two children born of the marriage, Erin Monet Parkey, age 12, at the time of trial, and Tyler Lamont Parkey, age 8, at the time of trial. During the marriage, Husband was employed as a professional musician and traveled with various country music artists. Although Wife was employed during most of the marriage, Husband provided the majority of the parties' income. Husband's income was approximately \$124,533.00 in 1997 and \$105,586.00 in 1998. Wife has a high school diploma and has completed a few computer courses. She was employed by U.S. Airways for 13 years and 5 months as a reservation agent. She also held temporary positions during the marriage and worked out of the home typing transcripts. At the time of trial, Wife was employed with J.C. Bradford with a gross salary of \$24,000.00 in 1998.

Wife filed a complaint for absolute divorce on August 28, 1997, alleging inappropriate marital conduct and irreconcilable differences. The parties were separated on April 16, 1998, when Husband vacated the marital home. Husband was not served with process until May 5, 1998. Husband's answer and counter-complaint denies Wife's allegations and alleges inappropriate marital conduct on Wife's part due to her relationship with Scott Jones, a twenty-four year old man. Husband avers that since February of 1997, Wife has had Scott Jones as a boyfriend and has "given him an inappropriate amount of attention, despite the Husband's many protest, and despite the advice of the parties' marriage counselor." Husband claims to have made good faith efforts to save the marriage, including participating in marriage counseling.

On August 27, 1998, an order of reconciliation was entered. Subsequent to that order, Husband hired a private investigator and learned that Wife had continued her relationship with Scott Jones. On September 16, 1998, Husband informed Wife, through his attorney, that he wanted to proceed with the divorce.

By agreed order entered December 16, 1998, the parties were divorced, but the trial court reserved all other issues, including the question of fault, for a final hearing. On February 23 and 24, 1999, the case was tried by the trial court sitting without a jury. Wife testified to monthly expenses of \$5,185.85 for herself and the two minor children, which does not include monthly reimbursement that Husband is to make to Wife of \$156.50 for health insurance on the minor children and \$44.10 for his share of life insurance premiums. Husband testified to monthly expenses of \$3,814.73, which includes payment of loans obtained to pay Wife for her equity in the house.

Proof was introduced concerning Wife's frequent telephone contacts with Mr. Jones. Also, proof was introduced that Wife and Mr. Jones went dancing together on many occasions, and on several occasions, they made out of town trips together and stayed in the same hotel room. Both Wife and Mr. Jones in their testimony denied that they ever had a sexual relationship at any time. They claimed that they were just good friends. Wife testified concerning Husband's negative attitude toward her and inappropriate conduct on his part, including receiving gifts from a female admirer, and on one occasion coming home from a road-trip with what she termed a sexually transmitted disease.

The parties reached an agreement as to all issues involved in the case, except which party would be entitled to the divorce and the issue of Wife's alimony. At the conclusion of the proof, the court determined that Wife was the cause of the breakup of the marriage and that she was entitled to rehabilitative alimony, which the trial court set at \$500.00 per month for thirty-six months. Wife has appealed and presents three issues for review as stated in her brief:

- 1.) Whether the trial court erred in its award of \$500.00 per month rehabilitative alimony instead of alimony *in futuro* in an amount sufficient to meet the plaintiff/appellant's needs and retain some semblance of the lifestyle she and the minor children were accustomed to living?
- 2.) Whether the trial court erred in awarding the defendant/appellee the final divorce based upon the fault of the plaintiff/appellant?
- 3.) Whether plaintiff/appellant should be awarded attorney's fee in the prosecution of this appeal?

We will first consider Wife's second issue for review wherein she asserts that the trial court erred in finding that she was the cause of the marriage breakup. Wife contends that the trial court erred in awarding Husband the divorce and that she should have been awarded the divorce. While acknowledging that her friendship with Scott Jones was improper, Wife asserts that this wrong is not sufficient to overcome the indignities that she suffered over the course of the marriage. In her brief, Wife notes testimony that enumerates such indignities including: phone calls, cards, and gifts from Husband's women admirers; Husband's failure to call his daughter when out of town on her birthday, while he did call another woman; Husband's bringing home a sexually transmitted disease which he claimed to have caught from dirty bedding; physical abuse; false accusations of Wife's going with other men; Husband's despicable attitude toward women revealed in his writings arising out of his involvement with the Church of Scientology; Husband's contempt for Wife's personality; verbal abuse; and Husband's admitted abuse of alcohol which caused Wife embarrassment and

humiliation.

Wife's deposition testimony introduced at trial is a candid appraisal of the cause of this divorce:

Q. Do you feel like you have been guilty of any inappropriate marital conduct yourself?

A. Inappropriate to Monty? Yes. And inappropriate to me. In the fact to me, that if I wanted to stay married to Monty then I should have not continued to go dancing or continue to have contact with Mr. Jones. And I'm sorry for that. I didn't intend for my marriage to break up over Mr. Jones or anybody else.

Q. So if the incident with Mr. Jones, had it not been a major deal with Mr. Parkey, as far as you know you would still be living together and married?

A. I believe so.

The trial court's findings of fact in the decree state:

1. The cause of the breakup of the marriage and family is the Wife's persistent improper relationship with Mr. Scott Jones and her refusal to terminate this relationship despite her many agreements and promises to do so, both to her husband and to the marriage counselor. This affair of the Wife constitutes inappropriate marital conduct, and the Wife is therefore judged to be at fault.

2. But for the Wife's relationship with Mr. Scott Jones, the parties would still be living together and married, as admitted by the Wife.

3. The Wife spent much time together with Mr. Jones, a 24 - year old man who lives in Joelton, Tennessee. She went on several trips with him, including a trip to Atlantic City, where she spent the night in a hotel room with him in the same bed, trips to Las Vegas, Evansville, Indiana, and Memphis, Tennessee. She also went dancing with him on a regular basis, including a twelve hour trip to Cookeville, Tennessee, to go dancing. The Wife spent at least one night alone with Mr. Jones in a chalet in Gatlinburg, Tennessee, in April 1997, when the Wife was aware that the Husband's mother was seriously ill and close to death. The Wife and Mr. Jones exchanged many thousands of telephone calls and pages. Most of this activity occurred during the time Mr. Parkey was trying to salvage the marriage through counseling and during a time when Mrs. Parkey had agreed never to see Mr. Jones again. The Wife did all she could to keep her continuing relationship with Mr. Jones a secret from the Husband.

4. The Wife lied under oath in her deposition when she testified that she had never been to Gatlinburg with Mr. Jones. At trial, based on the photographic exhibits and other evidence, the Wife now admits that she went to Gatlinburg with Mr. Jones...

The trial court noted that the testimony of both Wife and Mr. Jones was incredible concerning their relationship and indicated in the findings that the trial court seriously questioned Wife's credibility concerning her testimony regarding the Gatlinburg trip. 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. **Town of Alamo v. Forcum-James Co.**, 205 Tenn. 478, 327 S.W.2d 47 (1959); **Sisk v. Valley Forge Ins. Co.**, 640 S.W.2d 844 (Tenn. Ct. App. 1982). Our review of the record does not reveal that the evidence in this case preponderates against the finding of the trial court that the breakup of the marriage was caused by Wife.

In Wife's first issue, she asserts that the trial court erred in its award of rehabilitative alimony instead of alimony *in futuro*. Wife asserts that the rehabilitative alimony awarded by the trial court does not approach equity with the Husband, nor does it afford the enjoyment of a lifestyle and economic position similar to what she and the children enjoyed during the marriage. Wife asserts that the evidence in this case establishes that Wife was not a candidate for economic rehabilitation and that an award of long-term support was appropriate.

Wife acknowledges that although fault is one of the factors set forth in T.C.A. § 36-5-101(d)(1), she points out that the need of the payee spouse and the ability to pay of the payor spouse are the dominant factors to consider. She also asserts that she was not the cause of the marriage breakup, and therefore her fault should not be considered in awarding alimony, but we have already resolved this assertion.

Trial courts have broad discretion in awards for alimony. **Jones v. Jones**, 784 S.W.2d 349, 352 (Tenn. Ct. App. 1989). Appellate courts are not inclined to alter a trial court's determination of alimony unless the trial court's discretion has been manifestly abused. **Herrera v. Herrera**, 944 S.W.2d 379, 387 (Tenn. Ct. App. 1996). Determinations concerning the duration and amount of rehabilitative alimony are factually driven and require a balancing of the many factors contained in T.C.A. § 36-5-101(d)(1). That statute provides in part:

It is the intent of the general assembly that a spouse who is economically disadvantaged, relative to the other spouse, be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance. Where there is such relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors, including those set out in this subsection, then the court may grant an order for payment of support and maintenance on a long-term basis or until the death or remarriage of the recipient except as otherwise provided in subdivision (a)(3). Rehabilitative support and maintenance is a separate class of spousal support as distinguished from alimony *in solido* and periodic alimony. In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors....

T.C.A. 36-5-101(d)(1) (1996). The need of the payee spouse and the ability to pay of the payor spouse are two dominant factors to consider when deciding a proper award

of alimony. **Kincaid v. Kincaid**, 912 S.W.2d 140, 146 (Tenn. Ct. App. 1995).

In **Self v. Self**, 861 S.W.2d 360 (Tenn. 1993), our Supreme Court stated:

[T.C.A. § 36-5-101(d)(1)] reflects an obvious legislative policy that, if possible, the dependency of one ex-spouse on the other be eliminated and both parties be relieved of the impediments incident to the dissolved marriage, and that an ex-spouse be adjudged permanently dependent upon the other only when the court granting the divorce finds that economic rehabilitation is not feasible and long-term support is necessary.

Id. At 361.

The preference for rehabilitative alimony is reiterated by the Court in **Kincaid**, which held that the trial court should only award alimony *in futuro* when rehabilitation of the payee spouse is not feasible. **Id.** At 143-44; **see also Storey v. Storey**, 835 S.W. 2d 593, 597 (Tenn. Ct. App. 1992). The trial court must make a threshold determination that, considering all the relevant factors, rehabilitation of the disadvantaged spouse is not feasible. **Kincaid**, 912 S.W.2d at 144.

The fault of a spouse in bringing about the divorce is also a consideration when determining an alimony award. T.C.A. § 36-5-101(d)(1)(K); **Gilliam v. Gilliam**, 776 S.W.2d 81, 86 (Tenn. Ct. App. 1988). In **Mimms v. Mimms**, 780 S.W.2d 739 (Tenn. Ct. App. 1989), the wife argued on appeal that she needed long term support as she was economically disadvantaged and could not be rehabilitated. The divorce had been granted to the husband for the fault of the wife. The **Mimms** Court held that the wronged spouse is not required to continue to support the guilty spouse in the manner in which she was supported prior to the divorce. **Id.** At 745.

We believe that the trial court correctly determined that Wife should be awarded some alimony. The record supports the trial court's finding that Husband has an ability to pay and that Wife is in need of some support.

The evidence in the record does not preponderate against the trial court's award of rehabilitative alimony. The record reveals that Wife is forty-six years old and has a high school diploma with some on-the-job computer training. During most of the marriage, Wife has been gainfully employed in relatively responsible positions. It is conceivable that with some further training, Wife could increase her income. Therefore, in accordance with the legislative preference for rehabilitative alimony, **Self, supra**, we agree with the trial court that Wife should receive rehabilitative alimony instead of alimony *in futuro*.

Furthermore, we do not believe that the alimony award to Wife must sustain the comfortable lifestyle that she enjoyed before the divorce. Considering Wife's fault, we believe that \$500.00 a month for thirty-six months is sufficient to assist Wife to re-

establish herself following the divorce. A spouse who is at fault in a divorce need not be maintained in the same manner as before the divorce. **See *Mimms, supra***. We find this holding to be applicable to the case at bar.

Finally, Wife requests that this Court award attorney's fees in prosecuting this appeal. The trial court ordered both parties to pay their own attorney fees, and Wife has not appealed this ruling as to attorney fees. In light of the fact that Wife has been unsuccessful on appeal, Wife's request for attorney's fees on appeal is denied.

The judgment of the trial court is affirmed in all respects, and the case is remanded to the trial court for such further proceedings as are necessary. Costs of the appeal are assessed against the appellant, Georgia, "Sue" Parkey.

W. FRANK CRAWFORD, P.J., W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE