

STELLA ROETGER,)
)
 Plaintiff/Appellee,)
)
 VS.)
)
 DAVID A. ROETGER,)
)
 Defendant/Appellant.)

Appeal No.
01-A-01-9507-CV-00327

Sumner Circuit
No. 13634-C

FILED

February 28, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF SUMNER COUNTY
AT GALLATIN, TENNESSEE

THE HONORABLE THOMAS GOODALL, JUDGE

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

OPINION

The trial court granted Mrs. Roetger an absolute divorce and custody of the parties' minor child. The court also divided the marital property, and ordered Mr. Roetger to pay child support, rehabilitative alimony and attorney fees. Mr. Roetger appealed the award of alimony and attorney fees. We affirm the trial court.

I.

The parties had been co-workers at a Peterbilt Motors facility in California. They began a relationship that resulted in the birth of a son, Joshua, in 1979. Early in their relationship the couple lived in the wife's apartment, with a child from the wife's earlier marriage and the husband's two children from his own earlier marriage. Six months prior to the 1984 marriage between the parties, they bought a home in both their names, using for down payment \$15,000 that the husband had received through a previous divorce settlement.

In 1986 Peterbilt transferred the Roetgers from California to Tennessee. With the equity from the sale of their California home as down-payment, they were able to qualify for a mortgage loan on a house with a present fair market value of about \$205,000. Mr. Roetger subsequently enrolled as a part-time student at Trevecca Nazarene College in Nashville. The wife, a high school graduate, continued to work and take care of the children. Mr. Roetger also continued to work, and was able to attend classes at night. He ultimately earned his degree.

In 1993, the husband left the marital home to cohabit with another woman, and stayed away for one year. During that year he contributed \$1,288 per month, the amount of the mortgage payment, to Mrs. Roetger, but he did not support the household in any other way. The wife remained responsible for the living

expenses and the care of both Joshua and Mr. Roetger's son, David, (the older children having grown up and moved away) and for upkeep on the house and the automobile.

When Mr. Roetger returned to the marital home, he continued to contribute only the amount of the mortgage payments to the support of his family. On November 18, 1994, Mrs Roetger filed for divorce. A pendente lite order obligated the husband to pay the wife \$533 monthly for child support and \$470 for alimony, and to vacate the marital home.

The case came up for hearing on March 22, 1995. The parties stipulated that the wife was entitled to divorce on the ground of adultery, and that she was to have custody of Joshua, and child support in accordance with the guidelines, which was found by the court to be \$574 per month. She was also granted rehabilitative alimony, in the amount of \$470 per month, until Joshua graduates from high school. The court divided the marital estate between the parties, with the wife receiving property with a total value of \$72,071.14, and the husband receiving property with a total value of \$61,467.89. The court also awarded the wife her attorney fees, in the amount of \$5,022.25

II.

Mr. Roetger's primary objections are related to the trial court's disposition of the parties' interest in the marital home. The court permitted the wife to continue to live in the marital home until Joshua graduates from high school. At that time, the wife will either have to sell the home and from the proceeds pay the husband his share of the equity (which the court fixed at \$26,253.64), or keep the home and pay the husband the same amount for his interest in the residence.

The husband argues that ownership of the home might have made sense when both parties were living together and sharing expenses, but that it is entirely too expensive for the wife to maintain on her income alone. He notes that the wife would be unable to make the mortgage payments without the alimony he has been ordered to pay, and he argues that an award of rehabilitative alimony for such a purpose is inconsistent with the act by which the Legislature established this form of spousal support.

Mrs. Roetger testified that Joshua had been in the marital home since he was seven years old, that at the time of trial he was fourteen years old and a freshman in high school, that he had many friends in the neighborhood and in his school, and that if he had to move out, it would have a detrimental effect on him.

We note that an immediate sale of the marital home is frequently ordered in divorce cases, often because it is the only way for the trial court to achieve an equitable division of the prime marital asset, without placing an impossible financial burden on either of the parties. In such cases, though the sale of the home may disrupt the life of one of the parties more than is desirable, this is considered an acceptable price to pay, to enable the parties to disentangle their finances and their lives from each other as much as is possible.

In the present case, an immediate sale would not be an optimal solution for either Mrs. Roetger or for Joshua. Fortunately, the trial court was able to fashion a remedy that avoided adding to the trauma of divorce, or pauperizing either the husband or the wife.

While Mr. Roetger argues that retaining the house increases both parties' cash-flow problems and places an additional financial burden upon him, it appears to us that he should be able to meet his court-ordered obligations and his

own personal needs from his current annual salary of approximately \$44,024. Likewise, the wife should be able to meet her needs and those of Joshua, including the mortgage payments, on her salary of \$33,494, provided that the husband continue to pay child support and alimony as ordered. There was no testimony at trial that either party had an earning capacity in excess of current income, or that there was any likelihood of a reduction of income for the foreseeable future.

The appellant has argued that ordering the husband to pay alimony to enable the wife to remain in a house she could not afford on her income alone is contrary to the purpose of rehabilitative alimony, which was established to enable a disadvantaged spouse to achieve economic independence. He further argues that as her income would be adequate for her own support if she were living in less expensive housing, she is not in need of rehabilitative alimony.

We feel, however, that regardless of the appropriateness of classifying it as rehabilitative alimony, the award was proper when considered in the light of the the factors the trial court is instructed to take into account in granting spousal support under the Alimony and Child Support Statute, Tenn. Code Ann. § 36-5-101.

These factors include the relative earning capacities of the parties; the standard of living established by the parties during the marriage; the contribution made by each party to the marriage, and to the training, education or increased earning power of the other party; and the relative fault of the parties. The record indicates that the above-mentioned factors weigh heavily in favor of the correctness of the the trial court's ruling on alimony.

III.

The husband also appeals the award of attorney fees, arguing that such awards are only appropriate where the spouse is disadvantaged, and does not have sufficient assets with which to pay a lawyer. He notes that in the present case, the property division leaves the wife with liquid assets of \$12,130.50, an amount in excess of the attorney fees ordered by the court. We do not believe, however, that such a showing in and of itself necessarily prevents the trial court from including attorney fees in its order.

An award of reasonable attorney fees may be properly allowed as a part of alimony. *Raskind v. Raskind*, 45 Tenn. App. 583, 325 S.W.2d 617 (1959) Such an award is a matter left to the sound discretion of the trial court. *Crouch v. Crouch*, 53 Tenn, App. 594, 606, 385 S.W.2d 288, 293 (1964). Our cases variously say that the appellate court will not interfere except upon a clear showing of abuse of that discretion, *Crouch v. Crouch*, or unless the decision is not supported by a preponderance of the evidence, *Luna v. Luna*, 718 S.W.2d 673, 676 (Tenn.App. 1986).

The same factors supporting the trial court's decision to award alimony to the wife also support an award of attorney fees. See *Storey v. Storey*, 835 S.W.2d 593, 598 (Tenn.App. 1992). Taking into account both the property settlement and the relative income levels of the parties, it does not appear to us that the evidence preponderates against the decision of the trial court. Nor do we believe that the fees awarded to help the wife defray the costs of proceedings initiated as a result of the husband's own misbehavior are excessive or that they indicate an abuse of discretion by the trial court.

IV.

The order of the trial court is affirmed. Remand this cause to the Circuit Court of Davidson County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

SAMUEL L. LEWIS, JUDGE

