IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

WILLIAM MICHAEL ANDERTON,

Plaintiff-Appellant,

Vs.

EVELYN ADELE MORGAN ANDERTON,

Defendant-Appellee,

FROM THE FRANKLIN COUNTY CHANCERY COURT, No. 22482; THE HONORABLE HENRY DENMARK BELL, JUDGE
C.A. No. 01A01-9510-CH-00489

REMANDED

Jack Norman, Jr., of Nashville
Thomas F. Bloom of Nashville
For Appellant

Gregory C. Tibbetts of Nashville
For Appellee

MEMORANDUM OPINION[1]

CRAWFORD, J.

The parties to this appeal, William Michael Anderton (Husband) and Evelyn Adele Morgan Anderton (Wife), were divorced by decree entered July 24, 1995, as supplemented by decree entered August 30, 1995. Husband has appealed and presents issues pertaining only to the trial court's award of alimony and child support.

The parties married October 27, 1973 in Kirkland, Washington and have three children; Michael, born in 1977; Lisa, born in 1979; and Kari, born in 1981. When they married, Husband was employed by Boeing as a sheet metal worker and Wife had just completed one year of college. In 1975, the parties became involved in an Amway distributorship, which eventually became a substantial source of the household income. Husband left his job at Boeing and worked in numerous positions, eventually becoming involved in sales. In 1986, Husband's took a job with National Health Labs. Between 1986 and 1994, Husband's annual income increased from $25,000.00 to $180,000.00.

While Husband pursued his career at National Health Labs, Wife continued to earn money through the Amway business. She also earned an associate's decree in 1988 and, at

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Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

the time of trial, May 17, 1995, anticipated earning a bachelor's decree in August of 1995. Wife took chief responsibility for raising the parties' three children and maintaining the household.

When the parties separated in October of 1993, Husband voluntarily paid support of $6,000.00 per month from October of 1993 to August of 1994, at which point a dispute as to the amount of support arose and an agreed pendente lite order was entered requiring Husband to pay $5,500.00 per month. On February 9, 1995, Husband filed a petition to reduce his pendente lite support by 20% due to a decrease in his salary, and on February 9, 1995, Husband unilaterally reduced his support payments. On February 10, 1995, Wife filed a petition for contempt based on Husband's unilateral reduction of his pendente lite obligation. The final decree divorced the parties pursuant to T.C.A. § 36-4-129 (1991).

Since this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

Husband presents three issues for this Court's review. The first issue, as stated in Appellant's brief, is:

> The evidence preponderates against the chancellor's findings of fact that the Husband will earn in excess of two hundred thousand dollars ($200,000) in the proceeding twelve (12) months.

The finding of the trial court concerning Husband's income is critical in making a determination of both alimony and child support awards. T.C.A. § 36-5-101 (d)(1) and (e)(1) (Supp. 1995).

In 1991, Husband earned $160,000.00; in 1992, he earned $162,000.00; in 1993, $170,000.00; and in 1994, $180,000.00. In 1995, National Health Labs merged with another company and Husband's base salary decreased from $150,000.00 to $135,000.00. Additionally, Husband's maximum bonus potential decreased to $67,500.00, while the quota for achieving the maximum bonus doubled and Husband's sales force decreased. Regardless, it was undisputed at trial that, if Husband achieved his maximum bonus potential in 1995, his annual income would be $202,500.00. From the proof, the trial court made the finding that

Husband's income would be in excess of $200,000.00 in 1996.

Because the trial court found that Husband would earn $200,000.00 for 1996, this Court, by order entered March 28, 1996, allowed Husband to present post-judgment facts regarding his 1996 salary. Husband submitted evidence showing that he earned $207,835.55 in 1995, but that, effective February 1, 1996, his salary decreased to $95,000.00, with a maximum bonus of $47,500.00, for a total income potential of $142,500.00. Wife questions the authenticity of Husband's proof and certainly this issue can be addressed in the trial court on remand.

The trial judge did not have the benefit of the information provided by Appellant's post-judgment facts and thus made his finding of 1996 income based upon a projected income for Husband which may no longer be accurate. Accordingly, on the record now before us, we find that the evidence preponderates against the trial court's finding that Husband will earn in excess of $200,000.00 in 1996.

Husband's second issue for review, as stated in his brief, is as follows:

> The chancellor erred in failing to set child support according to the guidelines.

T.C.A. § 36-5-101 (e)(1) (Supp. 1995) provides:

> In making its determination concerning the amount of support of any child or children of the parties, the court shall apply as a rebuttable presumption the child support guidelines as provided in this subsection. If the court finds that evidence is sufficient to rebut this presumption, the court shall make a written finding that the application of the child support guidelines would be unjust or inappropriate in that particular case, in order to provide for the best interest of the child(ren) or the equity between the parties. Findings that the application of the guidelines would be unjust or inappropriate shall state the amount of support that would have been ordered under the child support guidelines and a justification for the variance from the guidelines.

The trial court found that Husband had gross earnings for the preceding twelve-month period of $170,000.00. The court then awarded child support in the amount of $1,731.00 per month. The parties concede that the amount awarded does not comply with the guidelines as required by the statute, and that the trial court made no finding concerning the deviation. The child support guidelines provide a minimum base from which to determine child support obligations, up to a monthly net income of $6,250.00. In cases where the obligor's monthly

net income exceeds $6,250.00 per month, the court is not limited to the $6,250.00 cap set out in the guideline table, nor is the court bound to award the full percentage of the net income set out in the guidelines. The court is authorized to exercise its discretion as the facts warrant. ***Nash v. Mulle***, 846 S.W.2d 803 (Tenn. 1993). In the case at bar, the presumptive guideline amount for a net income of $6,250.00 is $2,811.00, and the trial court gave no reason for deviating from that amount in making the award of child support. Accordingly, the case should be remanded for reconsideration of the child support in compliance with T.C.A. § 36-5-101 (e)(1) (Supp. 1995).

Husband's final issue for review, as stated in his brief, is:

> The chancellor abused his discretion in awarding alimony *in futuro* rather than rehabilitative alimony and in awarding alimony in excess of the Husband's ability to pay.

In her answer and counter-complaint, Wife seeks an award of alimony *in futuro* based on the duration of the marriage; Wife's contribution to the marriage in terms of homemaking, child care, career building and education; Wife's age and physical condition; and Husband's financial resources. As an alternative to permanent alimony, Wife seeks rehabilitative alimony for a sufficient period during which Wife may develop the necessary skills to secure a reasonable income. During the marriage and at present, Wife acted as primary caretaker of the parties' minor children. Wife has not worked outside the home for 21 years, although she has been involved in the parties' Amway business. Wife has a two year degree from an associates' college, and at the time of trial, anticipated earning a college degree by fall of 1995. Wife testified that, regardless of having a degree, she would not be qualified to work. She stated that the length of time she has been away from the workforce, her obligations with her children, and her physical conditions disqualify her from meaningful employment opportunities.

All three of the parties' minor children are involved in a variety of extra-curricular activities which require some transportation duties for Wife. Additionally, the children have experienced emotional/psychological problems as a result of the parties' divorce. Two of the children were receiving professional counseling at the time of trial.

Additionally, Wife suffers from numerous physical conditions. Wife, Husband, and their children have pronated ankles. As a result of the pronated ankles, Wife testified that she

is unable to stand for prolonged periods and is only able to wear orthopedic-style shoes or tennis shoes, which Wife feels are inappropriate for a career woman.

Samuel J. McKenna, DDS, MD, FACS, treated Wife on two occasions for temporomandibular joint dysfunction (TMJ). Wife testified that she has experienced varying degrees of jaw pain for fifteen years. Dr. McKenna testified that TMJ is exacerbated by talking, but he believes that Wife's prognosis is fair, and does not think her condition will get worse.

David Joseph Kapley, MD, is Wife's psychiatrist. He diagnosed Wife with major depression without psychotic features, attention deficit hyperactivity disorder, and post-traumatic stress disorder. Dr. Kapley testified that Wife's prognosis is good, and that with continued therapy, Wife should recover within three to five years. He does not think that Wife should attempt to make any significant career changes now, because major changes could reduce Wife's confidence and her chance of recovery.

The trial court awarded wife alimony *in futuro* of $5,500.00 per month for five years, and $5,000.00 per month thereafter. Alimony awards are based primarily on need and ability to pay. ***Loyd v. Loyd***, 860 S.W.2d 409, 412 (Tenn. App. 1993); ***Batson v. Batson***, 769 S.W.2d 849, 861 (Tenn. App. 1988). Husband's income for 1996 and his ultimate child support obligation will affect Husband's ability to pay. Thus, a determination of the alimony award should be made by the trial court when Husband's child support obligation is established.

This Court is mindful of the fact that Wife's primary concerns at present are with her children; however, there is proof in the record that, despite her health problems, Wife's prognosis for psychological recovery is good. We note that the parties' youngest child will reach majority in 1999, and Wife may well be capable of entering the work force at that time. Wife's ability to earn is evident in the proof. Upon remand, the trial court should consider the mandate of the legislature set forth in T.C.A. § 36-5-101(d)(1) regarding rehabilitative alimony:

> 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.

This case is remanded to the trial court for reconsideration of the child support and alimony awards consistent with this opinion. The trial court shall expedite this hearing on remand, and the present support awards shall remain in effect until the trial court enters judgment in the rehearing. Costs of the appeal are assessed equally against the parties.

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

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE