

DONNIE LEE BROWN, )  
 )  
 Plaintiff/Appellee, )  
 )  
 VS. )  
 )  
 BETTY CHRISTINE BROWN, )  
 )  
 Defendant/Appellant. )

Macon Chancery  
No. 2625  
Appeal No.  
01-A-01-9512-CH-00543

**FILED**

**May 24, 1996**

**Cecil W. Crowson  
Appellate Court Clerk**

IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF MACON COUNTY  
AT LAFAYETTE, TENNESSEE

HONORABLE C. K. SMITH, CHANCELLOR

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FOR PLAINTIFF/APPELLEE

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FOR DEFENDANT/APPELLANT

REVERSED AND REMANDED

HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:  
SAMUEL L. LEWIS, JUDGE  
WILLIAM C. KOCH, JR., JUDGE

DONNIE LEE BROWN, )

Plaintiff/Appellee,	)	
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	)	Macon Chancery
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VS.	)	
	)	Appeal No.
	)	01-A-01-9512-CH-00543
BETTY CHRISTINE BROWN,	)	
	)	
Defendant/Appellant.	)	

**OPINION**

In this post-divorce decree proceeding, the wife, Betty Christine Brown, has appealed from the judgment of the Trial Court granting the application of the husband, Donnie Lee Brown, for termination of periodic alimony.

The original divorce decree, entered on May 6, 1988, provided:

“It is further ORDERED, ADJUDGED and DECREED that pursuant to the Domestic Relations laws of the State of Tennessee, the Defendant, Betty Christine Brown, is hereby awarded a one-half interest in the Plaintiff, Donnie Lee Brown’s present and future funds in the Retirement Profit-Sharing Trust Plan administered by the Springs Valley Bank & Trust Company of French Lick, Indiana for the plaintiff’s employer Lafayette Manufacturing Company, a division of Kimball International. The Defendant, Betty Christine Brown, shall be entitled to receive one-half of each payment made pursuant to the Plan at the time the payment is made. The payments will be made to Betty Christine Brown at the time they are payable, pursuant to the terms of the Plan for any, including, but not necessarily limited to, the said Donnie Lee Brown’s normal retirement at age 65, his voluntary quitting his employment before normal retirement age, his death or disability, or his attainment of the age of 70 ½ year.

After a consideration of all relevant factors as set forth in T.C.A. Section 36-5-101(d), the Court finds that the Defendant, Betty Christine Brown, is economically disadvantaged relative to the Plaintiff, Donnie Lee Brown, and that the Defendant should, therefore, receive support and maintenance from the Plaintiff. It is, therefore, further ORDERED, ADJUDGED and DECREED that the Plaintiff, Donnie Lee Brown, pay to the Defendant, Betty Christine Brown, at this time, a lump sum payment of \$10,000.00 as rehabilitative alimony. In addition thereto, the Plaintiff shall pay to the Defendant, as periodic alimony, the sum of \$850.00 per month, which payments will continue until such time as the Defendant received her first payment of

funds from the Plaintiff's Retirement Profit-Sharing Trust Fund as set forth above, or until the Defendant's remarriage."

Upon appeal to this Court, the award of one-half of retirement benefits was vacated, and the cause was remanded for a finding of the value of the retirement on the date of the divorce.

On remand, on April 26, 1989, the Trial Court found the value of the retirement to be \$144,010.96 and ordered:

2. The appellee, Donnie Lee Brown, shall have ninety (90) days from the date of this hearing, that being April 17, 1989, within which to pay to Betty Christine Brown in a lump sum payment the amount of \$72,005.48 plus the interest . . . In the event this sum is paid by the Appellee to the Appellant, the parties will submit an Order to the Court stating that such payment has been made, and in that event, the said Donnie Lee Brown will retain the retirement benefits in his Retirement Profit-Sharing Trust Plan and the periodic alimony payments previously ordered by this Court will terminate.

3. In the event the said Donnie Lee Brown does not make said payment to the Appellant, Betty Christine Brown, pursuant to paragraph 2 above, this court retains jurisdiction of this matter and defers division of the retirement benefits, until such time as the benefits become payable to the parties pursuant to the terms of the Retirement Profit-Sharing Trust Plan. (Emphasis supplied.) (T.R. page 28-29, paragraphs 2,3.)

The husband did not elect to pay the \$72,005.48 as provided in paragraph two. Consequently, paragraph three became operative.

An appeal was initiated by the wife, but voluntarily dismissed when paragraph two became inoperative by non compliance.

On December 26, 1994, the husband initiated the present proceeding by a "complaint" under a new case number. Actually the "complaint" should have been

a motion or petition in the original divorce case, since the Trial Court retained jurisdiction of periodic alimony under T. C. A. § 36-5-101(a)(1) and by its order of April 26, 1989, expressly retained jurisdiction “of this matter.” The complaint will therefore be treated as an application to enforce or alter the former orders of the Court in the original divorce case.

The complaint alleges and prays:

2. That on May 6, 1988, the above-entitled court, in the matter of Brown v. Brown, Honorable Edward M. Turner presiding, entered a final judgment for divorce between the aforementioned parties.

3. . . . Periodic alimony payments were to cease upon Defendant’s receipt of the first payment of funds from Plaintiff’s Retirement Fund.

4. That Plaintiff has attained age 50 and, pursuant to the terms of the retirement plan, Defendant is now eligible to begin receiving monthly payments from said plan.

5. That there has been a material change in circumstances in that Defendant is both rehabilitated and capable of pursuing full-time employment as well as now being entitled to payment of retirement benefits.

WHEREFORE, Plaintiff Donnie Lee Brown would ask for issuance of a Qualified Domestic Relations Order, its purpose to order commencement of payments from Trust Fund to Defendant, thereby relieving him of the duty to pay periodic alimony. In the alternative, Plaintiff would ask that all spousal support be discontinued as circumstances have substantially changed the need for alimony payments in that Defendant is now rehabilitated and capable of pursuing full-time employment.

The answer denies any right of relief and claims failure to join an indispensable party, the employer of the husband and its retirement administrator.

Both parties moved for summary judgment.

The Trial Court awarded summary judgment in favor of the husband as

follows:

4. Plaintiff is no longer required to pay alimony to Defendant since he has attained age 50 and, under the terms of the pension plan, Defendant may begin receiving retirement fund payments; therefore, the alimony is terminated.

5. Plaintiff is now entitled to distribution of her one-half of Plaintiff's retirement funds accrued as of April 21, 1988, plus interest accrued on said amount, pursuant to this court's order of April 25, 1989.

6. Defendant is eligible to draw said retirement benefits as of the date of this order. Springs Valley Bank and Trust Company should pay the sums according to the pension plan forthwith.

On appeal, the wife presents five issues one of which is whether the Trial Court erred in entering summary judgment for the husband. Since this issue is dispositive of the appeal, other issues need not be discussed.

The correctness or incorrectness of the judgment of the Trial Court turns upon the interpretation of Paragraph three of the April 26, 1989, order of the Trial Court, quoted above, which states:

This Court retains jurisdiction of this matter and defers division of the retirement benefits, until such time as the benefits become payable to the parties.

The record contains the affidavit of the husband that:

3. I am now fifty-two (52) years old and my wife can receive those payments for her one-half because I am now in excess of Fifty (50) years of age. The divorce decree states that payments be made to Betty Christine Brown at the time they are payable pursuant to the terms of the plan for any reason.

It is my desire that payments be made to Betty Christine Brown pursuant to the terms of the plan and my obligation of alimony cease.

It is true that the original divorce decree stated:

. . . In addition thereto, the Plaintiff shall pay to the Defendant, as periodic alimony, the sum of \$850.00 per month, which payments will continue until such time as the Defendant receives her first payment of funds from the Plaintiff's Retirement Profit-Sharing Trust Fund as set forth above, or until the Defendant's remarriage.

However, the original decree, quoted above, also provided:

The defendant, Betty Christine Brown, should be entitled to receive one-half of each payment made pursuant to the Plan at the time the payment is made. The payments will be made to Betty Christine Brown at the time they are payable . . . including, but not necessarily limited to, the said Donnie Lee Brown's normal retirement at age 65, his voluntarily quitting his employment before normal retirement age, his death or disability, or his attainment of the age of 70 ½ years.

Although the foregoing verbiage does not exclude the beginning of payments at a date earlier than those designated, the expression, "one-half of each payment . . . at the time the payment is made" clearly indicates that retirement benefits should be paid to both parties simultaneously; that is, that payments would not be made to the wife before the husband actually ceased employment, his salary ceased, and his retirement pay began.

Although this provision was vacated by this Court, it is relevant because the judgment under review is based upon its provisions.

Moreover, by T. C. A. § 36-5-101(a)(1), the court retained jurisdiction to change the order for periodic alimony and, upon appeal and remand, on April 26, 1989, the Trial Court reserved the division of the retirement until such time as the retirement becomes payable "to the parties." Thus, the termination of alimony by payment of retirement benefits was deferred until such benefits were payable to both parties.

It is most unusual for a retirement to provide benefits to the spouse of an

employee while the employee continues to work and receive his salary. It is highly unlikely that the Trial Judge anticipated such an unlikely development.

Viewing the verbiage of the original divorce decree as amended, it is clear that its intent was to grant relief from periodic alimony at such time as the retirement benefits became available because of the retirement of the husband and consequent termination of his salary. This intent was emphasized by the verbiage of the subsequent order reserving jurisdiction until the parties (plural) became entitled to retirement benefits.

The provision was based upon two anticipated changes of circumstances: (1) the diminution of the ability of the husband to pay alimony and (2) the availability of a new source of income to the wife. Number (2) has occurred, but Number (1) has not.

Both of the conditions for the activation of the "distribution of the retirement benefits" has not occurred.

Therefore, the husband is not at this time entitled to a cessation of alimony payments as a matter of law. If and when he sees fit to voluntarily retire and exchange his salary for the retirement benefits, he will be entitled to an order "distributing" such benefits as set out in the April 26, 1989, order. Until that time, his relief from alimony, if granted, must be granted on other grounds.

The summary judgment in favor of the husband is reversed and vacated. Costs of this appeal are taxed against the husband. The cause is remanded to the Trial Court for further proceedings.

Reversed and Remanded.

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HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

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SAMUEL L. LEWIS, JUDGE

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WILLIAM C. KOCH, JR., JUDGE