RETHA LAMAR HUSSEY, Plaintiff/Appellee, v. GEORGE WILLIAM HUSSEY, Defendant/Appellant.	)	Appeal No. 01-A-01-9504-PB-00181 Davidson Probate No. 85D-1084

FILED

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Cecil W. Crowson
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COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE PROBATE COURT FOR DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

THE HONORABLE MARIETTA M. SHIPLEY, JUDGE

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

This is an appeal by defendant, George William Hussey ("Husband"), from the trial court's judgment denying his petition to terminate and/or reduce the alimony which the trial court had previously ordered him to pay to plaintiff, Retha Lamar Hussey ("Wife").

The Probate Court of Davidson County entered a Final Decree of Divorce on 17 October 1985. The decree incorporated and made a part of the decree a Property Settlement Agreement ("PSA") entered into by the parties. The PSA required Husband to pay Wife alimony in futuro of $25,000.00 on 31 October 1988 and every succeeding third year until Wife's remarriage or either parties' death. The purpose of the payment was to enable Wife to purchase an automobile every three years. The PSA also required Husband to pay additional alimony in futuro of $1,442.30 on Friday of each week, $10,000.00 on 31 July of each year, and $62.00 per month for medical insurance premiums. Neither the PSA nor the decree provided that these last three payments would discontinue upon Wife's remarriage. The agreement expressly provided that Husband would deduct the weekly, monthly, and yearly payments for federal income tax purposes and that Wife would report these payments as income. As to the weekly and yearly payments, the PSA provided that if Husband's "income is at any time reduced below his 1985 income, then...Husband shall have a right to petition the Court for a reduction in alimony payments." In order to secure the alimony payments, the court allowed Wife to maintain a life insurance policy on Husband’s life.

Wife agreed to forego any marital interest in fifteen separate pieces of real property, many of which were improved by motels or hotels and one of which included an office building.

Wife also agreed to transfer to Husband, in exchange for receiving alimony, all accounts receivable, all stock in Maple Manor Motel, all stock in Hussey and Jones Construction Company, and various leasehold interests in motels and outdoor advertising. In addition, Wife transferred her interest in eighteen separate bank accounts to Husband.

In August 1994 Husband filed a petition seeking to terminate or reduce his alimony in futuro payments because there were substantial and material changes in his circumstances since 17 October 1985 and because Wife had remarried and lived with her new husband who contributed to her support. He also argued that Tennessee Code Annotated section 36-5-101(a)(2)(B), effective 9 May 1994, provided that alimony in futuro would terminate automatically upon the remarriage of the recipient of the alimony. Thus, Husband asked the court to hold that his obligation to pay alimony in futuro terminated upon Wife's remarriage in June 1993 and to award him the amount of all payments made to Wife since her remarriage except for payments of alimony arrears made through a bankruptcy proceeding.

Wife answered and filed a counter-petition in which she asked the court to hold Husband in contempt of court for failing to make the $25,000.00 payment.

On the date of the hearing on Husband's petition to terminate or reduce his alimony, Husband was engaged in the real estate and motel business, leased an office building, and owned a motel and condominium in Steamboat Springs, Colorado. This is the same business that Husband was in on the date the parties entered into the PSA. At the hearing, Husband introduced evidence concerning his net worth and income in 1985, the year of the original decree, and in 1993, the year before Husband filed the

petition. The evidence established that Husband's taxable income in 1985 was in excess $358,000.00 and his net worth was $10,377,251.00. There was no countervailing evidence with respect to Husband's income or net worth in 1985. In addition, Husband had taxable income of $376,390.00 in 1984 and $247,837.00 in 1986. In 1987, he lost some $3,000,000.00 in the stock market. In 1993, Husband lost $512,282.00 and had a negative average monthly cash flow of -$3,807.50. Husband also introduced evidence showing that his net worth in 1994 was -$2,496,470.00.

Wife testified that she was remarried on 14 June 1993. When she remarried, she sold her condominium and paid off a mortgage of $45,000.00. Her monthly mortgage payment had been $541.00. At present, Wife's new husband pays rent of $725.00 per month for the couple's apartment. Wife also testified that her husband and his company have paid for her and her husband to take trips. At trial, Wife admitted that she spends approximately half of her time on those trips and that "we're gone constantly." She also testified that she pays for groceries and utilities at their apartment when they are not on the trips.

In September 1994, the trial court denied Husband's motion to terminate the alimony payments and ordered Husband to continue making the payments of weekly alimony to Wife until further orders. This order was without prejudice to Husband's right to be reimbursed for such payments. The trial court took all other matters under advisement. Subsequently, the court entered an order making the Attorney General of the State of Tennessee a party in order to address the constitutionality of Tennessee Code Annotated section 36-5-101(a)(2)(B).

On 7 December 1994, the trial court entered an order denying Husband's petition to terminate the alimony in futuro after finding

that "the parties clearly intended by the plain terms of the Marital Dissolution Agreement that the alimony in futuro was to be payable after the wife remarried" and that Tennessee Code Annotated section 36-5-101(a)(2)(B) "cannot be applied retroactively as it is in violation of Article 1, Section 20 of the Tennessee Constitution." The trial court also held that there had not been "a material or substantial change in [Husband's] financial condition."

Husband then moved to amend the findings and the judgment of the trial court. Husband's motion included two arguments. First, he contended that Tennessee Code Annotated section 36-5-101(a)(2)(B) required the termination of his obligation to pay alimony in futuro as of 9 May 1994, the date the statute became law. Second, he argued that there had been material and substantial changes in circumstances in that his income had decreased substantially below his 1985 income and that Wife had remarried and lived with her new husband who contributed to her support. Husband also asked the court to hold that he was not in contempt and that Wife was not entitled to the default remedy set forth in paragraph five of the decree. In addition, he asked the court to dismiss Wife's counter-petition.

Thereafter, the court vacated the 7 December order and entered a new order. The court held that it could not apply section 36-5-101(a)(2)(B) to the instant case without violating article 1 section 20 of the Tennessee Constitution.[1] The court found that the parties had intended that Husband would pay the alimony until Husband or Wife died, whichever occurred first, and that the PSA retained its contractual nature and was, therefore,

[1]Article 1 section 20 of the Tennessee Constitution provides "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made."

not subject to modification. The court then concluded that even if the alimony was subject to modification there had not been a material or substantial change in Husband's financial condition. The court subsequently amended its judgment to hold that Husband was not in contempt of court, that Wife was not entitled to the default remedy in paragraph five of the decree, and that Husband was not required to purchase Wife an automobile. In all other respects the January 1994 order remained in effect. Husband appealed from the court's order, as amended, and assigned several issues.

The record shows that the trial court questioned the credibility of Husband's testimony regarding the current valuations of his property. Husband's 1985 financial statement listed the market value of the Hallmark Inn IV, the Hallmark Inn V, the Congress Inn, the Hallmark Scottish Inn I, and the Gateway Office Building in excess of $11,600,000.00. The 1985 financial statement also listed the value of Husband's farm and home as $540,000.00. Husband currently owns all of these same assets, but, at the instant hearing, Husband insisted that the market value of all his holdings was only $6,250,000.00 plus $399,000.00 he had in cash. Ironically, Husband's new net worth not only includes the above assets, but also a motel in Steamboat Springs, Colorado that has a restaurant, two shops, twenty-four condos, twenty-three motel rooms, and a sports bar. He is adding three new rooms and the rooms rent for between $125.00 and $345.00 per night. Husband also had a commission of $142,500.00 due him for the sale of a motel at the time of the hearing. Further, Husband filed Chapter 11 bankruptcy which reduced the debt from the motels and substantially reduced the interest rate on the debt. In 1994, Husband had over one-half million dollars available to him from his sole proprietorship. The capital expenditures planned by Husband and the money set aside for his hotels in 1994 were several hundred

thousand dollars.

Husband's first issue is "[w]hether the Probate Court erred in holding that T.C.A. 36-5-101(a)(2)(B) (which provides that alimony *in futuro* will terminate automatically and unconditionally upon the remarriage of the recipient) did not terminate [Husband's] obligation to pay alimony *in futuro* even though [Wife] remarried in June, 1993."

The trial court refused to terminate Husband's alimony obligation and held that the portion of the PSA providing for alimony in futuro "retained its contractual nature" and that the statute "cannot be applied to the alimony at issue without violating Article 1, Section 20 of the Tennessee Constitution."

Tennessee Code Annotated section 36-5-101(a)(2)(B) provides, in pertinent part, as follows: "In all cases where a person is receiving alimony in futuro...and that person remarries, the alimony in futuro...will terminate automatically and unconditionally upon the remarriage of the recipient." According to the rules of statutory construction, a court is to apply a statute prospectively "unless the legislature clearly indicates to the contrary." ***Shell v. State***, 893 S.W.2d 416, 419 (Tenn. 1995)(citing ***Woods v. TRW, Inc.***, 557 S.W.2d 274, 275 (Tenn. 1977)). The statute at issue in the instant case does not clearly direct the courts to apply it retroactively.

It is Husband's contention that his obligation to pay alimony in futuro terminated in June 1993 because that is when Wife remarried. Husband concedes that retrospective laws that take away a right that vested before the General Assembly enacted the laws are unconstitutional. ***Morris v. Gross***, 572 S.W.2d 902, 907 (Tenn.

1978)(holding that retrospective laws are "those which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed"). Also, Husband concedes that, if Wife had a vested unconditional right to receive alimony in futuro prior to the enactment of the statute, it would be unconstitutional to apply the statute to Wife's right to receive alimony in futuro.

Wife argues that Husband's agreement to pay alimony until either parties' death in exchange for Wife foregoing any interest in the parties' marital property did in fact vest in her the right to receive the alimony in futuro. Further, she asserts that the alimony represented her share of the marital property. Thus, the portion of the PSA regarding alimony maintained its contractual nature and did not merge into the decree. She relies on ***McCarty v. McCarty***, 863 S.W.2d 716 (Tenn. App. 1992); ***Hays v. Hays***, 709 S.W.2d 625 (Tenn. App. 1986); and ***Seal v. Seal***, 802 S.W.2d 617 (Tenn. App. 1990) for the proposition "that a statute cannot be applied retroactively to a pre-statute divorce so as to permit termination of any alimony payments by a former husband to a former wife under a prior agreement."

In ***Morris***, the court stated that "[t]he words (vested rights) are used as implying interests which it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice." ***Morris***, 572 S.W.2d at 905 (citing 16 Am. Jur 2d *Const. Law* § 421 (1964)). Here, the application of the statute would arbitrarily deprive Wife of her right to receive the alimony payments. The legislature cannot, by fiat, terminate alimony upon the remarriage of a party when the parties did not intend that the alimony obligation would terminate

upon remarriage.

The determinative issue before us is "whether the provision in the agreement for the making of [alimony] payments retained its contractual nature because it constitutes the division of marital property, or lost its contractual nature because it constitutes alimony *in futuro* which the court has the continuing statutory power to modify upon a showing of changed circumstances." ***Towner v. Towner,*** 858 S.W.2d 888, 890 (Tenn. 1993). In ***Towner,*** the court found that a wife's waiver of any interest in her former husband's military pension in exchange for alimony payments did survive the merger of the Marital Dissolution Agreement into the Final Divorce Decree because the payment represented the wife's share of the marital property. ***Id.*** at 891-92.

The parties in this case entered into a written PSA covering the alimony, division of the marital property, and the costs of litigation. A PSA will merge into the decree to the extent that it represents a duty imposed by statute or judicial rule at the time the decree is entered. ***Blackburn v. Blackburn***, 526 S.W.2d 463, 465 (Tenn. 1975). To the extent that the agreement goes beyond the duties imposed by law, the agreement retains its contractual nature. That is, the contractual obligations which are beyond the duties imposed by law survive as contracts. ***Id.***

At the time of the entry of the original divorce decree, the parties' marital estate had a value of more than $14,000,000.00. Wife received a lump sum award of $100,000.00. The remainder of the property was vested in Husband. Courts are to construe divorce decrees incorporating property settlements as they would any other written instrument. ***Hale v. Hale***, 838 S.W.2d 206, 208-09 (Tenn. App. 1982). Courts are to interpret contracts by

ascertaining "the intention of the parties" and by giving "effect to that intention, consistent with legal principles." ***Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.***, 521 S.W.2d 578, 580 (Tenn. 1975). "In construing contracts the words expressing the parties' intentions should be given their usual, natural and ordinary meaning." ***Taylor v. White Stores, Inc.***, 707 S.W.2d 514, 516 (Tenn. App. 1985).

We are of the opinion, that taking the entire PSA into consideration, it was the intention of the parties that the alimony obligation would not terminate upon the remarriage of Wife. The plain language of the PSA shows that the parties contemplated that upon remarriage the $25,000.00 payment every three years would terminate. While the parties could have so provided, nothing in the PSA shows an intention that Wife's right to the yearly, weekly, and monthly alimony payments would terminate, except upon her death or Husband's death.

Moreover, we are of the opinion that it is clear that the parties bargained for and agreed that Wife would forego any interest in Husband's properties in exchange for a lifelong stream of income secured by a one million dollar life insurance policy that Wife was to maintain on Husband's life. Here, Wife, under the terms of the PSA, accepted a one time cash payment of $100,000.00, a yearly payment of $10,000.00, a payment of $25,000.00 every three years, a weekly payment of $1,442.30, and a monthly payment of $62.00. In exchange for these payments, Wife gave up her interest in the parties' marital residence, in fourteen separate parcels of real property, most of which were improved by motels and/or office buildings, and in eighteen separate bank accounts. The PSA also provided that the agreement was the "final settlement of all property rights of the parties and a discharge from all claims

arising out of their marital relationship, including but not limited to alimony, dower, curtsey, statutory allowance, homestead rights, right to take against the will of the other, inheritance, descent or distribution, or right to act as administrator or executor of the other's estate, except those claims preserved in this Agreement."

We hold that the parties intended that the award of alimony would, in effect, be a division of the marital estate. In exchange for the payment of alimony for her lifetime or Husband's lifetime. We believe that a plain reading of the PSA reveals on its face that the payments made to Wife represent her share of the marital property. This state recognizes that contracts may include implied obligations from the nature of the agreement. ***Moore v. Moore***, 603 S.W.2d 736 (Tenn. App. 1980). The terms of the PSA, which are in excess of the parties' obligations under Tennessee law, maintained their contractual nature. Because article 1 section 20 of the Tennessee Constitution prevents the application of a law which impairs a contract right, Tennessee Code Annotated section 36-5-101(a)(2)(B) does not affect the terms of the parties' PSA executed in 1985.

Further, we hold that the probate court did not err in holding that there had not been a substantial material change of circumstances which would entitle Husband to have his alimony obligation modified.

Tennessee Code Annotated section 36-5-101(d)(1) provides various factors which the court should consider in modifying support and maintenance. ***Jones v. Jones***, 784 S.W.2d 349, 353 (Tenn. App. 1989). In reviewing the factors set forth in the statute, it is clear that Husband has not carried his burden of

proving that a change of circumstances exists. Currently, he has significant earning capacity as compared with Wife. The duration of the parties' marriage was twenty-five years, and Wife has numerous physical ailments which would prevent or limit her from supporting herself.

Husband has shown that Wife is living with a third party. Once this is shown, "it is incumbent upon [Wife] to then show by the greater weight or preponderance of the evidence that... she needs the amount of support previously awarded." ***Azbill v. Azbill***, 661 S.W.2d 682, 687 (Tenn. App. 1983). We think the record establishes that Wife has shown that she has a need for the alimony payments to continue.

Wife is presently 53 years old. She is not employed nor was she employed during the marriage. Her sole income is the alimony. The evidence established that she received no support from her present husband except for apartment rent. Her present husband pays his former wife one-half of his gross income, her mortgage payment of $479.00 per month, one-half of all housing amenities which are approximately $400.00 to $500.00 per year, one-half of his former wife's health insurance, one-half of all medical bills not covered by insurance which are approximately $225.00 per month, and one-half of the house insurance of $800.00 per year. Wife suffers from crippling arthritis in her right hand and right foot and has high blood pressure which is at stroke level. Finally, she has a monthly obligation to the Internal Revenue Service of $4,600.00.

While there has been a substantial decrease in Husband's income, there has not been a material or substantial change in circumstances to merit a reduction in alimony in futuro.

We have also considered Wife's request that Husband pay her attorney's fees as a result of this appeal and find her request to be without merit.

The judgment of the trial court is in all things affirmed, and the cause is remanded to the trial court for further necessary proceedings. Costs on appeal are taxed one-half to the plaintiff/appellee and one-half to the defendant/appellant.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE