

1 STEVE STAFFORD DENNISON,)
2)
3 Plaintiff/Appellee,) Appeal No.
4) 01-A-01-9512-CV-00576
5 v.)
6) Davidson Circuit
7 MARILYN EDWARDS DENNISON,) No. 94D-1247
8)
9 Defendant/Appellant.)

FILED

July 31, 1996

Cecil W. Crowson
Appellate Court Clerk

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13 COURT OF APPEALS OF TENNESSEE
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15 MIDDLE SECTION AT NASHVILLE
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18 APPEAL FROM THE CIRCUIT COURT FOR DAVIDSON COUNTY
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20 AT NASHVILLE, TENNESSEE
21

22
23 THE HONORABLE MURIEL ROBINSON, JUDGE
24

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52 AFFIRMED AS MODIFIED AND REMANDED
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MEMORANDUM OPINION¹

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69 _____ This is an appeal by defendant, Marilyn Edwards Dennison,
70 from the trial court's Final Decree of Divorce as amended by the
71 court's order of 20 July 1995. The pertinent facts are as follows.
72

73 The parties were married in June 1971. Shortly thereafter,
74 they moved to Louisville, Kentucky so that plaintiff, Steve
75 Stafford Dennison, could pursue a job opportunity with the Coca-
76 Cola Company. In June 1973, the company transferred plaintiff to
77 Nashville where the parties lived for three years. In 1976, the
78 parties moved again after plaintiff took an advertising job in
79 Kansas City, Missouri. In 1981, plaintiff took a job in Chicago,
80 Illinois and the parties moved to Chicago. They moved back to
81 Nashville in 1982 when plaintiff obtained a position with Buntin
82 Advertising. At that time, plaintiff earned \$60,000.00 per year.
83 The parties purchased a home on Belle Meade Boulevard for
84 \$189,000.00 and renovated it at an additional cost of \$115,000.00.
85 In 1988, plaintiff began working for Ericson Marketing
86 Communications. In 1992, he earned \$112,990.00 a year and his
87 compensation has increased each year since that time. He testified
88 that his compensation for 1995 would be \$152,900.00. Also, he
89 explained that \$40,000.00 of his 1995 compensation was in the form
90 of a bonus he received in March 1995 based on 1994 operations.
91

92 Defendant found employment each time plaintiff's career took
93 the parties to a new city. From 1971 to 1981, defendant worked as
94 an administrative assistant and in real estate, but never earned

¹Court of Appeals Rule 10(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.

95 more than \$12,000.00 per year. In 1982, she had no income. While
96 employed, defendant's highest incomes were \$20,000.00 in 1983,
97 \$25,000.00 in 1984, and \$19,000.00 in 1985. Her employer offered
98 her a higher salary in 1985 on a temporary basis if she would keep
99 working while she was pregnant with the parties' daughter. The
100 parties' only child, Catherine Dennison, was born on 14 August
101 1985. Defendant stopped working for three years after the child
102 was born and had only part-time jobs after 1988. She earned
103 \$800.00 a year in 1988, 1989, and 1990; \$2,500.00 in 1991; and
104 \$5,500.00 in 1992. Since 1993, she has earned \$6,300.00 each year.
105 Recently, she has not been able to find full-time work which would
106 pay her more than \$19,000.00 per year. Moreover, if she did work
107 full-time, she would have the additional expense of paying someone
108 to care for the parties' minor child.

109

110 During the marriage, the parties separated and reconciled
111 three times. Defendant testified that plaintiff abused her during
112 the marriage. Specifically, she stated that he knocked her against
113 a wall and once kicked her causing permanent disfigurement to her
114 face. Plaintiff admitted that he became violent and abused
115 defendant during that time. He also conceded that he used cocaine
116 and marijuana during the marriage and committed adultery with at
117 least six women. Defendant testified that she did not know of
118 plaintiff's adultery when she reconciled with him and that she did
119 not learn of it until she heard him testify at his deposition.

120

121 _____ In March 1994, plaintiff filed a complaint seeking a divorce
122 from defendant on the grounds of irreconcilable differences.
123 Defendant answered the complaint and denied all material
124 allegations. Subsequently, defendant filed a motion for summary
125 judgment arguing that plaintiff was not entitled to a divorce on
126 the ground of irreconcilable differences and that he had not
127 alleged any grounds other than irreconcilable differences.

128 Defendant also filed a motion seeking pendente lite support.

129

130 Thereafter, plaintiff filed an amended complaint in which
131 he averred that he was entitled to a divorce on the grounds of
132 irreconcilable differences and inappropriate marital conduct. He
133 also filed a "Motion to Establish Support and Protect the Financial
134 Interests of Both Parties" in October 1994. Defendant filed a
135 second answer to the amended complaint and a counter-claim. She
136 denied that plaintiff was entitled to a divorce on the grounds of
137 irreconcilable differences, inappropriate marital conduct, or any
138 other ground. She also asked the court to award her separate
139 maintenance and sole custody of the parties' minor daughter.

140

141 In November 1994, the court entered an order requiring
142 plaintiff to pay defendant pendente lite support of \$5,000.00 per
143 month. Thereafter, defendant filed a motion for a bill of
144 particulars setting forth the facts relied on by plaintiff as
145 grounds for divorce. Plaintiff's resulting bill of particulars
146 alleged that the parties "had an unsatisfactory physical
147 relationship," that defendant "refused to engage in sexual
148 relations except on a very infrequent basis," that defendant
149 "failed to provide the support and affection that is expected of a
150 spouse," and that defendant did not offer a "complete and loving
151 family." Plaintiff alleged that the refusal to engage in regular
152 sexual relations combined with defendant's "refusal to provide the
153 love, emotional support, care and affection" he desired constituted
154 inappropriate marital conduct and rendered further cohabitation
155 with defendant intolerable.

156

157 Plaintiff filed his answer to defendant's counter-claim in
158 April 1995. He admitted that plaintiff was a fit and proper person
159 to have sole custody of the parties' minor child.

160

161 Defendant filed an answer to plaintiff's bill of particulars
162 in May 1995. She denied that the parties had an unsatisfactory
163 physical relationship and that she refused to have sexual relations
164 with plaintiff. To the contrary, she alleged that plaintiff
165 refused to have sexual relations with her. Defendant denied that
166 she disappeared emotionally, physically or otherwise, that she
167 refused to take steps to solve the parties' marital problems, that
168 she was unsupportive of plaintiff, or that any of her conduct
169 constituted inappropriate marital conduct or rendered further
170 cohabitation intolerable. In April 1995, plaintiff filed a
171 supplement to his bill of particulars. He alleged that defendant
172 was guilty of inappropriate marital conduct because defendant
173 falsely accused plaintiff of adultery and because defendant had "an
174 improper relationship" with another man. Plaintiff filed an answer
175 to the supplemental bill of particulars in May 1995. She denied
176 that she falsely accused plaintiff of adultery and alleged that
177 plaintiff admitted to adultery in his deposition. Defendant denied
178 that her relationship with another man constituted inappropriate
179 marital conduct as a ground for divorce.

180
181 The court heard the case in May 1995. In June 1995, it
182 entered a judgment awarding defendant a divorce and sole custody of
183 the parties' minor daughter. The court ordered plaintiff to pay
184 child support of \$1,440.00 per month except during the month of
185 July when the order required plaintiff to pay only one-half that
186 amount. The order also required plaintiff to furnish medical
187 insurance and prescription medication to the minor child. In
188 addition, the court ordered the parties to sell the marital
189 residence. It then awarded defendant alimony of \$750.00 per month
190 until the parties sold the residence and \$1,000.00 per month for
191 twenty-four months after the sale. Moreover, the court ordered
192 plaintiff to pay defendant \$266.40 per month for 36 months for
193 health insurance coverage. The court divided the marital property,

194 but reserved judgment on the division of an income tax credit which
195 plaintiff expected to receive. Finally, the court ordered
196 plaintiff to pay \$6,000.00 of defendant's attorney's fees.

197
198 The court addressed the tax credit issue in a July 1995
199 order. Therein, the court amended the final decree and found that
200 plaintiff's tax credit was not a marital asset. Based on this
201 finding, the court held that the credit was not subject to
202 equitable division.

203
204 Defendant's first issue is "[w]hether the trial court erred
205 in ordering Mr. Dennison to pay only \$1,440 per month as child
206 support which is less than the \$1,887 required by the child support
207 guidelines for Mr. Dennison's income of \$12,742 per month."

208
209 Tennessee's code and regulations control the determination
210 of child support. The code provides: "In making its determination
211 concerning the amount of support of any minor child or children of
212 the parties, the court shall apply as a rebuttable presumption the
213 child support guidelines" Tenn. Code Ann. § 36-5-101(e)(1)
214 (Supp. 1995). Next, the guidelines define the formula for
215 calculating child support amounts. Simply stated, the court awards
216 the obligee spouse an amount equal to a specified percentage of the
217 obligor spouse's net income. The terms net income and gross income
218 are dependant on one another and are defined as follows:

- 219 (3) Gross Income
220 (a) Gross income shall include all income
221 from any source (before taxes and other
222 deductions), whether earned or unearned,
223 and includes but is not limited to , the
224 following: wages, salaries, commissions,
225 bonuses, overtime payments, dividends,
226 severance, pay, pensions, interest . .
227 . .
228
229 (4) Net income is calculated by subtracting from
230 gross income of the obligor's FICA . . . the
231 amount of withholding tax deducted for a
232 single wage earner claiming one withholding
233 allowance . . . , and the amount of child

234 support ordered pursuant to any previous
235 order of child support for other children.
236
237 Tenn. Comp. R. & Regs. 1240-2-4-.03(3)(a) & (4) (1994). Once the
238 court determines the net income, it then rounds it up to the next
239 dollar and applies the appropriate percentage. *Id.* 1240-2-4-
240 .03(5). When there is one child, the appropriate percentage is
241 twenty-one percent. *Id.*

242
243 The record shows that plaintiff's gross income in 1995 was
244 \$152,900.00. This amounts to an average gross monthly income of
245 \$12,742.00 and a net monthly income of \$8,985.00. The parties have
246 one child. Twenty-one percent of \$8,985.00 is \$1,887.00. Thus,
247 the child support guidelines require plaintiff to pay \$1,887.00 per
248 month. Here, however, the court awarded defendant child support of
249 \$1,440.00 per month. Defendant pointed out and we agree that the
250 court apparently awarded \$1,440.00 per month in child support
251 because it is the amount for \$9,900.00, the highest gross monthly
252 income listed on the "Tennessee Child Support From Monthly Income"
253 table. That table was developed for use as an aid in applying the
254 Tennessee Child Support Guidelines. However, the guidelines
255 themselves require an award based upon plaintiff's entire net
256 income. "The court must order child support based upon the
257 appropriate percentage of all net income of the obligor as defined
258 according to 1240-2-4-.03 of this rule." *Id.* 1240-2-4-.04(3). A
259 trial court may deviate from the guidelines when it makes specific
260 findings supporting a deviation. *Id.* 1240-2-4-.02(7). We find no
261 evidence to support a deviation from the guidelines, and the trial
262 court did not find that plaintiff was entitled to a deviation from
263 the guidelines. Therefore, the trial court erred in failing to
264 require plaintiff to pay child support in an amount equal to
265 \$1,887.00 per month, twenty-one percent of his net income.

266
267 The guidelines do, however, allow the trial court discretion

268 in making alternative payment arrangements for the award of child
269 support. "When the net income of the obligor exceeds \$6,250 per
270 month, the court may establish educational or other trust funds for
271 the benefit of the child(ren) or make other provisions in the
272 child(ren)'s best interest; however, all of the support award
273 amount based on net income up through \$6,250 must be paid to the
274 custodial parent." *Id.* 1240-2-4-.04(3). Recognizing the
275 regulations, the parties proposed to the court that plaintiff pay
276 any additional support into an educational trust. Plaintiff filed
277 calculations with the trial court which proposed that he pay
278 \$1,440.00 per month child support to defendant and \$241.00 per
279 month into an educational trust. Nevertheless, the court refused
280 to award child support of more than \$1,440.00 and erred in doing
281 so.

282
283 On remand, the trial court shall set child support at
284 \$1,887.00 a month. Of this amount, \$1,440.00 shall go directly to
285 defendant and \$447.00 shall go into an educational trust fund for
286 the minor child. The trust shall include a provision that if the
287 trust funds are not used for the education of the minor child they
288 shall revert to the plaintiff.

289
290 Defendant's second issue is "[w]hether the trial court erred
291 in failing to award Mrs. Dennison alimony of more than \$750 per
292 month until the sale of the marital residence and \$1,000 per month
293 for two years after the sale of the residence."

294
295 Defendant argues that the record shows that this amount of
296 alimony is below her needs. Two of the more important factors to
297 consider when determining the amount of alimony are the obligee
298 spouse's need and the obligor spouse's ability to pay. *Barnhill*
299 *v. Barnhill*, 826 S.W.2d 443, 455 (Tenn. App. 1991). Other factors

300 include: disparity in the party's ability to earn income; the
301 relative fault for the demise of the parties' marriage; the
302 duration of the marriage; whether employment outside of the home is
303 undesirable because the obligee is the custodian of a minor child;
304 and the standard of living established during the marriage. Tenn.
305 Code Ann. § 36-5-101(d)(1)(Supp. 1995). Defendant argues that
306 these factors are in her favor and establish that the alimony
307 awarded by the trial court is too low and for too short a period of
308 time.

309

310 Alimony should be determined so that "the party obtaining
311 the divorce should not be left in a worse financial situation than
312 he or she had before the opposite party's misconduct brought about
313 the divorce." **Shackleford v. Shackleford**, 611 S.W.2d 598, 601
314 (Tenn. App. 1980). Authorizing an award of alimony "requires that
315 an amount of income be ascertained which will provide for the wife
316 to live in the manner to which she became accustomed during the
317 marriage[, and] . . . the husband is obligated to supplement the
318 income of his wife to the extent of his ability." **Duncan v.**
319 **Duncan**, 686 S.W.2d 568, 572 (Tenn. App. 1984).

320

321 The supreme court reversed this court in **Aaron v. Aaron**, 909
322 S.W.2d 408 (Tenn. 1995), and substantially increased the alimony
323 payments ordered by the trial court. In **Aaron**, the husband earned
324 \$130,000.00 per year and was the primary wage earner. The trial
325 court ordered the husband to pay the wife alimony in futuro of
326 \$1,500.00 per month until her death or remarriage, the wife's
327 education expenses, and the wife's attorney's fees. **Id.** at 409.
328 We limited the alimony to only six years and relieved the husband
329 from paying the wife's education expenses and attorney's fees. **Id.**
330 at 409-10. Our supreme court reversed and increased the alimony
331 award to \$2,500.00 per month until the wife's death or remarriage

332 and reinstated the trial court's award of education expenses and
333 attorney's fees. *Id.* at 411. The court stated:

334 Ms. Aaron offered proof that in order for her and
335 the children to maintain their pre-divorce standard
336 of living they would need \$6,461.70 per month.
337 While alimony is not intended to provide a former
338 spouse with relative financial ease, we stress that
339 alimony should be awarded in such a way that the
340 spouses approach equity. Finally, Mr. Aaron
341 offered no proof that he is unable to pay the
342 alimony ordered by the trial court. We conclude
343 that, based on these facts, \$1,500 per month is
344 insufficient to meet Ms. Aaron's needs. Thus, we
345 award her \$2,500 per month. While this will not
346 put her in the same position in which she was prior
347 to the divorce, it will provide her with "closing
348 in" money; that is, she will be enabled to more
349 closely approach her former economic position.
350 Further, we find that she is entitled to permanent
351 alimony, not to be terminated until her death or
352 remarriage.

353
354 *Id.*

355
356
357 The record reveals defendant's income history and her
358 financial needs. From 1971 to 1981, defendant earned no more than
359 \$12,000.00 in a single year. She had no earnings in 1982 and her
360 highest incomes were \$20,000.00 in 1983, \$25,000.00 in 1984, and
361 \$19,000.00 in 1985. After the birth of the parties' child,
362 defendant stopped working for three years. Thereafter, she earned
363 \$800.00 per year in 1988, 1989, and 1990. She earned \$2,500.00 in
364 1991 and \$5,500.00 in 1992. Since 1993, she has earned \$6,300.00
365 a year. Currently, she cares for the parties' daughter and works
366 part-time. The evidence also established that defendant's expenses
367 were \$7,214.00 per month. Because the court awarded defendant sole
368 custody of the minor child, her child care expenses will increase
369 if she works full-time. Also, she has been unable to find a full-
370 time job that would pay more than \$19,000.00 per year.

371
372 The undisputed evidence established that plaintiff's fault
373 caused the demise of the parties' marriage. Plaintiff physically
374 abused defendant. He admitted to knocking her against the wall and
375 kicking her. He also admitted that he used cocaine and marijuana

376 during the marriage and committed adultery with at least six
377 different women.

378

379 Consideration of the various factors justifies a
380 significantly larger alimony award for longer than two years. We
381 are of the opinion that the evidence preponderates against the
382 trial court's award of only \$750.00 per month until the sale of the
383 marital residence and \$1,000.00 per month for only two years
384 thereafter. We are of the opinion that from all of the evidence
385 the alimony should be increased to \$2,500.00 per month until
386 defendant's death or remarriage. On remand, the trial court shall
387 enter an order to this effect.

388

389 Defendant's third issue is "[w]hether the trial court erred
390 in failing to award Mrs. Dennison an equitable portion of the
391 amount in excess of that required by law that Mr. Dennison caused
392 to be withheld from his March 1995 bonus for federal taxes."

393

394 Plaintiff received a bonus of \$40,000.00 in March 1995. He
395 had his employer withhold \$20,000.00 of the bonus for federal
396 income tax purposes. The tax rate for an unmarried taxpayer² is
397 thirty-one percent of the excess of \$53,500.00 in taxable income up
398 to \$115,000.00 and is thirty-six percent of the income over
399 \$115,000.00 and up to \$250,000.00. 26 U.S.C.A. § 1(c)(West Supp.
400 1996). Plaintiff's 1995 income including his \$40,000.00 bonus was
401 \$152,900.00. The maximum tax rate on the \$40,000.00 bonus would
402 not have exceeded thirty-six percent. Nevertheless, plaintiff had
403 his employer withhold an extra fourteen percent or \$5,600.00.

²According to the code, "the determination of whether an individual is married shall be made as of the close of his taxable year" 26 U.S.C.A. § 7703(a)(1) (West 1989). Moreover, "an individual legally separated from his spouse under a decree of divorce . . . shall not be considered as married." *Id.* §7703(a)(2). Because the court filed the decree of divorce in June 1995, plaintiff's 1995 income will be taxed according to the unmarried tax schedule.

404 Because the parties were still married, it is defendant's
405 insistence that this compensation was marital property. We agree.
406 All totaled, the undisputed evidence established that plaintiff's
407 employer withheld an excess of \$10,242.00 for tax purposes during
408 the first five months of 1995.

409
410 Plaintiff's bonus and compensation are marital property.
411 Thus, defendant was entitled to a share of it. Marital property
412 includes "all real and personal property, both tangible and
413 intangible, acquired by either or both spouses during the course of
414 the marriage up to the date of the final divorce hearing"
415 Tenn. Code Ann. § 36-4-121(b)(1)(A)(1991). By having his employer
416 withhold an excessive amount, plaintiff attempted to convert the
417 marital property into a tax credit against his 1995 taxes that
418 would either result in his paying less taxes in 1995 after the
419 divorce was final or in his receiving a refund of taxes when he
420 filed his 1995 tax return. Under either of these scenarios the
421 excess amount is a marital asset and plaintiff is entitled to an
422 equitable division of that asset.

423
424 The trial court's finding that defendant had "failed to
425 convince this Court that a marital asset in the form of a tax
426 credit or overpayment has been created due to the amount of money
427 that Mr. Dennison has withheld from his 1995 bonus payment from his
428 employer" is a finding against the preponderance of the evidence.
429 This court holds that the excess withholding of \$10,242.00 was
430 marital property and that defendant is entitled to one half or
431 \$5,121.00 of that amount. On remand, the trial court shall enter
432 an order to that effect.

433
434 Defendant's fourth issue requests that she "be awarded
435 attorney's fees from Mr. Dennison for the services of her attorney
436 on this appeal."

437 We think that it is evident from this record that the
438 defendant lacks the resources to pay her attorney's fees. Under
439 these circumstances, an award of attorney's fees is appropriate.
440 **Fox v. Fox**, 657 S.W.2d 747, 749 (Tenn. App. 1983). Taking all
441 matters into consideration, including the plaintiff's ability to
442 pay and the defendant's success on appeal, we are of the opinion
443 that defendant is entitled to her attorney's fees.

444 [The spouse] should not have to pay the cost of
445 defending her entitlement to alimony and asserting
446 her child's right to increase support payments out
447 of her employment income which, when combined with
448 the support payments, still does not provide the
449 standard of living to which [the spouse] was
450 accustomed to during the parties' marriage.

451
452 **McCarty v. McCarty**, 863 S.W.2d 716, 722 (Tenn. App. 1992). **But see**
453 **Florence v. Florence**, No. 85-272, 1996 WL 125539, at * 3 (Tenn.
454 App. 22 March 1996)(affirming the trial court's decision awarding
455 wife only one-half of her attorney's fees because wife was
456 "consistently underemployed").

457
458 Therefore, it results that the judgment of the trial court
459 on remand should be amended to order plaintiff to pay child support
460 of \$1,887.00 per month to defendant, which shall include \$1,440.00
461 per month paid directly to defendant and \$447.00 per month payable
462 to an educational trust fund for the benefit of the minor daughter;
463 to order plaintiff to pay to defendant alimony in futuro of
464 \$2,500.00 per month until defendant's death or remarriage; to order
465 plaintiff to pay defendant \$5,121.00 as her share of the excess
466 marital property which was withheld from plaintiff's compensation
467 for federal taxes; and to conduct a hearing to determine reasonable
468 attorney's fees incurred by defendant in this appeal. It goes
469 without saying that if there is a material change in circumstances,
470 either party may apply to the court for a reduction or increase in
471 the amount of alimony in futuro. In all other respects, the
472 judgment of the trial court is affirmed and the cause is remanded

473 to the trial court for further necessary proceedings. Costs on
474 appeal are taxed to plaintiff/appellee, Steve Stafford Dennison.

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SAMUEL L. LEWIS, JUDGE

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482 CONCUR:

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HENRY F. TODD, P.J., M.S.

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BEN H. CANTRELL, J.

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