

MARILYN KENNEDY HENDON, )  
 )  
 Plaintiff/Appellee, )  
 )  
 VS. )  
 )  
 ROBERT C. HENDON, JR., )  
 )  
 Defendant/Appellant. )

Appeal No.  
01-A-01-9603-CV-00108

Williamson Circuit  
No. C-9432

**FILED**

**November 20, 1996**

**Cecil W. Crowson  
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF WILLIAMSON COUNTY  
AT FRANKLIN, TENNESSEE

THE HONORABLE CORNELIA A. CLARK, JUDGE

MARLENE ESKIND MOSES  
Eisenstein, Moses & Mossman  
Suite 500  
One Church Street Building  
Nashville, Tennessee 37201  
Attorney for Plaintiff/Appellee

JAMES H. DRESCHER  
Stokes & Bartholomew, P.A.  
424 Church Street, 28th Floor  
Nashville, Tennessee 37219  
Attorney for Defendant/Appellant

AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

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

## OPINION

In this post-divorce proceeding, the trial judge modified a temporary award of rehabilitative support by changing it to a long-term award. The husband argues on appeal that there have been no unforeseen changes in circumstances since the divorce; that the lower court erred in not considering the fact that the wife will inherit a substantial estate from her parents; and that the court erred in relying on the fact that the husband's current wife has a substantial income. We affirm the trial court.

### I.

In 1990 the Circuit Court of Williamson County ordered a divorce of these parties. The court found as a fact that the wife -- who has a masters degree in speech therapy, but also has a long history of mental problems -- could be rehabilitated and could return to the work force as a full-time employee. Consequently, the court ordered the husband, a Nashville lawyer, to pay the wife \$1500 per month for sixty months, and then \$750 per month for thirty-six months or, until her death or remarriage, if either of these events occurred sooner.

On March 7, 1995 the wife filed a petition seeking a change in the support award to make it \$1500 per month until her death or remarriage. The petition asserted that the wife's continuing psychological problems prevented her from returning full time to the work force, and that the husband's income had increased dramatically since the divorce. After a hearing, the trial judge found that, based on the wife's current status, full rehabilitation was not feasible and that the husband's income had increased to \$175,000 per year (from \$75,000 at the time of the divorce). The court also found that the husband's current wife has an income of \$50,000 per year.

Based on these findings, the court modified the support award to provide payments to the wife of \$1150 per month until her death or remarriage.

## II.

A post-divorce increase or decrease in spousal support may be ordered “only upon a showing of a substantial and material change of circumstances.” Tenn. Code Ann. § 36-5-101(a)(1)(emphasis added). “To be material, the change of circumstances must be shown to have been unforeseeable at the time the decree was entered.” *McCarty v. McCarty*, 863 S.W.2d 716, 719 (Tenn. App. 1992).<sup>1</sup>

The husband argues that it was entirely foreseeable at the time of the original divorce that the wife could not be rehabilitated; that it was not only foreseeable but predictable, because the medical proof available at that time strongly suggested that she would never be able to work at all. Thus, the husband reasons that the only change in circumstances is for the better, since the wife now works part time.

We think, however, that the husband cannot have it both ways on this issue. At the original divorce hearing he argued that the wife would be able to go back to work full time, and that consequently she should be awarded temporary, rehabilitative support only. He was successful in persuading the court to make that finding. He now argues that since proof that the wife could not be rehabilitated existed at the original hearing, her subsequent inability to re-enter the workplace full time should be considered entirely foreseeable.

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<sup>1</sup>Although the origin of the rule of unforeseen circumstances is hard to trace, it goes back at least as far as *Hicks v. Hicks*, 176 S.W.2d 371, 26 Tenn. App. Reports 641 (1943), where the court referred to “new facts and changed conditions which were not determined and could not be anticipated by the decree.” We should also point out that the courts usually do not draw a distinction between situations where the initial support obligation was set by agreement and those where the initial obligation was set by the court.

We think that anytime a court finds as a fact during the original divorce that a future course of events is likely, and the finding turns out to be erroneous, a material change of circumstances has occurred. Therefore, the court was justified in modifying the previous support order in accordance with the changed circumstances.

### III.

The husband also raises several issues concerning the wife's needs and his ability to pay. The trial judge found that the wife's regular monthly expenses were \$2100, and that she earned a total of \$951 from her work and her investments. These findings are amply supported by the record, and the husband does not seriously contest her need for an additional \$1150 per month.

The husband does argue that the fact that his income has substantially increased is not a change of circumstances justifying a modification of the support award. He also argues that the trial judge erred in basing her decision in part on the fact that the husband's current wife earns approximately \$50,000 per year.

We think, however, that in this case these factors are irrelevant to the question of whether the period for which the husband is obligated to pay spousal support should have been extended. Although it is arguable that the court increased the award from \$750 per month (the figure set in the final decree after the first sixty months) to \$1150, the award was actually reduced to the lower figure from \$1500 per month, which had been awarded on the basis of the husband's income of \$75,000 per year. Without considering any increase in earnings or the current wife's income, the record does not reflect that the husband is less able to pay the lower amount. Thus, any error in admitting evidence of the second wife's income would be harmless. See Tenn. R. App. Proc. 36(b).

#### IV.

The husband also asserts that the trial judge should have taken into account the fact that the wife will inherit a sizeable estate at the death of her parents. His offer of proof showed that the wife's parents were elderly and had an estate of approximately \$1,300,000 which, according to their most recent wills, was to be divided among their three children.

The trial court refused to consider this evidence; instead the court held that if and when the inheritance occurred it could be considered as a change of circumstances on which to base a modification of the support award.

We think the court properly handled the question of the inheritance. Assuming that the wife is certain to inherit a sizeable amount of money from her parents, the timing of the receipt of the bequest is too uncertain to merit consideration. Instead, leaving the question open for consideration when it happens is a more practical and preferred treatment.

#### V.

The wife has asked this court to order the husband to pay the attorney fees she incurred responding to his appeal. The grant of attorney fees in divorce cases is within the discretion of the trial judge. *Brown v. Brown*, 913 S.W.2d 163 (Tenn. App. 1994); *Seal v. Seal*, 802 S.W.2d 617 (Tenn. App. 1990); *Lancaster v. Lancaster*, 671 S.W.2d 501 (Tenn. App. 1984). Such an award is only considered appropriate, however, when the spouse does not have sufficient funds to pay his or her own legal expenses, *Houghland v. Houghland*, 844 S.W.2d 619 (Tenn. App. 1992) or when payment of those expenses would require depletion of the obligee spouse's resources. *Harwell v. Harwell*, 612 S.W.2d 182 (Tenn. App. 1980).

In the present case, the wife does have sufficient financial assets from which she could pay her attorney, but the income from those assets is one of three components of support she relies upon to meet her monthly expenses. It thus seems equitable to us to have the husband pay the wife's attorney fees from his vastly greater income, rather than have the wife pay and consequently be compelled to reduce still further her modest standard of living.

**VI.**

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Williamson County to fix the amount the husband must pay for the wife's attorney fees on appeal, and for any further proceedings that may become necessary. Tax the costs on appeal to the husband.

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BEN H. CANTRELL, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE  
MIDDLE SECTION

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SAMUEL L. LEWIS, JUDGE