

IN THE COURT OF APPEALS OF TENNESSEE

**FILED**  
**December 23, 1996**  
**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

VIRGINIA RUTH MATHELY, ) C/A NO. 03A01-9607-CV-00237  
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Plaintiff-Appellee, )  
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v. ) APPEAL AS OF RIGHT FROM THE  
 ) HAMILTON COUNTY CIRCUIT COURT  
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 )  
JOHNNY G. MATHELY, )  
 ) HONORABLE WILLIAM L. BROWN,  
Defendant-Appellant.) JUDGE

Attorney for Appellant  
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O P I N I O N

AFFIRMED AND REMANDED

Susano, J.

This is a post-divorce proceeding. Virginia Ruth Mathely filed a complaint against her former husband, Johnny G. Mathely, seeking a modification of the then-existing order obligating him to pay alimony *in futuro* of \$100 per week. Following a hearing, the court modified its order by increasing the alimony payment to \$125 per week, beginning May 24, 1996, and ending December 31, 1997. The court's modification order provides that beginning in 1998, Mr. Mathely's spousal support obligation will revert to \$100 per week. Husband appealed, arguing that the trial court erred in awarding a temporary increase in alimony predicated on medical bills incurred by Ms. Mathely since the entry of the previous order for alimony. We affirm.

A "court may decree an increase or decrease of such allowance [of spousal support] only upon a showing of a substantial and material change of circumstances." T.C.A. § 36-5-101(a)(1). The requirement of a substantial and material change of circumstances since the previous order is consistent with the legal principle that a court decree is *res judicata* as to the facts existing at the time of the earlier decree. **Hicks v. Hicks**, 176 S.W.2d 371, 374-75 (Tenn. App. 1943).

In **Elliot v. Elliot**, 825 S.W.2d 87 (Tenn. App. 1991), we addressed the principles applicable to a petition to modify an alimony award:

The party seeking relief on the grounds of changed circumstances has the burden of proving the changed circumstances justifying

an increase or decrease in the amount of the alimony award. (citation omitted.) The change in circumstances must be shown to have occurred after the entry of the divorce decree, and must not have been foreseeable at the time the decree was entered into. (citation omitted.) Changes in circumstances are not material if such changes were in the contemplation of the parties at the time they entered into the Support and Alimony Agreement. (citation omitted.)

*Id.* at 90.

In the instant case, the trial court stated that it was increasing the alimony award "primarily because of the unforeseen medical expenses [Ms. Mathely had] incurred." This finding was based on her testimony that in 1995 she had undergone emergency surgery because her "colon and intestines ruptured." Apparently, the surgery also involved her gall bladder. As a result of the surgery, she incurred \$2,000 in medical bills which were not paid by insurance. According to her, she had "whittled that down some," but still owed a substantial amount at the time of the hearing.

Mr. Mathely argues that he should not be burdened with an increase in alimony to pay these expenses because, he claims, his income is basically the same as it was at the time of the parties' divorce when the alimony was first set at \$100; and because his former wife has not attempted to pursue employment with more hours and/or a greater hourly rate.

In the last court order entered prior to the filing of the petition to modify, the court temporarily reduced Mr.

Mathely's alimony obligation from \$100 to \$15 per week because he was unemployed. That order of July 13, 1995, provided that his alimony would go back to \$100 per week when he got a job. He was employed and paying \$100 per week when the current petition to modify was heard.

It is clear that Ms. Mathely's emergency surgery resulting in \$2,000 in unreimbursed medical bills was not an event anticipated by the parties at the time of the divorce or when any of the subsequent orders were entered. Given the economic circumstances of these parties, we believe it is clear that \$2,000 in unreimbursed medical bills justifies a finding of a material and substantial change of circumstances.

A question of alimony, both in its original award and on a modification petition, addresses itself to the discretion of the trial court. *Marmino v. Marmino*, 238 S.W.2d 105, 107 (Tenn. App. 1950); *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. App. 1989). That discretion will not be disturbed on appeal unless it has been abused. *Marmino*, 238 S.W.2d at 107. On a petition to modify, the court should consider the factors set forth at T.C.A. § 36-5-101(d)(1)(A)-(L). *Cranford*, 772 S.W.2d at 50.

The proof demonstrates the plaintiff's need. It also shows that her former husband's anticipated income exceeds his projected expenses by \$533 a month. Need and ability to pay are two of the most important factors for the trial court's consideration in any alimony determination. *Lancaster v.*

*Lancaster*, 671 S.W.2d 501, 503 (Tenn. App. 1984); *Barker v. Barker*, 671 S.W.2d 843, 847 (Tenn. App. 1984).

Citing cases from other jurisdictions<sup>1</sup>, the appellant argues that a modification petition should not be predicated on a temporary change. Our response is threefold. First, counsel has not cited any Tennessee authority for a permanent/temporary dichotomy as it pertains to the question of a change of circumstances in an alimony modification setting. Furthermore, we are unaware of any Tennessee authority finding such a distinction significant as an absolute bar to an increase in alimony. Second, even if we were to adopt such a distinction, which we decline to do, it is clear that here we are dealing with a permanent change, in the sense that these bills have been absolutely and permanently incurred. They do not constitute a temporary condition that is immediately going away. The creditors expect to be paid. Third, on at least two occasions in the past, the trial court reduced Mr. Mathely's alimony obligation because he was "temporarily" unemployed--a condition that was going to change, but which was certainly permanent while it existed. We find no merit in Mr. Mathely's temporary versus permanent argument in this case.

Applying our Rule 13(d), T.R.A.P. standard of review in this case, we cannot say that the evidence preponderates against the trial court's findings. Certainly, we find no abuse of discretion in the modification decreed by the trial court.

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<sup>1</sup>*Riley v. Rollo*, 913 S.W.2d 382 (Mo. App. W.D. 1996); *Stewart v. Rich*, 664 So.2d 1145 (Fla. App. 4 Dist. 1995).

The appellee has moved for an award of counsel fees in connection with this appeal. We find that such an award is appropriate. See **Cranford**, 772 S.W.2d at 52. This case will be remanded to the trial court to set the fees to which the appellee is entitled with reference to this appeal. See **Folk v. Folk**, 357 S.W.2d 828 (Tenn. 1962).

The trial court's judgment is affirmed. This case is remanded for further proceedings not inconsistent with this opinion. Costs on appeal are taxed to the appellant and his surety.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.