

IN THE COURT OF APPEALS OF TENNESSEE  
EASTERN SECTION

**FILED**

July 31, 1997

Cecil Crowson, Jr.  
Appellate Court Clerk

DANNY DANIEL,

) C/A NO. 03A01-9703-CH-0096

)

Plaintiff-Appellant,

) HAMILTON CHANCERY

)

v.

) HON. HOWELL N. PEOPLES,

) CHANCELLOR

DONNA DANIEL,

)

) AFFIRMED AS

Defendant-Appellee.

) MODIFIED

MARVIN BERKE, BERKE, BERKE & BERKE, Chattanooga, for Plaintiff-Appellant.

PHILLIP C. LAWRENCE, FEENEY & LAWRENCE, PLLC, Chattanooga, for Defendant-Appellee.

**OPINION**

Franks. J.

In this divorce action the Trial Judge, at the conclusion of the evidentiary hearing, made the following findings:

Mr. Daniel has an income of \$1,500 a week, \$6,450 a month gross. He also has \$2,000 a month that comes in as rental income from some real property that he owns.

His tax return from last year shows an adjusted gross income of \$201,200. That's \$16,766 a month.

If Mrs. Daniel makes \$1,600 a month, he still makes, based on last year's tax return, ten times the income that she has.

The parties have been married since 1979. Mrs. Daniel has worked as a nurse until her child was born. She has returned to working on the PRN basis as a nurse. Her income since February the 22nd, 1996

has been \$6,800.

Assuming that same rate of income, the court will order the Plaintiff, Danny Daniel, to pay her alimony at the rate of \$1,500 per month.

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Because of the great disparity in the amount of income between these parties, I assume these parties are going to make equal division of their assets and their property, so the Court would still deem appropriate to award Mrs. Daniel attorneys fees as alimony.

Danny Daniel has appealed and has raised these issues:

1. Did the Court err in ordering husband to pay alimony *in futuro* at the rate of \$1,500 per month, even though the wife has no need for that amount and rehabilitation was possible?
2. Did the Court err in ordering the husband to pay the wife's attorney \$5,770 as their attorney's fees when the wife had sufficient resources to pay the fees herself?

The amount of alimony awarded is within the sound discretion of the Trial Judge. *Houghland v. Houghland*, 844 S.W.2d 619 (Tenn. App. 1992). Appellant points out that need and ability to pay are the "most critical" factors to be considered in determining whether to award alimony. *Lloyd v. Lloyd*, 860 S.W.2d 409 (Tenn. App. 1993). We agree, but the Court is required to consider all the factors, if applicable, set forth in T.C.A. §36-5-101(d). Moreover, the spouse's ability to pay is an important consideration for the Court in setting alimony. *McCarty v. McCarty*, 863 S.W.2d 716 (Tenn. App. 1992). The record establishes that the wife is economically disadvantaged, and it is appropriate to provide alimony. However, the wife testified that she is employed part-time and has no desire to work full time. She is a nurse and capable of making a substantial income. She is a specially trained in endoscopies, colonoscopies, and gasoscopies. She testified that, if necessary, she could be retrained as a floor nurse within a period of a year, and has substantial assets from the division of marital property.

Courts have been directed by the General Assembly that when there is a

finding that a spouse is economically disadvantaged relative to the other spouse, that the disadvantaged spouse be rehabilitated “whenever possible”. T.C.A. §36-5-101(d)(1). It appears the Trial Judge based the award of permanent alimony upon the disparity in the income of the parties. However, when the elements enumerated in T.C.A. §36-5-101(d) are applied to the facts of this case, rehabilitative alimony is appropriate. Accordingly, we modify the Trial Court’s judgment to reclassify the alimony as rehabilitative and to be paid in the amount of \$1,500.00 per month for five years.

The trial judge is vested with wide discretion in allowance of attorney’s fees and expenses. *See Elliott v. Elliott*, 825 S.W.2d 87 (Tenn. App. 1991), and as in this case, where the award of attorney’s fees is an alimony award, the Trial Court was required to take into account the factors enumerated in §36-5-101(d). We find from our review that the Trial Court properly exercised his discretion in making the award of fees. Accordingly, we affirm the judgment of the Trial Court, as modified, and remand at appellant’s cost.

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Herschel P. Franks, J.

CONCUR:

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Don T. McMurray, J..

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William H. Inman, Sr.J.