

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

July 28, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

RALPH STEVEN WISEMAN

Plaintiff - Appellant

v.

SARA MCCARTT WISEMAN

Defendant - Appellee

) HAMILTON COUNTY
) 03A01-9612-CV-00392
)
)
)

) HON. L. MARIE WILLIAMS,
) JUDGE
)
)

) AFFIRMED AND REMANDED

JOHN P. KONVALINKA and MATHEW D. BROWNFIELD OF CHATTANOOGA FOR APPELLANT

PHILLIP C. LAWRENCE OF CHATTANOOGA FOR APPELLEE

O P I N I O N

Goddard, P. J.

Ralph Steven Wiseman, Plaintiff-Appellant, appeals a judgment of the Circuit Court for Hamilton County which denied Mr. Wiseman's request for modification of rehabilitative alimony, while increasing pursuant to Ms. Wiseman's counter-suit the amount of the childrens' trust payments paid by him.

Mr. Wiseman raises the following issues on appeal:

I. The trial court erred in concluding that it had no discretion to deviate from the child support guidelines in awarding child support on income in excess of \$6,250.00 per month.

II. The trial court erred in denying plaintiff, Ralph S. Wiseman's complaint for modification of temporary rehabilitative alimony.

A. The preponderance of evidence indicates a substantial and material change in circumstances.

B. Based on the facts and circumstances in this case, Dr. Wiseman is entitled to a modification of the rehabilitative alimony award, decreasing the amount of monthly payments.

III. The trial court erred in refusing to place the burden upon the defendant, Sara Wiseman, to show that all reasonable efforts at rehabilitation have been made and have been unsuccessful.

The parties entered into a final decree for divorce on March 24, 1994. The Marital Dissolution Agreement, adopted by the Court, recited that the parties had reached a property settlement. The agreement contained among other provisions the following provision concerning rehabilitative alimony:

10. REHABILITATIVE ALIMONY: The Husband shall pay unto the Wife beginning March 1, 1994, the sum of Four Thousand Dollars (\$4,000.00) per month as periodic rehabilitative alimony which payments shall continue on a monthly basis through March 1, 1999 (a total of 5 years) with said payments to continue whether or not the Wife remarries. Said obligation for payment of this five (5) years of alimony shall only be terminated by death of Husband or Wife. Effective March 1, 1999, the Husband's alimony payments will reduce to \$2,000.00 per month and will continue on a monthly basis through March 1 of the year 2000 (24 months in all)¹, with these payments of alimony being terminated by the death of either party or remarriage of Wife.

¹ The briefs of the parties do not comment on this inconsistency.

In addition to the rehabilitative alimony, the agreement provided for child support payments for their two children, who were nine and five years old at the time of this hearing. The child support payments were Two Thousand and Five Hundred Dollars (\$2,500.00) per month paid directly to Ms. Wiseman and an additional payment of Twenty thousand Dollars (\$20,000.00) per year for ten (10) years, to be paid into the childrens' educational trust fund.

I. Rehabilitative Alimony

Dr. Wiseman claims that there have been substantial and material changes in circumstances warranting modification of the rehabilitative alimony award. The first substantial change concerns the means of Dr. Wiseman's income production rather than the amount of income produced. Dr. Wiseman testified that when the parties were negotiating the Marital Dissolution Agreement, he was a sixty percent (60%) partner in Anesthesiologists Associated, P.C., and the parties contemplated that he would become a one hundred percent (100%) full partner in 1994, which would increase his income to a projected \$372,636.00. Dr. Wiseman stated that he did not receive an increase in pay as a result of becoming a partner because of a decrease in reimbursements from third party payers. Dr. Wiseman testified that in order to increase his pay, he had to significantly increase his workload from 1100 patients per year to over 2000 patients per year. As a result, Dr. Wiseman concedes that his

present earnings are equivalent to his anticipated earnings.²

The substantial and material change upon which Dr. Wiseman relies is the necessity for him to work twice as many hours to receive the increase in income anticipated in the Marital Dissolution Agreement.

At the time of the Marital Dissolution Agreement, the parties anticipated that Dr. Wiseman's increase in earnings would provide him the ability to pay the rehabilitative alimony. Dr. Wiseman's earnings have increased, thus, giving him the ability to pay the rehabilitative alimony. It is immaterial that the increase in earnings is due to Dr. Wiseman's increased workload rather than from his partnership interest. The simple fact is that Dr. Wiseman still has the ability to pay.

Dr. Wiseman argues that the change is material because there is no guarantee that he will be physically able to continue to treat 2000 patients per year, or that there will continue to be 2000 patients per year seeking his services, thus enabling him to maintain his current level of income. As a result, Dr. Wiseman argues that his salary is not set, as contemplated by the parties, but is speculative. This argument asserted by Dr. Wiseman speaks to the future. If Dr. Wiseman's salary does decrease due to the above asserted possibilities occurring, he can return to court and seek a modification. Thus, we find this contention of Dr. Wiseman to be without merit.

² In 1995, Dr. Wiseman's income tax return showed earnings of \$381,647.00, which is over \$9000.00 more than his projected earnings at the time of the Marital Dissolution Agreement.

The other substantial and material change in circumstances upon which Dr. Wiseman relies is that his ability to pay places a tremendous burden on him. This burden is due to his remarrying and being responsible for the financial support of his new wife and stepchildren. In Dillow v. Dillow, 575 S.W.2d 289 (Tenn.App.1978), the father remarried a woman with two children and sought a reduction in child support payments to his former wife on the basis of his new obligation to his immediate family. The Court held that "obligations voluntarily assumed are not proper to be considered as changed circumstance to reduce support payments otherwise owed." See also Adams v. Reed, 874 S.W.2d 61 (Tenn.App.1993). Dr. Wiseman's new financial obligations, which increased his expenses, were likewise voluntarily assumed. As a result, we find this contention of Dr. Wiseman to be without merit.

Finally, Dr. Wiseman claims that Ms. Wiseman has not made reasonable efforts of rehabilitation, thus entitling him to a modification of the rehabilitative alimony award. However, Ms. Wiseman contends that the rehabilitative alimony award in the Marital Dissolution Agreement was not rehabilitative alimony but was rather an award of alimony in solido. She claims that an award of a definite amount over a set period of time is still alimony in solido and not rehabilitative alimony, relying on the Tennessee Supreme Court decision in Isbell v. Isbell, 816 S.W.2d 735 (Tenn.1991).

Ms. Wiseman's reliance on Isbell is misplaced. The Tennessee Legislature enacted T.C.A. 36-5-101(d)(2) in response to the Isbell decision to allow modification of rehabilitative

alimony even when it is an award of a definite amount over a set period of time. See Marlar v. Marlar, an unpublished opinion of this Court, filed in Nashville on May 22, 1996; Sommerville v. Sommerville, an unpublished opinion of this Court, filed in Nashville on August 23, 1995. As a result, the rehabilitative alimony award in the case at hand is subject to modification.

The Trial Court found that Dr. Wiseman failed to satisfy his burden of proof in regard to Ms. Wiseman's efforts to rehabilitate herself. It is the contention of Dr. Wiseman that the Trial Court improperly placed the burden of proof on him rather than his wife. In support of this contention, Dr. Wiseman relies upon the language of the rehabilitative alimony statute:

An award of rehabilitative, temporary support and maintenance shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances. Rehabilitative support and maintenance shall terminate upon the death of the recipient. Such support and maintenance shall also terminate upon the death of the payor unless otherwise specifically stated. The recipient of the support and maintenance shall have the burden of proving that all reasonable efforts at rehabilitation have been made and have been unsuccessful.

T.C.A. 36-5-101(d)(2). The Trial Court rejected Dr. Wiseman's assertion and explained as follows:

It is the opinion of this Court that the burden of proving reasonable efforts of rehabilitation and the lack of success thereof comes into issue at such time as the wife is seeking an extension, award or increase of rehabilitative alimony and that the burden of proof does not rest with the defendant merely because a petition to decrease or terminate rehabilitative alimony has been filed by the petitioner.

We, however, find it unnecessary to resolve the burden of proof issue because we find, based upon our de novo review that Ms. Wiseman carried the burden of proof with respect to her attempts to rehabilitate herself.³

II. Child Support

The issue before us is whether a trial court has discretion to deviate from the Child Support Guidelines in awarding child support on income in excess of \$6,250.00 per month. Mr. Wiseman contends that the Trial Court held that it did not have authority to deviate from the guidelines.⁴ Ms. Wiseman argues that the Trial Court simply decided not to deviate from the guidelines.

The Supreme Court in Nash v. Mulle, 846 S.W.2d 803 (Tenn.1993) held that "the trial court should retain the discretion to determine--as the guidelines provide, 'on a case by case basis'--the appropriate amount of child support to be paid when an obligor's net income exceeds \$6,250.00 per month, balancing both the child's need and the parents' means." Following the decision in Nash, Tenn. Admin. Comp. Ch. 1240-2-4-.04(3) was amended to provide as follows:

³ For example, Ms. Wiseman did take some additional classes at Chattanooga State, she has applied for numerous job openings, and she is currently working part-time, albeit for a minimal salary. In comparison, she did not work outside of the house in the years leading up to the divorce.

⁴ Mr. Wiseman relies on the trial court's statement that "the guidelines leave no discretion for deviation from the guidelines other than in specific cases."

The court must order child support based upon the appropriate percentage of all net income of the obligor as defined according to 1240-2-4-.03 of this rule but alternative payment arrangements may be made for the award from that portion of net income which exceeds \$6,250. When the net income of the obligor exceeds \$6,250 per month, the court may establish educational or other trust funds for the benefit of the child(ren) or make other provisions in the child(ren)'s best interest.

The Supreme Court recently revisited the Child Support Guidelines issue in Jones v. Jones, 930 S.W.2d 541 (Tenn.1996), holding that a trial court must articulate sufficient grounds to rebut the presumption that the guidelines are applicable. The Court explained as follows (at page 545):

While § 36-5-101(e)(1) does authorize deviation in order to ensure equity between the parties, and while downward deviation is clearly not prohibited, the trial court's authority to do so must be considered in light of the provisions dealing with such deviation--Rule 1240-2-4-.04(2) and (4). Although not exclusive, those subsections provide for downward deviation in three instances: (1) where DHS has taken custody of the child(ren) pursuant to a neglect dependency, or abuse action; (2) where the child(ren) spend more visitation time with the obligor than is assumed by the guidelines; and (3) in cases in which the obligor is subjected to an "extreme economic hardship," such as where other children living with the obligor have extraordinary needs. Therefore, the guidelines expressly provide for downward deviation where the obligee has utterly ceased to care for the child(ren); where the obligee clearly has a lower level of child care expense than that assumed in the guidelines; and where the obligor is saddled with an "extreme economic hardship." Although the rule does not purport to set forth an exhaustive list of instances in which downward deviation is allowed, these specific instances nevertheless are a powerful indication as to the *types* of situations in which it is contemplated under the guidelines.

The Trial Court stated in its order that "specific reasons for deviation from the guidelines are outlined including situations in which the obligor's current family and children

living in the home of obligor may present extraordinary special needs. However, this Court does not find there is a basis for a deviation from the Child Support Guidelines." Obviously, the Trial Court was referring to the Jones decision. We hold that the Trial Court recognized that it has the discretion to deviate from the guidelines and properly applied the Supreme Court dictates in Jones. Mr. Wiseman argues that Jones is distinguishable from the case at hand because it dealt with a non-custodial parent with income less than \$6250 per month. We disagree. The Supreme Court decision in Jones is equally applicable to cases where the non-custodial parent has income in excess of \$6250 per month. Thus, we affirm the decision of the Trial Court to increase Mr. Wiseman's child support obligation.

Ms. Wiseman appeals insisting that she is entitled to have the increase in child support payments applied retroactively. It is within the sound discretion of the trial court to make child support payments retroactive to the time of the filing of the petition to modify. Natelson v. Natelson, an unpublished opinion of this Court, filed in Knoxville on November 29, 1995. We find no abuse of discretion.

Ms. Wiseman also asks us to award her attorney fees. We decline to do so.

The judgment of the Trial Court is affirmed and the cause remanded for such further proceedings as may be necessary and collection of costs below. Costs of appeal are adjudged against Mr. Wiseman and his surety.

Houston M. Goddard, P.J.

CONCUR:

Herschel P. Franks, J.

Charles D. Susano, Jr., J.