**IN THE COURT OF APPEALS OF TENNESSEE**

**EASTERN SECTION AT KNOXVILLE**



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| LILLIAN ELIZABETH KLINE | ) | |
| | ) | WASHINGTON CIRCUIT |
| Plaintiff/Appellee | ) | |
| | ) | NO. 03A01-9706-CV-00240 |
| v. | ) | |
| | ) | HON. G. RICHARD JOHNSON |
| JOHN THOMAS KLINE | ) | JUDGE |
| | ) | |
| Defendant/Appellant | ) | AFFIRMED |

John P. Chiles, Kingsport, for Appellant.

Robert J. Jessee, Johnson City, for Appellee.

**O P I N I O N**

INMAN, Senior Judge

These parties were divorced March 12, 1991. The judgment provided that "husband would pay to wife the sum of $478.00 per month as spousal support."[1] An agreed order was thereafter entered which required husband to designate wife as the beneficiary of his Survivor's Benefit Plan [SBP] pursuant to the Uniformed Services Former Spouse Protection Act, 10 U.S.C.A. § 1048 et seq., and directed that the award of $478.00 shall be paid by direct payment to wife from husband's retirement pay by the Military Finance Center, Denver, Colorado.

Another agreed order was entered on October 1, 1991 which, as pertinent, provides:

> "It is ordered that the motion and stipulation of the parties is hereby approved and that in lieu of support provided in Paragraph 14 of the

[1] Husband was 66 years of age; wife was 62. They were married 24 years. Neither enjoyed good health and neither had any realistic marketable skills. Husband was a military retiree.

> original judgment, [wife] shall receive the sum of $259.00 per month from [husband's] military retirement and an additional sum of $100.00 per month to be paid by [husband]. In addition thereto, [husband] shall pay from his retirement the sum of $54.00 per month to be applied to the SBP [Survivor Benefit Plan], an insurance plan which will afford [wife] an insured income from [husband's] retirement subsequent to his death."

It is the latter order which must be construed in this litigation, because wife married a retired minister on December 3, 1996 whose entire income is social security benefits. Wife did not inform husband of her remarriage; upon his learning of the fact, he filed a motion to terminate alimony pursuant to T. C. A. § 36-5-101(a)(2)(B) which provides:

> "In all cases where a person is receiving alimony in futuro or alimony the amount of which is not calculable on the date the decree was entered, and that person remarries, the alimony in futuro or alimony the amount of which is not calculable on the date the decree was entered, will terminate automatically and unconditionally upon the remarriage of the recipient. The recipient shall notify the obligor of the remarriage timely upon remarriage. Failure of the recipient to timely give notice of the remarriage will allow the obligor to recover all amounts paid as alimony in futuro or alimony the amount of which is not calculable on the date the decree was entered, to the recipient after the recipient's marriage."

Believing that it would be inequitable to apply the statute, the trial judge denied the motion. Husband appeals and presents for review the issue of whether the alimony award terminated upon the remarriage of wife. Our review is *de novo* on the record with no presumption of the correctness of the decision of the trial court on a question of law. *NCNB Nat'l Bank v. Thrailkill,* 856 S.W.2d 150 (Tenn. Ct. App. 1993).

At the outset, we observe that no evidence whatever was presented as to changed circumstances. The case was tried and decided solely on the issue of the applicability of the statute.

The precise issue has been addressed by this Court on one occasion. In *Hussey v. Hussey,* No. 01A01-9504-PB-00181, Middle Section, April 1996, a

Property Settlement Agreement [PSA] required husband to pay *alimony in futuro* of $25,000.00 every third year until wife's death or remarriage to enable her to purchase a new automobile. The PSA also required husband to pay additional *alimony in futuro* of $1,442.30 each Friday and $10,000.00 on July 31 of each year. Neither the PSA nor the decree provided that the latter two payments would discontinue upon wife's remarriage.

Husband was a multimillionaire, and wife surrendered any marital interest in 15 parcels of real estate, 18 bank accounts, and other valuable assets. About eight years later wife remarried, and husband filed a motion to terminate or reduce his alimony payments because (1) wife's second husband contributed to her support, and (2) T.C.A. § 36-5-101(a)(2)(B) automatically terminated the alimony.

The trial court held that the parties by the plain terms of the Marital Dissolution Agreement intended the alimony *in futuro* to continue after remarriage of the wife, and that the statute could not be applied retroactively, since to do so would conflict with art. I, § 20 of the Tennessee Constitution.[2] The order reflecting these reasons was vacated and the trial judge thereafter ruled:

(1) That the statute did not apply to the case at Bar, owing to constitutional limitations;

(2) that the parties intended that the Marital Dissolution Agreement retain its contractual nature, and

(3) That the parties intended that husband would pay the alimony until he or wife died, whichever occurred first.

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[2]"No retrospective law or law impairing the obligations of contracts shall be made."

We held that the Marital Dissolution Agreement was contractual in nature, and in light of the fact that from a marital estate of more than fourteen million dollars wife accepted a lump sum of only $100,000.00, the parties intended that the alimony obligation would not terminate upon the remarriage of wife.

We also declined to apply the statute retroactively, holding that a court is to apply a statute prospectively "unless the legislature clearly indicates to the contrary," citing *Shell v. State,* 893 S.W.2d 426 (Tenn. 1995), and that "the statute at issue in the instant case does not clearly direct the courts to apply it retroactively. To take the benefits acquired under the law prevailing at the time of the divorce - 1991 - from wife pursuant to a statute enacted in 1994 would in our judgment be unconstitutional."

In the case at Bar there is no Marital Dissolution Agreement and thus no contract, and no indication that alimony was awarded on any basis other than need. Neither is there any indication that the portion of the award ordered to be paid from the husband's military pension was treated as a marital asset, and thus not alimony as that term is commonly understood. Neither was any proof offered, or insistence made, that a change of circumstances had occurred, thus justifying the termination of alimony. The husband's sole argument is directed to the applicability of the quoted statute. We reiterate our holding in *Hussey,* that the statute cannot be given retrospective effect consistent with the Constitution of Tennessee.

The judgment is affirmed, with costs assessed to appellant.

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William H. Inman, Senior Judge

CONCUR:

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Houston M. Goddard, Presiding Judge

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Herschel P. Franks, Judge