

In her complaint, Wife requested that Husband be awarded the marital residence and the indebtedness for the property, and that half of the equity in the property be awarded to her. She requested that both parties keep their vehicles, and that the personal property and remaining indebtedness be divided equally. Wife requested reasonable alimony from Husband and attorney's fees. Husband also sought attorney's fees. The trial court granted temporary spousal support of \$400 per month.

The final decree of divorce, entered December 19, 1996, awarded the parties their personal property. Husband was awarded the marital residence and was ordered to pay Wife \$45,000, her share of the equity in the property. Wife was awarded half of Husband's pension plan. Attorney's fees were not awarded to either party. The issue of alimony was reserved until February 10, 1997 because Husband was having health problems.

After a hearing on September 8, 1997, the trial court entered an order on the remaining issue of alimony. He awarded Wife alimony *in futuro* in the amount of \$250 per month. The trial court did not elaborate on its reasoning in making the award. No transcript was made of the hearing.

Shortly thereafter Husband obtained a new attorney and sought to contest the alimony award by filing a motion for a new trial and for alteration or amendment of the judgment. He argued that his former attorney failed to address Wife's assets and liabilities at the hearing on alimony. He asserted that Wife has two certificates of deposit in excess of \$53,000, including the \$45,000 she was awarded for her share of the equity in the marital property. Husband stated that he had had to mortgage the marital home in order to pay her the \$45,000. He claimed that his monthly expenses are \$2844.63, but his net monthly income is only \$2150. In addition, he noted that Wife was living with her mother, who was paying all of Wife's expenses, which eliminated Wife's need for alimony. He cited Tennessee Code Annotated § 36-5-101(a)(3) for the proposition that where an alimony recipient resides with a third party, there is a rebuttable presumption that the third person is contributing to the support of the alimony recipient.

In Wife's response to the motion for a new trial, she asserted that in the alimony hearing the trial court fully considered all the factors Husband raised in his motion for a new trial, including both parties' assets and liabilities, Wife's certificates of deposit, and Wife's living arrangement with her mother.

A second hearing was held on January 12, 1998. At the hearing, Wife testified that she has lived with her mother since April, 1996, when she filed for divorce. Wife testified that her mother is unable to care for herself. Although Wife does not pay rent or mortgage payments, she testified that she cares for her mother, does all the housework, cooks, and performs house repairs. Her mother's income supports both of them. On cross examination, Wife testified that she explained her living situation and finances at the September 8, 1997 hearing. No other witnesses testified at the January 12 hearing.

On June 29, 1998, the trial court denied Husband's motion for new trial and approved the following Statement of the Evidence on the September 8, 1997 hearing:

(a) Plaintiff testified the parties were married for twenty (20) years at the time of their divorce. She was working as a waitress at the Little Dixie Restaurant in Union City, Tennessee, when she met Mr. Mallard. Ms. Mallard has a twelfth (12th) grade education.

(b) Ms. Mallard worked at the Little Dixie Restaurant for approximately five (5) years and five (5) months until 1981. She stated that waitress work was very demanding both physically and mentally, but she worked without any physical complaints.

(c) Plaintiff testified that when she quit working at the Little Dixie Restaurant, the parties agreed she would work in the home as a housewife. She testified that while she was involved in domestic duties at the home, she would also involve herself with canning, sewing, gardening, and other related tasks. During the marriage she assisted the Defendant in many strenuous household tasks such as yard work and heavy automobile repairs.

(d) Plaintiff testified that although she was physically and mentally able to work, she did not seek outside employment since the parties' separation to care for her mother, who was in poor health.

(e) The Plaintiff testified that her monthly living expenses were approximately \$500.00 at the time of the divorce in December, 1996, but had since dropped to approximately \$450.00 per month at the time of the alimony hearing on September 8, 1997.

(f) Plaintiff further testified that she was living with her mother and that her mother might qualify for Medicaid and she could then be placed in a managed care facility, such as a nursing home.

(g) Plaintiff agreed the Defendant paid her approximately \$45,000.00 for her equity in the parties' marital residence and that those funds had not been dissipated.

(h) Plaintiff further testified that she received one-half (1/2) of 20 years value of Mr. Mallard's 401-K pension/retirement plan, via a Qualified Domestic Relations Order.

(i) Plaintiff testified that her other assets included being the sole beneficiary to her mother's home and several acres of land; a certificate of deposit valued at \$30,000.00 bearing 5-1/2 percent interest and certificate of deposit valued at \$12,000.00, bearing 5.0 percent interest and \$3,000.00 in her checking account.

Husband now appeals the trial court's award of alimony *in futuro*.

On appeal, Husband contends that the evidence preponderates against the trial court's award of alimony. He submits that insufficient evidence was presented to establish that Wife was

economically disadvantaged or that he had the ability to pay. He also asserts that the trial court failed to make a threshold determination that rehabilitation was not feasible, as required by Tennessee Code Annotated § 36-5-101(d)(1). Finally, Husband contends that Wife failed to rebut the presumption that she was not in need of support since she lived with and was fully supported by her mother.

The trial court is afforded wide discretion concerning the award of alimony and an appellate court should reverse the trial court's findings only in instances in which this discretion "has manifestly been abused." *Hanover v. Hanover*, 775 S.W.2d 612, 617 (Tenn. App. 1989).

Husband argues first that the trial court erred in not making a threshold determination that Wife was economically disadvantaged or needed alimony as required by Tennessee Code Annotated § 36-5-101(d)(1).² He asserts that two circumstances eliminate Wife's need for alimony: the award to Wife of \$45,000 for her share of the equity in the parties' marital residence and the payment of her expenses by her mother.

In this case, the trial court implicitly found that rehabilitation of the Wife was not feasible, as evidenced by its award of alimony *in futuro* rather than rehabilitative alimony. The trial court heard evidence of the parties' finances, work histories, and future prospects. Husband clearly has the greater earning capacity of the two parties; he earns almost \$3000 per month. Wife has only a twelfth grade education and five years' work experience as a waitress. Several years after the parties' marriage, the parties mutually agreed that Wife would stop working as a waitress and be a homemaker. She is now in her fifties, has not worked outside the home in over fifteen years, and must care for her elderly mother. Clearly, Wife has significant barriers to rehabilitation and is economically disadvantaged relative to Husband. Considering the circumstances as a whole, we

² The pertinent part of Tennessee Code Annotated § 36-5-101 reads:

(d) (1) It is the intent of the general assembly that a spouse who is economically disadvantaged, relative to the other spouse, be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance. Where there is such relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors, including those set out in this subsection, then the court may grant an order for payment of support and maintenance on a long-term basis or until the death or remarriage of the recipient except as otherwise provided in subdivision (a)(3). Rehabilitative support and maintenance is a separate class of spousal support as distinguished from alimony in solido and periodic alimony. . . .

Tenn. Code Ann. § 36-5-101(d)(1) (Supp. 1998).

cannot say that the evidence preponderates against the trial court's implicit determination that rehabilitation in this case is not feasible.

Husband also argues that Wife failed to rebut the presumption that she is supported by the person with whom she lives. Tennessee Code Annotated § 36-5-101(a)(3) provides:

(3) In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is thereby raised that:

(A) The third person is contributing to the support of the alimony recipient and the alimony recipient therefore does not need the amount of support previously awarded, and the court therefore should suspend all or part of the alimony obligation of the former spouse; or

(B) The third person is receiving support from the alimony recipient and the alimony recipient therefore does not need the amount of alimony previously awarded and the court therefore should suspend all or part of the alimony obligation of the former spouse.

Tenn. Code Ann. § 36-5-101(a)(3) (Supp. 1998). Husband cites several cases in support of his contention that Wife is not entitled to alimony since she lives with and is supported by a third person. *See Azbill v. Azbill*, 661 S.W.2d 682 (Tenn. App. 1983); *Hubbard v. Hubbard*, No. 03A01-9603-CV-00108, 1996 Tenn. App. LEXIS 611 (Oct. 1, 1996).

The trial court in this case reviewed the evidence presented at the hearings regarding Wife's living arrangements and financial situation. The fact that a party is living with a third party who is helping the alimony recipient financially does not bar a spouse from receiving alimony. "The statute authorizes total or partial suspension, but not termination. . . . The statute preserves the long recognized discretion of the Trial Judge in respect to alimony." *Harris v. Corley*, No. 01A01-9102-CH-00055, 1991 Tenn. App. LEXIS 548 (July 5, 1991). Wife's living expenses were approximately \$450 per month at the time of the alimony hearing. Wife requested alimony of \$500 per month. The trial court awarded alimony of \$250 per month. Considering all of the circumstances in this case, we cannot say that the trial court abused its discretion in making the award of alimony *in futuro*.

The decision of the trial court is affirmed. Costs are taxed to Appellant, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P. J., W.S.

ALAN E. HIGHERS, J.