IN THE COURT OF APPEALS OF TENNESSEE

FILED

November 19, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

AT KNOXVILLE

PATSY CARR SMITH,	) C/A NO. 03A01-9901-CH-00020
	)
Plaintiff-Appellee,	) HAMILTON CHANCERY
	)
vs.	) HON. HOWELL N. PEOPLES,
	) CHANCELLOR
DONALD WALKER SMITH,	)
	) AFFIRMED IN PART
Defendant-Appellant.	) AND VACATED IN PART

KYLE E. HEDRICK, Chattanooga, for Plaintiff-Appellee.

MITCHELL A. BYRD, Chattanooga, for Defendant-Appellant.

O P I N I O N

Franks, J.

In this action, the Trial Judge dismissed Donald Smith's petition to modify the alimony award to his former wife, Patsy Smith.

Donald Smith appeals, insisting the dismissal of his petition was improper.

The parties were divorced by Final Decree filed on July 1, 1994, and the Final Decree provides in pertinent part:

> Husband shall pay to the Wife, alimony in futuro, in the monthly amount of Two Thousand Dollars ($2,000.00).Wife will not seek any modification for an increase in the alimony. After three years, or in the event of disability, remarriage of the Wife,

> cohabitation of the Wife, or substantial change in circumstances, Husband may petition the Court for reduction or cessation of alimony.

On June 1, 1997 the appellant, discontinued the payments required by the Final Decree and began making payments in the amount of $1,000.00 per month.

Appellant had been self employed as a pharmacist, and retired at age 65. He sold his pharmacy for $185,000. He still owns the building, and collects $500 a month in rent. As part of the sale of his business, he signed an agreement not to compete within a five-mile radius.

Appellant had a myocardial infarction in 1995 that required balloon surgery. However, the Trial Judge found that this did not affect his ability to work as he continued to work until he retired in 1997. The Judge also found that Mr. Smith "probably could have worked this year if work was available".

Appellee filed a petition for contempt, seeking judgment for arrearage and attorney's fees, and appellant filed a counterclaim seeking reduction in alimony, alleging that a reduction beginning June 1, 1997 was "contemplated" by the parties in 1994 by their agreements as this would be his retirement date three years later.

The Trial Judge ordered the appellant to pay $16,000 in back alimony and continue to pay $2,000 per month and dismissed the Counter Claim. The Trial Judge found that to modify a final decree, a party must show a change of circumstance, and that such change was not foreseeable when the decree was entered. The Judge concluded that the retirement at age 65 is quite typical and was certainly a foreseeable event to the parties prior to the entry of the Final Decree, and for that reason, the decree would not be modified.

The appellant's refusal to pay the full amount of alimony awarded by the Court in its Final Decree was properly classified as civil contempt. *See Givler v. Givler*, 964 S.W.2d 902 (Tenn. Ct. App. 1997). Moreover, we have held that "[w]here [the husband] neglects to apply for a modification of the decree in spite of the fact that sufficient cause exists to warrant an alteration thereof, the mere existence of such grounds is not available as a defense to proceedings for contempt." *Mowery*

v. Mowery, 363 S.W.2d 405 (Tenn. Ct. App. 1962).

Donald Smith cannot use as a defense the fact that he thought that the decree allowed for modification upon his retirement, even if his retirement three years from the time of the decree was an event that would trigger modification. The final decree of the court clearly states that the Husband merely has the right to *petition* the court after three years. There is no language in the decree to suggest that such a modification would be automatic at that time. Additionally, because Donald Smith did not plead the defense of inability to pay, analysis of such an ability is unnecessary. Regardless, he clearly had the resources to pay alimony prior to his retirement, and his retirement was a conscious choice by him, and therefore he cannot avail himself of a plea that his was unable to obey the court order.

Instead of petitioning the Court for modification as he had a right to do, he completely disregarded the order of the Court as set forth in the Final decree. He is therefore guilty of contempt and the Court's order for him to pay the amount for which he was in arrears was correct.

"It is a general rule that a party who is in contempt will not be heard by the court, when he wishes to made a motion or ask a favor.... His first duty is to purge his contempt." *Hoyle v. Wilson*, 746 S.W.2d 665 (Tenn. 1988) (citing *Bradshaw v. Bradshaw*, 133 S.W.2d 617, 620 (Tenn. Ct. App. 1939)). The court may also act within its discretion to take into account a party's contempt when fashioning a remedy instead of flatly refusing to hear such a party. *Hoyle v. Wilson*, 746 S.W.2d at 673 (citing *Gossett. v. Gossett*, 241 S.W.2d 934 (Tenn. Ct. App. 1951).

In the case at bar, the Trial Judge found that the only change of circumstance alleged was Donald Smith's retirement, and that such retirement was not a material change because it was foreseeable at the time of the divorce, but we conclude from the language incorporated in the Marital Dissolution Agreement, that the parties contemplated some possible modification of the award at the time of the appellant's retirement.

The rules of construction applicable to written instruments also apply to judgments and orders. *Hale v. Hale*, 838 S.W.2d 206, 208 (Tenn. Ct. App. 1992). Thus, a final divorce decree should be construed in light of the pleadings, particularly the requests for relief, and the apparent

intentions of the drafters and of the court. *Hale*, 838 S.W.2d at 208-209; *Southwestern Presbyterian Univ. v. Clarksville*, 259 S.W. 550, 553 (Tenn. 1924). Where the decree incorporates a marital dissolution agreement, the entire agreement should be considered in determining the meaning of any or all of the parts of the decree. *See Davidson v. Davidson*, 916 S.W.2d 918 (Tenn. Ct. App. 1995).

The decree, in pertinent part, states:

> **After three years**, ***or*** in the event of disability, remarriage of the Wife, cohabitation of the Wife, ***or*** substantial change in circumstances, Husband may petition the Court for reduction or cessation of alimony. (Emphasis added.)

The use of the word "or" suggests that the parties contemplated the possible modification of alimony after three years even absent "substantial change in circumstances." Three years from the divorce was the time the appellant would turn 65, the normal age of retirement. As retirement is foreseeable and therefore not a material change in circumstances, it would be necessary for the parties to provide for modification absent such a change as defined by the courts. If the husband still had to show a substantial change in circumstances, the "after three years, or" language would be superfluous.

We therefore vacate and remand.

Upon remand, the Trial Court should evaluate the relevant factors in T.C.A. §36-5-101 to determine the appropriate amount of alimony in light of the circumstances. It should be noted that the recipient spouse's demonstrated need for spousal support is the single most important factor, *see Sannella*, and the obligor's ability to pay is another important factor. *Also see Sannella*.

Appellant's final argument is that the Chancellor erred in not requiring the filing of certain financial records regarding income. The appellant argues that the Trial Judge could not make the appropriate comparison without considering the financial records from the time of the divorce, nor did he require the filing of sworn statements of the parties as provided in Rule 18.04 of the *Hamilton County Local Rules of Chancery Practice*. It is in the discretion of the Chancellor to waive the filing requirements if he deems them unnecessary. Moreover, it is the appellant's burden to prove a change in circumstances to justify modification. He should have filed financial statements, regardless of the Court's failure to request them, if he deemed those statements necessary.

Upon remand, appellant will be required to purge himself of contempt, before proceeding on the issue remanded. "His first duty is to purge his contempt." *Hall v. Wilson*, 746 S.W.2d 655 (Tenn. 1988).

We do not disturb the award of attorney's fees entered by the Trial Judge, but decline to award any attorney's fees as a result of this appeal.

The cause will be remanded to proceed in accordance with this Opinion, and the cost of the appeal is assessed one-half to each party.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P.J.

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D. Michael Swiney, J.