IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 26, 2015 Session

TRACY MELINDA COOK v. TRACY DEAN IVERSON

Appeal from the Chancery Court for Williamson County
No. 39876 Robbie T. Beal, Chancellor

No. M2014-01206-COA-R3-CV – Filed November 30, 2015

Father and Mother divorced in February 2012. Later that same year, Father's employer notified him that his high-paying sales job would be eliminated. Due to his unemployment, Father filed a petition to modify his alimony and child support obligations. The trial court concluded there was a material change in circumstances and reduced Father's monthly alimony and child support obligations. Father argues on appeal that the trial court erred by applying an incorrect legal standard; not reducing his alimony and child support obligations further; and declining to reduce his alimony *in futuro* obligation retroactive to the date of his petition. As an additional issue, Mother argues that the trial court erred in measuring any change in circumstances from the final decree of divorce rather than an agreed order addressing payments to Mother entered after Father learned that he was losing his job. Both Father and Mother seek an award of their attorney's fees incurred on appeal. After a review of the record on appeal, we conclude that the trial court correctly found a material change in circumstances but erred in imputing income to Father. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

Tenn. R. App. P. 3 Appeal; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Gregory D. Smith and Brenton H. Lankford, Nashville, Tennessee, for the appellant, Tracy Dean Iverson.

Craig H. Brent, Franklin, Tennessee, for the appellee, Tracy Melinda Cook.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Tracy Melinda Cook ("Mother") and Tracy Dean Iverson ("Father") were married August 10, 1985, and divorced by final decree entered on February 7, 2012. Mother and Father have one daughter. The Final Decree of Divorce included both a Permanent Parenting Plan and a Marital Dissolution Agreement.[1] The Permanent Parenting Plan obligated Father to pay $2,100 in child support based upon his gross monthly income of $31,121.88 and Mother's lack of income. The Marital Dissolution Agreement obligated Father to pay alimony *in futuro* of $5,000 per month until Mother's remarriage or death and, for thirty-six months, Mother's health insurance premiums. Father secured his alimony obligation by a $1,000,000.00 insurance policy on his life with Mother as beneficiary.

At the time of the parties' divorce, Father worked as a salesman for Abbott Laboratories at an annual salary of $373,000. On October 17, 2012, Abbott Laboratories notified Father of a reduction of its sales force and that he would be losing his job. Father received a severance package, which included pay through May 2013. Father informed Mother in early November 2012 of his termination, but he continued to meet his alimony and child support obligations.

On May 1, 2013, Father filed a Petition to Modify Alimony and Child Support in the Chancery Court for Williamson County. He claimed that his job loss constituted a substantial and material change in circumstances. On April 2, 2014, the trial court held a hearing on the petition at which only Father and Mother testified.

According to Father, upon learning of his termination, he immediately began an aggressive search for a new job. He updated his resume, networked, and availed himself of a corporate outplacement service provided by Abbott. Father testified that he applied for several positions and had been interviewed by prospective employers, primarily by telephone. However, as of the date of the hearing, he had not received a job offer. Father believed that his lack of success was due to either the fact that he was overqualified for most of the

[1] The Final Decree of Divorce, Permanent Parenting Plan, and Marital Dissolution Agreement are not included in the record on appeal. Father appends these documents to his reply brief. Although not included in the record, in this circumstance and given the issue raised by Mother discussed below, we take judicial notice of the Final Decree of Divorce, Permanent Parenting Plan, and Marital Dissolution Agreement as well as the Agreed Order Amending Final Decree of Divorce. Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009).

positions or his compensation history. One position for which he interviewed paid only $70,000.

Father also testified that his health impacted his ability to work. At the time of the hearing, Father was 59 years of age. However, he described his general health as poor. He had suffered a heart attack in 2009. He also had an essential tremor, making it difficult for him to type and write. Since the parties' divorce, Father had injured his ankle in an accident involving a three-wheeler. The accident necessitated five surgeries on his ankle, the last of which, in December 2013, was a total ankle fusion.

In January 2014, Father voluntarily admitted himself into a program for the treatment of depression. After completing a ten day residential program, he continued treatment for three weeks as an outpatient. As of the date of the hearing, he was taking medication for his depression and had an appointment to see a psychiatrist, but Father described his mental health as improved.

As for assets and other sources of income, Father received roughly fifty percent of the marital assets as part of the divorce settlement. As an exhibit, he provided a listing of his assets and liabilities, showing a current net worth of $613,339. His two largest assets consisted of a home valued at $414,000, which was subject to a mortgage of $325,000 and two individual retirement accounts with a combined value of $334,777. Father had recently withdrawn $50,000 from one retirement account to fund his obligations.

Father testified that he had been in discussions about the placement of a cell phone tower on his property. The interested party had suggested a twenty-five year lease that could generate between $600 and $700 per month in income. Father thought the lease payments might be higher depending on where the tower was located on his property.

Although Father claimed that he had economized since losing his job, cross-examination revealed that his lifestyle had changed little. Father proceeded with several expensive purchases despite being unable to find work. Among other examples, Father purchased a hot tub for his home at a cost of $11,000. He paid between $11,000 and $12,000 for a new home stereo system, and he purchased a new Harley-Davidson motorcycle for himself. Father bought a Harley-Davidson engine for nearly $7,000; a purchase Father described as an "investment." He also purchased a dune buggy for his daughter and storage units for his driveway because the storage space in his basement was "extremely limited."

Father engaged in other behavior seemingly at odds with his financial circumstances. On December 1, 2013, a woman moved into Father's home, receiving free room and board. Ostensibly, the woman assisted Father as he was recovering from ankle surgery, and

according to Father, the woman helped him reduce his expenses. However, the proof showed Father also gave the woman access to his credit card and that she was making unauthorized charges. Some of Father's credit card statements reflected frequent visits to a local bar and to a liquor store, where Father testified he would purchase a case of wine on nearly a weekly basis.

Mother's testimony focused on her need for support. Prior to her daughter's birth, Mother had worked outside of the home, but her career had yielded to Father's. She had to leave jobs on three separate occasions to accommodate Father's moves for work. Since her daughter's birth in 1998, she had been a "stay-at-home mom," and she had no income other than alimony from Father.

Although she ultimately hoped to find employment again outside of the home, Mother testified that she was unable to do so at present because her daughter needed her. According to Mother, her daughter "is unruly, she has ADHD, she has oppositional defiant disorder, she does not have respect for authorit[y] figures, she doesn't show much empathy, she is highly impulsive, and she has an audio processing disability." Mother expressed concern that her daughter was drinking alcohol and using marijuana. Mother also expressed concern that her daughter might skip school if Mother was not present in the home.

As for her assets, Mother agreed with Father that her current assets had a value in excess of $1,000,000. Other than revolving credit card debt, which she paid off monthly, Mother had no debt. She lived in a five bedroom house with her daughter. When asked why she lived in such a large home, Mother explained that it was the only home within her daughter's school district that she could find on short notice following the divorce.

Much like Father, Mother admitted that her lifestyle had changed little since learning Father was losing his high paying position. When asked what adjustment she had made, Mother testified that "[w]e've tried to cut back on gas, on heating the house, on my counseling appointments, getting my hair done as often, clothes, travel."

On May 20, 2014, the trial court entered an order granting Father's request to modify alimony and child support. The trial court concluded that Father's job loss was a substantial and material change in circumstances. The trial court also stated that medical and mental issues suffered by Father hampered his ability to look for work. As for alimony, the court found that Father had "the ability to earn $16,500.00 a month." Based on this imputed income, the court reduced Father's monthly alimony *in futuro* to $4,000.00.

With respect to child support, the court reduced Father's monthly obligation to $1,343.00. In doing so, the court imputed income to both Father and Mother. The court

again used $16,500 as Father's monthly income and found Mother had the ability to earn $2,000 per month.

The court ordered Father to continue to pay for Mother's health insurance expenses, which the court described as a contractual obligation. However, the court relieved Father of the obligation to maintain a $1,000,000 life insurance policy naming Mother as beneficiary.

II. ANALYSIS

On appeal, Father argues the trial court erred by: (1) treating Father's alimony *in futuro* and insurance expense obligations as contractual; (2) imputing $16,500 in monthly income to Father; (3) not substantially reducing Father's alimony and child support obligation in light of his lack of income; and (4) failing to make the reduction in Father's alimony obligation retroactive to the date of his petition. Although framed differently, Mother's issues touch on those raised by Father. In addition, Mother argues that the trial court erred by measuring the change of circumstances from the entry of the Final Decree of Divorce instead of a subsequently entered Agreed Order Amending Final Decree of Divorce. Father and Mother both request an award of attorneys' fees incurred on appeal.

Our review is de novo upon the record, accompanied by a presumption of the correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Modification of an alimony award is a factually driven determination and requires a balancing of factors. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). As such, we give "a trial court's decision to modify support payments . . . 'wide latitude' within its range of discretion." *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). The question of willful and voluntary underemployment is also one of fact, and "the trial court has considerable discretion in its determination." *Eldridge v. Eldridge*, 137 S.W.3d 1, 21 (Tenn. Ct. App. 2002). A trial court's conclusions of law are reviewed de novo with no presumption of correctness. Tenn. R. App. P. 13(d).

A. Modification of Alimony

An award of alimony *in futuro* "remain[s] 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." Tenn. Code Ann. § 36-5-121(f)(2)(A) (2014). A "substantial" change is one that "significantly affects either the obligor's ability to pay or the obligee's need for support." *Bogan*, 60 S.W.3d at 735 (citing *Bowman v. Bowman*, 836 S.W.2d 563, 568 (Tenn. Ct. App. 1991)). To be material, the "change in circumstances must have occurred since the entry of the divorce decree ordering the payment of alimony" and "must not have been foreseeable at the time the parties

entered into the divorce decree." *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999). The party seeking the modification bears the burden of proof. *Wright v. Quillen*, 83 S.W.3d 768, 772 (Tenn. Ct. App. 2002)

Because it impacts our analysis of some of the issues raised by Father, we first consider Mother's unique issue: whether the trial court properly measured the change of circumstances from the Final Decree of Divorce. In this case, on February 5, 2013, two days short of a year after entry of the Final Decree of Divorce, the court entered an Agreed Order Amending Final Decree of Divorce. Among other things, the Agreed Order modified the alimony paragraph of the Marital Dissolution Agreement. Mother argues that any change of circumstances should be measured from the Agreed Order. This point is potentially significant because Father learned that he was losing his job well before entry of the Agreed Order. If the Agreed Order is the proper point from which to measure the change in circumstance, Father's job loss was not "material" for purposes of the modification statute.

We conclude that the trial court properly measured the change in circumstance from the Final Decree of Divorce. A close examination of the Agreed Order Amending the Final Decree shows that the amended language only modified the alimony obligation of Father in one respect.[2] The Agreed Order changed the bank account where alimony payments would be deposited. Such a minor change makes it appropriate to look to the final decree. We also conclude that Father's job loss was a substantial and material change in circumstance.

A substantial and material change in circumstances does not necessitate a modification of alimony. *See* Tenn. Code Ann. § 36-5-121(f)(2)(A) ("An award of alimony in futuro . . . *may be* increased, decreased, terminated, extended, or otherwise modified, upon a showing of a substantial and material change in circumstances." (emphasis added)). "Once such changes are proved, the petitioning party must then demonstrate that a modification of the award is justified." *Wright*, 83 S.W.3d at 773. In making the determination, the trial court should consider the factors found at Tennessee Code Annotated § 36-5-121(i), which are the same factors that the court looks to in making an initial award of alimony. *See id.* Of the factors, the most important "are the need of the disadvantaged spouse and the obligor spouse's ability to pay." *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 110 (Tenn. 2011). When making an initial support determination, the need of the disadvantaged spouse is the most important factor, but when a modification of support is sought, the obligor spouse's ability to pay must be given at least

[2] The Agreed Order Amending the Final Decree also removed the opening sentence from the alimony paragraph of the Marital Dissolution Agreement, which included an obligation for Father to pay Mother's living expenses until either the sale of the marital residence or January 1, 2013, whichever occurred first. However, the Agreed Order also added a nearly identical sentence, but specified in addition that the living expense payments would be not taxable to Mother.

equal consideration. *Bogan*, 60 S.W.3d at 730.

Father argues that the trial court failed to consider the statutory factors and instead treated Father's alimony *in futuro* and insurance expense obligations as contractual. Among other things, in its order, the court stated,

> that Mr. Iverson had obligated himself, that he had placed himself in the position of being the breadwinner and Ms. Cook in the position of being the primary caregiver to the parties' child, that even though his income may have suffered greatly and he is having to dwindle his assets down while Ms. Cook may not necessarily be required to, it is the obligation that Mr. Iverson set himself up for that the court is still ultimately required to enforce.

In another portion of its order, the court stated,

> that Mr. Iverson's obligation to pay for Ms. Cook's COBRA Insurance is a proper obligation in the form of alimony, and a contractual obligation between the parties which Mr. Iverson obligated himself to do for better or worse and the Court decline[s] to modify his contractual obligation to continue to reimburse Ms. Cook for her COBRA Insurance.

Elsewhere, however, the court examined statutory factors, including: (1) the relative earning capacity of both parties; (2) the relative education and training of both parties; (3) the length of the marriage; (4) the age and mental condition of the parties; (5) the physical condition of each party; (6) the extent to which it would be desirable for the parties to seek employment outside of the home; (7) the division of marital property; (8) the parties' standard of living; and (9) the contributions of each party to the marriage.

Based on the order, we conclude the court failed to apply the correct standard. Despite the court's reference to the appropriate factors for setting support, we are convinced that, once it came to consideration of Father's obligations to pay some of Mother's expenses, the court improperly treated the obligations as if they were not subject to modification. On this issue alone, therefore, a remand is necessary. However, even to the extent the statutory factors were applied in modifying the periodic alimony, the trial court erred.

The court reduced Father's alimony to $4,000 per month. In doing so, the court found that Father had "the ability to earn $16,500.00 a month." We find no support for such a finding in this record. Therefore, even considering the evidence in the light most favorable to the court's decision, we cannot affirm the decision. *Gonsewski*, 350 S.W.3d at 106. Despite what the court described as a diligent search for employment, Father had received no

job offers, and the court specifically found factors adversely impacting Father's job prospects, including his age and the "flux" in the health industry job market.

As a final issue relative to the modification of alimony, Father argues that the trial court erred in not modifying the obligation retroactive to the date of Father's petition. This Court, based on child support cases, has found such decisions to be discretionary. *Howell v. Howell*, No. M2005-01262-COA-R3-CV, 2006 WL 1763660, at *4 (Tenn. Ct. App. June 28, 2006) (citing *Huntley v. Huntley*, 61 S.W.3d 329, 339 (Tenn. Ct. App. 2001)). In light of our decision to remand this matter for a new determination on alimony, we decline to address the issue. We leave it to the court on remand to determine whether any modification in alimony should be retroactive and, if so, the date to which it should be made retroactive.

B. Modification of Child Support

In determining whether to modify an existing child support order, courts apply a "significant variance" test, which refers to the variance between the amount of child support ordered and the amount of support required under the child support guidelines. Tenn. Code Ann. § 36-5-101(g)(1) (Supp. 2015). If the variation is not "significant," a child support order is only modifiable as necessary to provide "for the child's health care needs." Tenn. Comp. R. & Regs. 1240-02-04-.05(2)(a) (2008). A significant variation includes:

> 1. At least a fifteen percent (15%) change in the gross income of the [Alternate Residential Parent][3]; and/or
>
> 2. A change in the number of children for whom the [Alternate Residential Parent] is legally responsible and actually supporting; and/or
>
> 3. A child supported by this order becoming disabled; and/or
>
> 4. The parties voluntarily entering into an agreed order to modify support in compliance with these Rules, and submitting completed worksheets with the agreed order; and
>
> 5. At least a fifteen percent (15%) change between the amount of the current support order and the proposed amount of the obligor parent's pro rata

[3] The Alternative Residential Parent "is the parent with whom the child resides less than fifty percent (50%) of the time." Tenn. Comp. R. & Regs. 1240-02-04-.02(4) (2008).

share of the [Basic Child Support Obligation][4] if the current support is one hundred dollars ($100) or greater per month and at least fifteen dollars ($15) if the current support is less than one hundred dollars ($100) per month; or

6. At least a seven and one-half percent (7.5% or 0.075) change between the amount of the current support order and the amount of the obligor parent's pro rata share of the [Basic Child Support Obligation] if the tribunal determines that the Adjusted Gross Income of the parent seeking modification qualifies that parent as a low-income provider.

Tenn. Comp. R. & Regs. 1240-02-04-.05(2)(b).

In the matter before us, Father relied upon the change in his gross income to justify a modification in his child support obligation. Therefore, we must begin with an examination of Father's gross income, which can include imputed income. Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2). Imputation of income is appropriate in the following instances:

(I) If a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed; or

(II) When there is no reliable evidence of income; or

(III) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(i).

In modifying child support, the trial court imputed income to both parents. The court again found Father had the "ability to earn $16,500.00 per month." The court found Mother had the "ability to earn $2,000.00 per month."

We conclude the court erred in imputing income. First, the court made no finding that either parent was "willfully and/or voluntarily underemployed or unemployed." The closest the court came to such a finding was the determination that Father had "chosen to not to take

[4] The Basic Child Support Obligation "is the amount of support displayed on the Child Support Schedule . . . which corresponds to the combined Adjusted Gross Income . . . of both parents and the number of children for whom support is being determined. " Tenn. Comp. R. & Regs. 1240-02-04-.02(5).

some positions to avoid devaluing his own worth when it comes to the marketplace." Such a finding is not tantamount to a determination that Father was willfully or voluntarily unemployed, although it could support such a determination. *See Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001) (employment decisions should be evaluated on the basis of whether they were "reasonable and made in good faith."); *see also* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii) ("The purpose of the [willfully and/or voluntarily underemployed or unemployed] determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children."). The court also failed to find any other instance justifying imputation of income.

Second, even had the court determined both Father and Mother were "willfully and/or voluntarily underemployed or unemployed," we find the evidence does not support the amounts imputed. In imputing income, the court must consider the "parent's past and present employment" and the "parent's education and training." Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii). Although the court referenced Father's past employment in imputing income to him, it is unclear how the past employment impacted the amount imputed or whether the court considered the other applicable criteria. At least when it came to Father's income, the court acknowledged at the hearing that the amount imputed might be "pie in the sky." As for Mother, the court makes reference to none of the applicable criteria in imputing income to her.

Because imputed income can be included in gross income, we must remand for a determination of the appropriate amount of child support. On remand, before imputing income, the court should determine the applicable instance justifying imputation of income under the child support guidelines. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(i).

C. Attorney's Fees

Father and Mother both seek an award of their attorney's fees incurred on appeal. Father cites no basis for his request. In support of her request, Mother relies on Tennessee Code Annotated § 36-5-103, which provides, in pertinent part, as follows:

> The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court,

> before whom such action or proceeding is pending, in the discretion of such court.

Tenn. Code Ann. § 36-5-103(c) (2014).

Under Tennessee Code Annotated § 36-5-103, we may award attorney's fees incurred on appeal to enforce a child support order. *Pippin v. Pippin*, 277 S.W.3d 398, 407 (Tenn. Ct. App. 2008). Such an award is discretionary. *Id.*; *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004). Because we have determined that this case must be remanded for further proceedings on child support and based on the particular factual circumstances before us, we decline to award either party their attorney's fees.

III. CONCLUSION

We affirm the chancery court's decision to modify alimony and child support. We reverse and remand for a determination of the amount of such obligations and for further proceedings consistent with this opinion.

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W. NEAL MCBRAYER, JUDGE