

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
November 18, 2015 Session

**STEVE KIRBY KUCINSKI v. MAGALI ORTEGA**

**Appeal from the Chancery Court for Montgomery County**  
**No. MCCHCVDI03429 Laurence M. McMillan, Jr., Chancellor**

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**No. M2015-00481-COA-R3-CV – Filed August 23, 2016**

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In this divorce action, the husband appeals the award of alimony *in futuro*, asserting that the award should be overturned because the wife was awarded substantial marital property or, alternatively, that due to changed circumstances, the award of alimony is inappropriate. Finding no error, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Steve Kirby Kucinski.

Mark A. Rassas and Julia P. North, Clarksville, Tennessee, for the appellee, Magali Ortega.

**OPINION**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This appeal arises from the divorce proceedings of Steve Kirby Kucinski and Magali Ortega. At the time of the trial, Mr. Kucinski was 47 years old and owned a dry-wall business; Ms. Ortega was 60 years old, with disability payments from the Social Security Administration being her only source of income. The parties were married on July 13, 1991; on September 3, 2003, Mr. Kucinski filed a complaint for divorce. The case remained dormant until the parties attended mediation on May 20, 2014, where a number of issues were successfully resolved. The parties were unable to agree on Ms. Ortega's claim for alimony and the division of the some of the marital property, including the marital residence,

and those matters were submitted to the court for resolution.

Trial was held on November 4, 2014; on December 5, the court entered a Memorandum Opinion and on February 19, 2015, the court entered the final decree declaring the parties divorced, approving and adopting the marital dissolution agreement, determining the value of and dividing the marital property, and awarding the marital residence to Mr. Kucinski and half of the equity in the home, \$75,690, to Ms. Ortega. In addition, after considering the factors at Tenn. Code Ann. § 36-5-121(i), the court awarded Ms. Ortega alimony *in futuro* of \$1,000 per month for a period of 60 months.

Mr. Kucinski appeals, asserting that the trial court erred in awarding alimony *in futuro* when Ms. Ortega was awarded substantial marital property.

## II. ANALYSIS

Mr. Kucinski contends that the award of alimony should be overturned because Ms. Ortega is able to work and received \$75,690 from the equity in the marital residence. He argues alternatively that the case should be remanded to the trial court to determine whether the award should be “cancelled” due to changed circumstances arising as a result of brain surgery he underwent after the trial which has rendered him unable to work and pay the alimony. Ms. Ortega responds that the trial court found that both need and ability to pay had been demonstrated and, therefore, this court should presume these findings to be correct and uphold the award of alimony.

Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). Therefore, appellate courts are disinclined to second-guess a trial court’s decision regarding spousal support “unless it is not supported by the evidence or is contrary to public policy.” *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). There are no hard and fast rules for spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996). Alimony decisions require a careful balancing of the factors in Tenn. Code Ann. § 36-5-121(i)<sup>1</sup> and typically “hinge on the unique facts and circumstances of the case.”

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<sup>1</sup> Tenn. Code Ann. § 36-5-121(i) provides as follows:

In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:

*Anderton*, 988 S.W.2d at 683. The two most important of these factors, and the only factors at issue in this case, are “the disadvantaged spouse’s need and the obligor spouse’s ability to pay.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 110 (Tenn. 2011).

The trial court found that Ms. Ortega had a need for alimony and Mr. Kucinski had the ability to pay; the court did not make specific findings of fact in this regard. When the trial court fails to explain the factual basis for its decisions, we may conduct a *de novo* review of the record to determine where the preponderance of the evidence lies or remand the case with instructions to the court to make the required findings of fact and conclusions of law and enter judgment accordingly. Tenn. R. Civ. P. 52.01; *see Lovlace v. Copley*, 418 S.W.3d 1, 36 (Tenn. 2013); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). We have determined that the record is sufficient to conduct a review *de novo*; accordingly, in the interest of expeditious resolution of this matter and judicial economy, we proceed to determine where the preponderance of the evidence lies.

Ms. Ortega testified that she is 60 years old and English is not her first language. While she has some experience working for Mr. Kucinski’s drywall business, she has not

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- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
  - (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party’s earnings capacity to a reasonable level;
  - (3) The duration of the marriage;
  - (4) The age and mental condition of each party;
  - (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
  - (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
  - (7) The separate assets of each party, both real and personal, tangible and intangible;
  - (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
  - (9) The standard of living of the parties established during the marriage;
  - (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
  - (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
  - (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

worked full-time in over 20 years. Ms. Ortega testified that she receives \$9,788.90 per year in disability payments and that this is her only source of income. Going forward she will need to establish a residence and incur living expenses she did not have previously. This evidence shows Ms. Ortega's need for alimony, irrespective of the \$75,690 she received as her share of the equity in the marital residence.

The evidence similarly supports a finding that Mr. Kucinski has the ability to pay. While he testified that he had never made more than \$20,000 a year, he also testified that his 2013 tax return showed gross receipts from his drywall business of \$62,000<sup>2</sup> and that he spent the cash which he received.<sup>3</sup> Further, he testified that he had been able to pay for a new truck and the marital home from his earnings; the mediation settlement agreement reflected that Wife's credit card debt was the only marital debt.<sup>4</sup>

The evidence does not preponderate against the trial court's determination that Ms. Ortega has a need for support and that Mr. Kucinski has the ability to pay.

Once the threshold determination of need and ability to pay has been reached, the

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<sup>2</sup> The 2013 tax return, which the transcript reflects was introduced as Exhibit 7, was not included in the record on appeal.

<sup>3</sup> In the course of his examination regarding the income from his business as reflected on the tax return as well as his personal income, Mr. Kucinski testified as follows relative to cash payments:

Q. And in looking at at your income tax returns, it appears that you've never claimed that you made more than \$20,000 a year. Is that accurate?

A. That I've never made more than \$20,000 a year? I don't know if that's accurate or not.

Q. Sir, I'm just going by what was reported. Have you fairly and accurately reported your income?

A. Yes.

Q. Do you keep cash money that you receive?

A. Everybody spends their cash money.

Q. I understand that, sir. But do you keep cash money that you receive that may not, through inadvertence or otherwise - -

A. No.

Q - - failed to be reported on your - -

A. No.

Q. - - income tax returns?

A. No.

Q. But do you keep cash that you spend; is that correct?

A. Keep cash that I spend? If I spend it, I don't keep it.

<sup>4</sup> This debt was assigned to Wife in the final decree.

court may award rehabilitative alimony, alimony *in futuro*, transitional alimony, alimony *in solido* or a combination of these. Tenn. Code Ann. § 36-5-121(d)(1). The Tennessee General Assembly has stated it is its intent 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 alimony.” Tenn. Code Ann. § 36-5-121(d)(2). When rehabilitation is not feasible, “the court may grant an order for payment of support and maintenance on a long-term basis or until death or remarriage of the recipient . . .” Tenn. Code Ann. § 36-5-121(d)(3).

Husband contends the court erred in making the award because it did not make a specific finding that Ms. Ortega was not capable of rehabilitation. We do not agree. In the Memorandum Opinion, the court stated the following in the discussion of Tenn. Code Ann. § 36-5-121(i)(2):

[N]either party is in need of rehabilitation. The court finds that Husband has job skills and owns his own dry-wall business. The court further finds that the Wife has worked beside the Husband for years and has the same manual labor skills. The court finds that this factor does not support the award of alimony.

Even though the court was not specifically addressing the type of alimony to be awarded, this finding also provides support for the determination that an award of rehabilitative alimony was not appropriate.

Mr. Kucinski does not challenge any other finding of the court, and upon our review we have determined that the evidence does not preponderate against the findings as to the factors at Tenn. Code Ann. § 36-5-121(i). We affirm the court’s award of alimony.

While Mr. Kucinski also argues that the award should be reversed in light of his current medical condition, our review has been limited to the facts adduced at trial, at which time he anticipated having brain surgery. Inasmuch as an award of alimony *in futuro* is subject to modification upon a showing of a substantial and material change of circumstance, Mr. Kucinski is free to present this matter to the trial court.

#### IV. CONCLUSION

For the foregoing reasons, we affirm the judgment in all respects.

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RICHARD H. DINKINS, JUDGE