IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 28, 2016 Session

ROBIN ANN LONGSTRETH v. PHILLIP ANDREW LONGSTRETH

Appeal from the Chancery Court for Rutherford County
No. 13CV612 Robert E. Corlew, III Chancellor

No. M2014-02474-COA-R3-CV – Filed April 20, 2016

The issues on appeal arise from a final decree of divorce following a 27-year marriage in which Wife is clearly the economically disadvantaged spouse. The trial court awarded Wife the divorce, divided the property, and awarded Wife alimony *in futuro* and approximately one-third of the attorney's fees she requested. Both spouses appeal. Husband contends the trial court erred by awarding Wife alimony *in futuro*, insisting she could be rehabilitated. Husband also contends Wife had sufficient resources to pay all of her attorney's fees. Wife challenges the division of property and seeks to recover all of the attorney's fees she incurred at trial and in this appeal. Both parties challenge the trial court's decision to include, *sua sponte*, a mathematical formula pursuant to which alimony will be modified in the future based solely on the parties' future income thresholds. We agree with the parties that the trial court erred by incorporating an automatic modification of alimony that is based solely on future income thresholds. We affirm the award of alimony *in futuro* to Wife; however, we vacate that portion of the alimony award that purports to automatically modify alimony based on future income thresholds. We affirm the division of property. We find that Wife should be awarded $18,105.75 of the $29,141 in attorney's fees and litigation expenses she claims she incurred at trial. Therefore, we modify the trial court's award of attorney's fees Wife incurred at trial. As for Wife's fees incurred on appeal, we find that she is entitled to recover the reasonable and necessary attorney's fees incurred on appeal.

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

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

Matthew D. Dunn, Brentwood, Tennessee, for the appellant, Phillip Andrew Longstreth.

Lisa Eischeid, Murfreesboro, Tennessee, for the appellee, Robin Ann Longstreth.

OPINION

Robin Ann Longstreth ("Wife") and Phillip Andrew Longstreth ("Husband") married in 1986 when Wife was 19 years old. In April 2013, after 27 years of marriage, Wife filed for divorce on grounds of inappropriate marital conduct. The parties have two children, neither of whom was a minor at the time of the divorce.

Wife's petition requested a *pendente lite* hearing to establish temporary support, and the trial court referred the case to a special master in May 2013. Following a hearing and report and recommendation by the special master, the court ordered Husband to pay $2,205 per month in temporary support and awarded Wife one-third of the parties' tax refund. The court reserved the issue of attorney's fees until trial based on the finding that Wife had "the funds to pay her attorney on at least an interim basis." The court also found that Wife "has some $6,000 in savings and is not yet spending the money she claims she needs . . . ."

The case was tried before the chancellor on May 14-15, 2014. Testimony revealed that Husband has an MBA from Middle Tennessee State University, he has passed the CPA exam, works in house for a private employer, and his annual salary is $125,000. Wife does not dispute Husband's income.

Wife is a high school graduate who has completed a little more than one year of college. She worked full-time until the birth of the parties' first child in 1989. After the birth of the parties' second child in 1991, Wife was diagnosed with bipolar disorder, and she has been hospitalized several times, most recently in 2006, following what she described as a "breakdown."

Before 2006, Wife worked in various capacities including work as a nurse's aide and a sales representative, and her annual earnings ranged from $12,400 to $44,000. Wife has not had a full-time job since 2006, although she has worked part-time at her sister-in-law's "out-of-the-home business with electronic medical parts." Her annual earnings from 2006 to 2013 ranged from $609 to $10,000. Wife stated that she applied for Social Security disability benefits but was denied both initially and on appeal.[1]

In addition to her part-time work, Wife volunteered to coordinate funerals at her church. She testified that she coordinated 22 funerals over several years, with three funerals in 2013 and four in 2012. Each funeral required her to work for 10 to 12 hours per day, usually for three days at a time. Wife testified that she took frequent breaks during this time. Wife also testified that she spent time gardening because it was

[1] At oral argument, Wife's attorney represented that Wife had reapplied for disability.

therapeutic. The parties' daughter testified that her mother worked in the garden for "five or six hours" at a time. A neighbor also testified that Wife worked long hours in the garden.

Wife introduced the depositions of two doctors, Dr. Elizabeth Baxter and Dr. Stephen Humble. Dr. Baxter testified that she started treating Wife in 2007. She confirmed Wife's diagnosis of bipolar disorder and testified that she did not think Wife would be able to hold a full-time job "at any time." Dr. Humble testified that he saw Wife for one appointment. He confirmed Wife's bipolar disorder diagnosis and opined that Wife would have difficulty working in a full-time position.

The trial court issued a final order in June 2014 in which it granted Wife a divorce "due to the inappropriate marital conduct of the Husband . . . ." The court divided the parties' property without classifying the property as marital or separate and without making findings about the value of the property. The parties owned two pieces of real property: the marital residence and a rental property. The court awarded the residence to Husband and the rental property to Wife. Instead of continuing to rent the property, Wife intended to use the rental property as her residence. Husband and Wife each received one-half of the parties' retirement accounts and were ordered to keep their own vehicle.

At trial, Wife identified the household items that she wanted. She stated that Husband could have the other household items if Husband paid her one-half of the value of that property. The trial court awarded Wife all of the household items that she wanted but did not award her any additional money. Instead, the court awarded Wife the wedding ring she had given Husband because the diamond and gold used to make the ring came from her family. Although neither party presented any evidence concerning the value of the ring, the court stated, "the value of the ring offsets the other items received by Husband and therefore the Wife does not receive any further cash settlement for the division of personal property."

With regard to Wife's request for alimony, the court found that "the Wife is able to work and capable of earning money. The Court hopes that the Wife can obtain work and even full-time work like she did prior to 2006." The trial court ordered Husband to pay Wife $2,000 per month in alimony, less a $550 per month mortgage payment he was ordered to pay on the rental property awarded to Wife. The order states that the alimony payments are to continue until "the death of either party; the Wife's remarriage; the wife reaching the age of 67; or the husband losing his earning capacity or ceasing to be able to earn $50,000.00 per year."

Although neither party requested it, the order includes a provision for automatic modifications of alimony if the parties meet certain income thresholds:

> If Husband's earnings go below $50,000.00, then his alimony obligation shall be prorated based upon his loss of income. The proration shall come at the end of the year.
>
> . . . .
>
> There is no decrease in alimony until [Wife] earns over $24,000.00. The Court finds that if she is able to earn $25,000.00 per year then Husband's alimony obligation would decrease by ½ of that $1,000.00 or by $500.00 per year. If she gets a job and earns $34,000.00, $10,000.00 above the $24,000.00 threshold, then the spousal support would diminish by half of that $10,000.00 or by $5,000.00 per year.

In addition, the court awarded Wife $10,000 of the $29,141 in attorney's fees and litigation costs she claimed to have incurred during the proceedings in the trial court. Husband filed a motion to alter or amend regarding, *inter alia*, the trial court's use of automatic thresholds for alimony modification. The court denied the motion, and this appeal followed.

ANALYSIS

On appeal, both Husband and Wife challenge the trial court's decision to automatically modify alimony based on specific income thresholds. In addition, Husband contends that the trial court erred by awarding Wife $2,000 per month in alimony and $10,000 in attorney's fees. For her part, Wife argues that the trial court did not equitably divide the parties' marital property, that she should have been awarded additional attorney's fees at trial, and that she is entitled to attorney's fees on appeal.

I. ALIMONY *IN FUTURO*

Husband contends the trial court erred by awarding Wife alimony *in futuro*, insisting she could be rehabilitated. Both Husband and Wife contend the trial court erred by incorporating a mathematical formula pursuant to which alimony would be modified in the future based solely on the parties' income levels.

A. The Type of Alimony to be Awarded

Husband contends it was error for the trial court to award Wife alimony *in futuro* because she can be rehabilitated. Therefore, according to Husband, Wife is only entitled to a modest amount of rehabilitative alimony for a short period of time.[2]

Rehabilitative alimony is a form of short-term support while alimony *in futuro* is a form of long-term support. *See Gonsewski v. Gonsewski*, 350 S.W.3d 99, 107-08 (Tenn. 2011). Rehabilitative alimony is intended to "assist an economically disadvantaged spouse in acquiring additional education or training which will enable the spouse to achieve a standard of living comparable to the standard of living that existed during the marriage or the post-divorce standard of living expected to be available to the other spouse." *Id.* at 108. Alimony *in futuro* is appropriate when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible. *Id.* at 107; Tenn. Code Ann. § 36-5-121(f)(1). An award of alimony *in futuro* is subject to modification and remains in the court's control for their entire duration. *See* Tenn. Code Ann. § 36-5-121(f)(2)(A). Alimony *in futuro* also ceases automatically upon the recipient's death or remarriage. Tenn. Code Ann. § 36-5-121(f)(3).

"Rehabilitated" means that, with reasonable efforts, the economically-disadvantaged spouse will be able to achieve:

> an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(e)(1).

As this subsection indicates, the parties' standard of living is a factor that the courts consider when making alimony determinations. *See id.*; Tenn. Code Ann. § 35-6-121(i)(9). However, "the economic reality is that the parties' post-divorce assets and incomes often will not permit each spouse to maintain the same standard of living after the divorce that the couple enjoyed during the marriage." *Mayfield v. Mayfield*, 395

[2] Although the trial court did not classify the award as alimony *in futuro*, both parties concede it is alimony *in futuro*. We agree because it is a long-term award that terminates automatically upon Wife's death or remarriage. *See Gonsewski v. Gonsewski*, 350 S.W.3d 99, 107-108 (Tenn. 2011); Tenn. Code Ann. § 36-5-121(f)(1). Further, the trial court's order clearly indicates that, like an award of alimony *in futuro*, this award was intended to be modifiable and to remain in the court's control for its duration. *See* Tenn. Code Ann. § 36-5-121(f)(2)(A).

S.W.3d 108, 115-16 (Tenn. 2012) (citing *Gonsewski*, 350 S.W.3d at 113). Accordingly, "[d]ecisions regarding the type, length, and amount of alimony turn upon the unique facts of each case and careful consideration of many factors, with two of the most important factors being the disadvantaged spouse's need and the obligor spouse's ability to pay." *Id.* at 116. Therefore, courts must consider all of the factors listed in Tenn. Code Ann. § 35-6-121(i) when awarding alimony. *See id.* at 115-16; *Robertson v. Robertson*, 76 S.W.3d 337, 340-41 (Tenn. 2002).

Rehabilitation may be possible when the economically disadvantaged spouse has specialized training, is capable of earning income, and has substantial assets from the division of property. *See Daniel v. Daniel*, No. 03A01-9703-CH-0096, 1997 WL 427030, at *1 (Tenn. Ct. App. July 31, 1997) (holding that rehabilitation was possible when the wife was a employed part-time as a nurse, could be retained as a floor nurse within one year, was specially trained in endoscopies and other procedures, and had substantial assets from the division of marital property). Similarly, this court has held that a spouse could be rehabilitated when she was only 38 years old, held a license to sell insurance, and was physically and emotionally healthy enough to sustain full-time employment. *See Totty v. Totty*, No. W1999-02426-COA-R3-CV, 2000 WL 527699, at *3 (Tenn. Ct. App. May 2, 2000).

In contrast, rehabilitative alimony may not be appropriate after a long marriage when one spouse has a high school education and is not able to work full-time. In *Hulshof v. Hulshof*, the parties married when the wife was 17 and remained married for 27 years. No. 01A01-9806-CH-00339, 1999 WL 767807, at *1 (Tenn. Ct. App. Sept. 29, 1999). At the time of the divorce, the wife was 46 years old and had only a high school education. *Id.* Although the wife had worked at "numerous jobs" during the marriage, she sustained injuries to her back and wrist, underwent surgery, and was approved for disability by the Social Security Administration. *Id.* On appeal, we determined that "wife's ability to materially improve her health or increase her income is limited, leading us to conclude that rehabilitation is not feasible." *Id.* at *4-5.

The facts in this case and those in *Hulshof* are strikingly similar. Here, the parties were married for 27 years. Wife was 19 at the time the parties married and only has a high school education. In *Hulshof*, the wife was merely two years younger and the parties were married for the same period of time, 27 years. *Id.* at *1. Here, Wife worked a variety of jobs prior to 2006, and she is no longer working full time due to health problems. In *Hulshof*, the wife also worked a number of years but could no longer work because of physical disability. *Id.*

We also find it significant that two doctors testified that Wife is unable to maintain full-time employment due to her bipolar diagnosis. Notably, Husband has not identified any medical evidence that contradicts their testimony. Instead, Husband cites testimony that Wife has energy to garden and is able to volunteer her time to coordinate funerals.

We are not persuaded by this argument because these occasional activities are not equivalent to maintaining full-time employment. Moreover, Husband has not identified a job Wife is qualified to perform that would permit her "standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse . . . ." *See* Tenn. Code Ann. § 36-5-121(e)(1). Although Wife works in the garden and as a volunteer, this work only occurs a few days at a time and is not as demanding as full-time employment.

The trial court's order states that "the Wife is able to work and capable of earning money. *The Court hopes that the Wife can obtain work and even full-time work like she did prior to 2006.*" (Emphasis added). It is apparent that Wife has been able to earn some money – from $609 to $10,000 annually – after her 2006 hospitalization. Earning this level of income does not indicate that Wife can be rehabilitated. Tenn. Code Ann. § 36-5-121(e)(1). Further, it is also apparent that the trial court merely *hoped* that Wife could obtain full-time employment like she previously had. A finding that Wife "is capable of earning money" and the "hope" that she might be able to maintain work like she did in the past are not findings that Wife can be rehabilitated to the extent that she will not require long-term support. *See id.* Moreover, even if Wife were to obtain and maintain full-time work "like she did prior to 2006" at her highest salary level, her income would only be one-third of Husband's current salary. This scenario is simply not consistent with the statutory definition of "rehabilitated." *See id.*

For the foregoing reasons, we affirm the trial court's ruling that Wife is entitled to receive alimony *in futuro*. Husband's argument about alimony was limited to an argument that Wife could be rehabilitated. He has not advanced an independent argument that the amount of alimony awarded to Wife ($2,000 per month) was excessive for any other reason. He has also not identified any evidence upon which to conclude that $2,000 per month is excessive if Wife cannot be rehabilitated. Consequently, we consider that issue waived.

For the foregoing reasons, we affirm the award of alimony *in futuro* in the amount of $2,000 per month. We now turn our attention to the parties' mutual assertion that the trial court erred by automatically modifying alimony based on predetermined income thresholds.

B. Automatic Modification of Alimony Based on Income Thresholds

The general rule is that alimony *in futuro* is not modifiable until a party files an application and makes the required showings. *See* Tenn. Code Ann. § 36-5-121(f)(2)(A); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001). The Tennessee Code provides that "*upon application of either party*, the court may award an increase or decrease or other modification of the [alimony] award based *upon a showing of a substantial and material*

change of circumstances . . . ." Tenn. Code Ann. § 36-5-121(a) (discussing alimony generally) (emphasis added); *see* Tenn. Code Ann. § 36-5-121(f)(2)(A) (discussing alimony *in futuro* specifically). "A change in circumstances is 'substantial' when it significantly affects either the obligor's ability to pay or the obligee's need for support." *Bordes v. Bordes*, 358 S.W.3d 623, 627 (Tenn. Ct. App. 2011). "A change is material if it was not anticipated or contemplated at the time of the original divorce." *Church v. Church*, 346 S.W.3d 474, 482 (Tenn. Ct. App. 2010). The party seeking modification bears the burden of proving that a substantial and material change in circumstances has occurred. *Id.*

The Tennessee Code states that the court "may" modify alimony *in futuro* based on a showing of a material change in circumstances. Tenn. Code Ann. § 36-5-121(f)(2)(A). Thus, modification of alimony "shall not be automatic upon proving that a substantial and material change in circumstances has occurred." *Proctor v. Proctor*, No. M2006-01396-COA-R3-CV, 2007 WL 2471504, at *4 (Tenn. Ct. App. Aug. 31, 2007); *Church*, 346 S.W.3d at 484. The party seeking to modify alimony must also "affirmatively establish that modification is justified based upon the relevant factors in Tenn. Code Ann. § 36-5-121(i)." *Proctor*, 2007 WL 2471504, at *4 (citing *Bogan*, 60 S.W.3d at 730); *see Wiser v. Wiser*, 339 S.W.3d 1, 12 (Tenn. Ct. App. 2010).

The foregoing notwithstanding, we have approved automatic increases in alimony in limited circumstances, such as when a minor child will soon reach majority and the obligor is no longer required to pay child support. *See Bloom v. Bloom*, No. W1998-00365-COA-R3-CV, 2000 WL 34410140, at *5 (Tenn. Ct. App. Sept. 14, 2000); *Erwin v. Erwin*, No. W1998-00801-COA-R3-CV, 2000 WL 987339, at *2 (Tenn. Ct. App. June 25, 2000). In these unique cases, we reasoned that automatic modification was appropriate because a spouse's ability to pay alimony was directly affected by the termination of child support. *See Erwin*, 2000 WL 987339, at *2. Since the ability to pay alimony is one of the most important factors in determining the amount of alimony, an automatic increase may be appropriate when child support is no longer required. *See id.* Importantly, the facts in *Ewing* and *Bloom* were unique because the minor children were approaching the age of majority; therefore, the modification of alimony was certain to occur shortly after the order was issued. *See id.* at *1 (daughter was 17 at the time of the divorce); *Bloom*, 2000 WL 34410140, at *1 (son was 15 at the time of trial). By including the automatic modification provision, the trial courts in these cases "spared the parties the additional expense and trouble that they would have otherwise incurred from having to re-open the question of alimony *so soon after the court's decree*." *Anderson v. Anderson*, No. M2005-02029-COA-R3-CV, 2007 WL 957186, at *8 (Tenn. Ct. App. Mar. 29, 2007) (emphasis added).

Except in cases involving unique circumstances that are expected to occur in the near future, automatic modifications are generally not appropriate. *See id.* For example, in *Anderson*, we vacated the trial court's judgment automatically increasing alimony

when the parties' child reached majority because "the length of time before the increase is scheduled to go into effect [approximately nine years] is so long that any predictive advantage is likely to be overcome by the effects of other events, at this point quite unpredictable, such as changes in the employment, income and health of either or both parents." *Id*. at *9. We concluded that the statutory provisions for modification were the "most appropriate vehicle" for managing the uncertainty of future events and that using these provisions "relieve[d] the trial court from having to base its judgment on an act of clairvoyance." *Id.* (citing *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000)).

Here, the changes in income on which the trial court predicated its automatic modifications of alimony are not certain to occur "so soon after the court's decree" or, for that matter, at any point in the near future. *See id.* at *8. Consequently, the advantage of automatically modifying alimony is likely to be overcome by the effects of other unpredictable events. *See id.* at *9. As in *Anderson*, the statutory provisions governing alimony modification are better tools to manage Husband's alimony obligation than an attempt to predict the status of all the relevant modification factors at a distant point in the future. *See id.* at *8-9; Tenn. Code Ann. § 36-5-121(i).

In addition, although the need of the obligee spouse and the obligor's ability to pay are important factors in initially setting the amount of alimony, they are not the only factors. *See Church*, 346 S.W.3d at 484. Moreover, in a subsequent proceeding to modify an alimony award, other factors may be more important. *Church*, 346 S.W.3d at 484 (quoting *Wiser*, 339 S.W.3d at 12); *see Bogan*, 60 S.W.3d at 730 ("[W]hen deciding whether to *modify* a support award, the need of the receiving spouse cannot be the single-most dominant factor, as a substantial and material change in circumstances demands respect for other considerations." (emphasis in original)). Consequently, automatically modifying alimony based solely on income thresholds will seldom be appropriate. *See Church*, 346 S.W.3d at 484.

Based on the foregoing, we vacate the portion of the trial court's judgment that automatically modifies the amount of alimony based on the parties' future income levels and remand with instructions for the trial court to enter judgment modifying the final decree of divorce by substituting the following for paragraphs 15 and 16:

> The Court finds that Husband shall pay Wife $2,000.00 per month in alimony in futuro, less the mortgage payment on her residence. Alimony shall be payable until the death of either party, Wife's remarriage, or Wife reaching the age of 67.

II. DIVISION OF PROPERTY

Wife contends that the trial court did not equitably divide the parties' property. Wife contends she did not receive an equitable share of the marital property, and she asks

this court to modify the award. Nevertheless, we begin our analysis of this issue by noting that both parties made it crystal clear at oral argument that they did not want this court to remand this issue because the cost of doing so would exceed the amount in controversy.[3]

In the interest of judicial economy, we endeavored to resolve this dispute by conducting a de novo review of the record; however, we were unable to do because the trial court did not make findings of fact concerning the value of the marital property, and the meager evidence in the record concerning the value of the marital property is insufficient for this court to conduct a de novo review of this issue. Specifically, no proof was presented regarding the value of the gold ring that the trial court awarded to Wife. The value of the ring is an essential part of determining whether the trial court equitably divided the parties' marital property because the trial court used the ring to justify its decision not to award Wife a cash settlement, finding that the ring "offsets the other items received by Husband and therefore the Wife does not receive any further cash settlement for the division of personal property." Because we cannot determine the value of the ring, we cannot determine whether the trial court's division of property was equitable.

The record is insufficient to allow us to make the required findings. Usually we would remand this case to the trial court for further proceedings. *See Gooding v. Gooding*, 477 S.W.3d 774, 783 (Tenn. Ct. App. 2015). However, Wife has effectively declared that she does not want to proceed with this issue if it must be remanded for a new trial. That being the case, we shall honor Wife's election and deem the issue waived. Therefore, the trial court's division of marital property stands**.**

III. ATTORNEY'S FEES

Husband contends that the trial court erred by granting Wife any of her attorney's fees. For her part, Wife argues that the trial court erred by limiting her award to $10,000, insisting she should have been awarded all of her attorney's fees. She also seeks to recover attorney's fees incurred in this appeal.

[3] At oral argument, this court asked both attorneys about the relief their clients sought if this court determined that the record was insufficient for this court to conduct a de novo review of the division of the marital estate. Both attorneys stated with total clarity that their clients did not want this issue remanded for a new trial. Specifically, Wife's attorney stated that Wife did not want to incur the expense of a retrial. Similarly, Husband's attorney stated that Husband had not appealed the division of property because the cost of addressing that issue on remand would be too great. This court's inquiry and the attorneys' responses were motivated by the fact that the trial judge retired shortly after the entry of the final order in this case, and a remand of this issue would require a full evidentiary hearing before a different trial judge. *See* Tenn. R. Civ. P. 63 (outlining the procedure for successor judges to proceed with a case that has already commenced).

An award of attorney's fees in a divorce case constitutes alimony *in solido*. *Gonsewski*, 350 S.W.3d at 113 (citing Tenn. Code Ann. § 36-5-121(h)(1)). When deciding whether to award alimony *in solido*, the trial court should consider the factors in Tenn. Code Ann. § 36-5-121(i). *Id.* Spouses with adequate property and income are not entitled to awards of alimony to pay attorney's fees and expenses. *Id.* (citing *Umstot v. Umstot*, 968 S.W.2d 819, 824 (Tenn. Ct. App. 1997)). Instead, "[s]uch awards are appropriate only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, or the spouse would be required to deplete his or her resources in order to pay them." *Id.* (internal citations omitted). Even when a spouse receives "a substantial portion of the martial assets and an ample award of alimony in futuro," an award of attorney's fees is appropriate when the spouse "continues to have some need of assistance in paying [his or her] attorney's fees to avoid a depletion of the assets that the court awarded [him or her] for future support." *Koja v. Koja*, 42 S.W.3d 94, 100 (Tenn. Ct. App. 2000).

The decision of whether to award attorney's fees is within the sound discretion of the trial court and will be affirmed if a preponderance of the evidence supports the award. *Gonsewski*, 350 S.W.3d at 113; *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995). However, even discretionary decisions "must take the applicable law and the relevant facts into account." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). When we review a trial court's discretionary decision, we are to determine whether the factual basis for the trial court's discretionary decision is supported by evidence in the record, whether the trial court properly identified and applied the most appropriate legal principles applicable to the decision, and whether the trial court's decision was within the range of acceptable alternative dispositions. *Id.* The trial court's factual findings are reviewed pursuant to the preponderance of the evidence standard in Tenn. R. App. P. 13(d), and its legal determinations are reviewed pursuant to the de novo standard without any presumption of correctness. *Id.* at 525.

Because "discretionary decisions must take the applicable law and the relevant facts into account," *Id.* at 524, our deference to a trial court's discretionary decision may abate when the record does not reveal which legal principles and facts the trial court relied upon in making its decision.[4] *Gooding*, 477 S.W.3d at 783. In such cases, we may

[4] We discussed the effect of the trial court failing to identify the reasoning underlying a discretionary decision in *Gooding v. Gooding*, 477 S.W.3d 774, 782-83 (Tenn. Ct. App. 2015) and in *In re Noah J.*, No. W2014-01778-COA-R3-JV, 2015 WL 1332665, at *5 (Tenn. Ct. App. Mar. 23, 2015), *no perm. app. filed*. Our discussion in *In re Noah J.* pertained to a challenge to a parenting plan; it reads as follows:

> [W]e cannot determine whether the trial court applied an incorrect legal standard or relied on reasoning that caused an injustice because we do not know what legal standard the court applied, or what reasoning it employed. *See Halliday v. Halliday*, No. M2011-01892-COA-R3-CV, 2012 WL 7170479, at *12 (Tenn. Ct. App. Dec. 6, 2012), *perm.*

(continued…)

conduct a de novo review of the record to determine where the preponderance of the evidence lies and enter judgment accordingly instead of vacating and remanding. *Id*.

Here, the court ordered Husband to pay $10,000 of Wife's attorney's fees. Its order states "[t]he Court recognizes on the ability to pay versus the need for the Wife that the Husband shall pay $10,000.00 of Wife's attorney fees." Based on the proof at trial, Wife has significantly less income than Husband. Although Wife received approximately half of the marital property, most of those assets were non-liquid assets, and the record clearly demonstrated that Wife needs assistance in paying her attorney's fees to avoid a depletion of the assets she was awarded. *See Gonsewski*, 350 S.W.3d at 113. Thus, the evidence preponderates in favor of the trial court's decision to award Wife at least a portion of her attorney's fees.

In determining the amount of fees to award, the trial court identified Wife's need and Husband's ability to pay as the legal principles it considered and applied, which are two of the most important factors in determining the amount of alimony *in solido*. *See Schuett v. Schuett*, No. W2003-00337-COA-R3-CV, 2004 WL 689917, at *6 (Tenn. Ct. App. Mar. 31, 2004). Because the trial court identified the legal principles it considered, we are afforded a clear understanding of the legal basis for its decision. *See Lovlace v. Copley*, 418 S.W.3d 1, 35 (Tenn. 2013). However, the trial court did not state the factual basis for its decision to award Wife $10,000 of the $29,141 of attorney's fees and expenses she requested. As a result, we are left to wonder about the factual basis of the trial court's decision. *See id.* Therefore, we will conduct our own de novo review to determine where the preponderance of the evidence lies concerning Wife's need for Husband to pay her attorney's fees and Husband's ability to pay all or a portion of her fees. *See Gooding*, 477 S.W.3d at 783.

Wife contends she is unable to pay any of the $29,141 in attorney's fees and litigation expenses she claims to have incurred at trial while Husband insists that the award of $10,000 in attorney's fees is excessive.

> *app. denied* (Tenn. Apr. 11, 2013) (explaining that "this Court cannot determine whether the trial court abused its discretion" in the absence of factual findings by the trial court); . . . "'Discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J.App. Prac. & Process 47, 58 (2000)). Thus, an abuse of discretion will be found "when the trial court . . . fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination." *Id*.

In re Noah J., 2015 WL 1332665, at *5.

The evidence in the record reveals that Wife's highest annual income since 2006 was $10,000. By adding the award of alimony *in futuro* of $2,000 per month ($24,000 a year) to her highest annual income since 2006, her current annual income would be approximately $34,000. Husband's current annual income is $125,000; therefore, Husband's current income is approximately four times greater than Wife's income. We also note that while both parties received real estate in the divorce, none of the real estate is income producing. Further, the personal property awarded to each spouse is of relatively modest value. Based on the foregoing, it is readily apparent that Wife has a substantial need for Husband to pay her attorney's fees, and Husband has the ability to pay some if not all of the fees requested.

Wife's attorney submitted an "Affidavit For Attorney Fees" stating that she billed her time at the rate of $275 an hour. Attached to the attorney's affidavit is an itemized listing of time spent representing Wife. The attorney also stated in her affidavit that she was requesting "[o]n behalf of [Wife] . . . an award of $19,552.50 for time spent in this matter."

In addition to the Affidavit For Attorney Fees and the itemization of time spent representing, Wife's attorney filed a separate claim for litigation expenses, titled "Wife's Listing of Litigation Expenses," in which she detailed nine separate "litigation expenses" totaling $9,618.50. Surprisingly, the first item listed as a litigation expense reads: "Attorney retainer $5,000."[5] No explanation is provided for this entry or why a retainer fee should be distinguished from and charged separately as a litigation expense in addition to the itemized claim for attorney's fees in the amount of $19,522.50. We can only surmise that the $5,000 "attorney retainer" is duplicative of the legal services itemized in the affidavit. Moreover, without a reasonable explanation, which does not appear in this record, we have concluded the retainer fee was erroneously listed as a

[5] "Wife's Listing of Litigation Expenses" reads as follows:

Attorney retainer	$5,000.00
Divorce without children filing fee	$239.50
Mediation fee	$350.00
Medical records from various doctors	$25.00
Deposition fee of Dr. Humble . . .	$1,500.00
Deposition fee Dr. Baxter . . .	$800,00
Transcripts of the Doctor depositions	$1,100.00
Transcript of Husbands [sic] Deposition	$545.00
Transcript of Sons [sic] Deposition	$84.00
TOTAL	$9,618.50

IN ADDITION:

Remaining attorneys fees (see affidavit)

"litigation expense." Accordingly, we shall deduct $5,000 from the litigation expenses. With this deduction, Wife's litigation expenses total $4,618.50, not $9,618.50.

Having revised the total amount of Wife's litigation expenses, the corrected total Wife seeks to recover in attorney's fees and litigation expenses incurred at trial is $24,141.00. Wife's current income, including her alimony *in futuro*, is approximately one-fourth of Husband's current income, and neither party received substantial liquid or income-producing assets. Based on these facts, Wife is significantly disadvantaged economically as compared to Husband, and she would be required to deplete a substantial portion of the assets awarded to her in the divorce if she were required to pay all of her attorney's fees and litigation expenses.

Due to the great disparity in the parties' financial resources, we have determined that Wife needs substantial assistance to pay her attorney's fees and litigation expenses. The most optimistic estimate for Wife's post-2006 salary (including alimony *in futuro*) is roughly one-fourth of Husband's actual current salary; therefore, Husband has the ability to pay three-fourths of the attorney's fees and litigation expenses, as modified by this court, Wife incurred at trial. Accordingly, we modify the award of attorney's fees and litigation expenses and remand with instruction for the trial court to award Wife attorney's fees and litigation expenses in the amount of $18,105.75.[6]

Wife also seeks to recover the attorney's fees and costs she incurred on appeal. This court has authority to award counsel fees for the services of a party's attorney on appeal. *See Seaton v. Seaton*, 516 S.W.2d 91, 93-94 (Tenn. 1974); *Davis v. Davis*, 138 S.W.3d 886, 890 (Tenn. Ct. App. 2003). When appropriate, an appellate court will remand to the trial court to determine the amount to award for fees on appeal. *See Folk v. Folk*, 357 S.W.2d 828, 829 (Tenn. 1962) (discussing factors to be considered). After reviewing the record, we have determined that Wife is entitled to recover the reasonable attorney's fees she incurred on appeal, or a portion thereof, the amount of which shall be established by the trial court. Accordingly, we remand for the trial court to determine the amount of attorney's fees and expenses Wife incurred on appeal that should be awarded. *See id.*; *Butler v. Butler*, 680 S.W.2d 467, 471 (Tenn. Ct. App. 1984).

IN CONCLUSION

The portion of the trial court's order establishing automatic thresholds for alimony modification is vacated; in all other respects we affirm the award of alimony *in futuro* to Wife. We affirm the division of marital property. We modify the award of attorney's fees and litigation expenses Wife incurred at trial, increasing the award to $18,105.75. We find that Wife is entitled to the reasonable and necessary attorney's fees she incurred on

[6] Three-fourths of $24,141.00 is $18,105.75.

appeal and remand to the trial court to determine the amount of fees to be awarded. In all other respects, the judgment of the trial court is affirmed.

Costs of appeal are assessed against Phillip Andrew Longstreth.

_____
FRANK G. CLEMENT, JR., JUDGE