IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 3, 2015

CHRISTOPHER ERIC TIDWELL v. ALICIA ANN TIDWELL

Appeal from the Chancery Court for Hickman County
No. 13CV5131 Michael Binkley, Judge

No. M2015-00376-COA-R3-CV – Filed February 2, 2016

This appeal results from a divorce proceeding between Christopher Eric Tidwell ("Father") and Alicia Ann Tidwell ("Mother"). On appeal, Father challenges the trial court's determination of Mother's income for child support purposes, the trial court's award of rehabilitative alimony to Mother, and the trial court's award of attorney's fees to Mother. Having reviewed the record transmitted to us, we affirm the trial court's determination of Mother's income, vacate a portion of the awarded rehabilitative alimony, and modify the award of attorney's fees.

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

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C. J., and RICHARD H. DINKINS, J., joined.

Melanie Totty Cagle, Centerville, Tennessee, for the appellant, Christopher Eric Tidwell.

Alicia Ann Tidwell, Pro se.[1]

OPINION

Background and Procedural History

The parties in this case became romantically involved while in high school. After Mother became pregnant with their first child, they both dropped out of school. Father subsequently obtained a G.E.D. and pursued employment as an auto mechanic. In 2003, the

[1] Appellee did not file a brief.

same year that the parties married, Father obtained a position at Crown Ford. By the time Father left his position at Crown Ford in 2008 to start his own business as a tools salesman, he was earning approximately $75,000.00 per year. Mother's employment was intermittent throughout the parties' relationship. She previously held positions in a couple of grocery stores, but most of her energy was devoted to raising the parties' two children. Although she started a business of her own as a caterer after Father left Crown Ford to become a tool salesman, Mother abandoned her catering business in 2010 when she became ill with an apparent thyroid condition.[2]

On September 19, 2013, Father filed a complaint for divorce. In addition to alleging that irreconcilable differences had arisen between the parties, Father asserted that Mother was guilty of inappropriate marital conduct. On October 18, 2013, Mother answered and counterclaimed for divorce. Although Mother admitted that irreconcilable differences had arisen in the marriage, she denied that she was guilty of inappropriate martial conduct. Instead, she alleged that Father was guilty of inappropriate marital conduct, prayed for an award of alimony, and requested that she be reimbursed for her attorney's fees. On November 7, 2013, Father filed an answer to Mother's countercomplaint and denied that he was guilty of any inappropriate marital conduct.

Following an unsuccessful mediation, the case came to be heard for trial on October 30, 2014. At the time of trial, both parties were 36 years of age. In addition to considering proof concerning the custody of the parties' minor children,[3] the trial court heard evidence regarding the parties' property, debts, and respective financial prospects. On January 23, 2015, the trial court entered its final order in the case. The final order granted Mother a divorce based upon Father's inappropriate marital conduct, divided the marital estate, and incorporated a permanent parenting plan that designated Mother as the primary residential parent for the parties' two minor children. Under the terms of the permanent parenting plan, Father was ordered to pay Mother monthly child support in the amount of $1,097.00. This amount was set in accordance with the trial court's determination that the monthly incomes of Father and Mother were $5,358.00 and $0.00, respectively.

The trial court's final order also awarded Mother rehabilitative alimony and attorney's fees. In awarding rehabilitative alimony, the court cited Mother's intention to obtain a surgical technician's degree. Father was ordered to pay Mother $350.00 for thirty months

[2] Mother's previous thyroid condition does not appear to be an ongoing medical problem. At trial, Mother described her physical health as "good."

[3] We note that the parties' oldest child reached the age of majority shortly after the divorce decree was entered by the trial court.

and was also specifically directed to pay "[a]ny left over amount [from Mother's tuition] that is owed." The trial court concluded that such monetary support would be sufficient to rehabilitate Mother. In awarding Mother attorney's fees of $6,000.00, the trial court noted that Mother had to borrow money to pay these fees and found that Father had the ability to reimburse her for them. Father subsequently appealed to this Court.[4]

Issues Presented

In his appellate brief, Father raises three issues for our review. Slightly restated, these issues are as follows:

1. Whether the trial court erred in determining that Mother's income should be set at $0.00 for purposes of the child support calculations.

2. Whether the trial court erred in requiring Father to pay Mother's educational expenses without any time restriction or amount limitation.

3. Whether the trial court erred in awarding Mother attorney's fees.

Standard of Review

On appeal, we review the trial court's findings of fact "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). We review the trial court's resolution on a question of law *de novo*, but no presumption of correctness attaches to the trial court's legal conclusions. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Discussion

Mother's Income

We first address Father's assertion that the trial court erred in determining that Mother's income should be set at $0.00 for child support purposes. Before turning to

[4]We note that Mother has not participated in this appeal. Although she was represented in the divorce proceedings, her trial counsel was allowed to withdraw from any appellate representation by a June 4, 2015 order of this Court. In his motion seeking leave to withdraw, Mother's attorney represented that Mother did not wish to participate or file a brief in this appeal. Although our June 4 order allowed Mother's counsel to withdraw, we stressed that nothing prohibited Mother from participating in the appeal should she choose to do so. Mother ultimately did not file an appellate brief, and this matter came to be heard on the record transmitted to us and the brief filed by Father.

Father's specific arguments in support of this issue, it is helpful to consider the relevant background facts, some of which were previously discussed. As of the date of trial in this matter, Mother had not worked in several years. As stated earlier, although she had worked occasionally throughout the parties' relationship, her primary role within the family was devoted to raising the parties' two minor children. At the time of the trial, both children were in high school. The parties' oldest child was a senior; the parties' youngest child was a sophomore. Although Mother abandoned her catering business in 2010 when she became ill with a thyroid condition, she testified that this medical problem had since been controlled. Indeed, Mother testified that she was in "good" physical health, although she described her mental health as "[a] little thin." According to Mother, she was often stressed throughout the marriage, and she stated that she suffered from anxiety and attention deficit disorder. Her testimony revealed that she was on medication for both her anxiety and attention deficit issues.

Although Mother obtained a G.E.D. in November 2013, she stated that the last time she had applied for a job was in the fall of 2012. According to the testimony of Mother's expert witness, Robert Mitchell ("Mr. Mitchell"), a certified career advisor with the Tennessee Career Center, a person of Mother's age and experience would be limited in the number of available employment opportunities. As he stated:

> You're going to be a novice. You're going to start at the very bottom, and you're looking at minimum-wage jobs. Predominantly the jobs you're going to be open to will be labor jobs, maybe in a factory, staffing company displacements on temporary staffing, working in the retail industry, working in a store or restaurant or something.

Mr. Mitchell testified that approximately 30 to 35 such jobs were available within a 35-mile radius of Mother, and he stated that this minimum-wage work would pay $7.25 per hour.

When Mother testified, she indicated that such entry-level employment was not appealing to her and expressed a desire to better herself for her children. She stated that she wanted to enter the surgical technician program at the Tennessee College of Applied Technology in Hohenwald, Tennessee. According to her testimony, this program would start in January 2015 and last twelve months. Mother was unsure whether she could begin her studies in January 2015, however, because she had yet to pass the requisite entrance examination. Although she had passed one half of the test, she testified that she had failed the other half "by three points." She expressed her desire to retake the second half of the test and pass it before the program at Hohenwald started in January 2015. According to her testimony, although she had not renewed her studies for the second half of the test by the time of trial, she stated that she had treated her previous preparation for the entrance

examination as if it were her job. The proof showed that the starting pay for a new surgery technician would be anywhere from $13.00 to $18.00 per hour, depending on the specific area of employment.

In his brief, Father cites a number of considerations that he believes countenance against the trial court's decision to set Mother's income at $0.00. He notes that although Mother was the primary caregiver to the children, the children were in high school at the time of trial. In addition to contending that no parenting responsibilities impede Mother's pursuit of employment, Father notes that Mother is physically able to work. Portions of the trial court's oral findings seem to substantiate these contentions. As the trial court remarked:[5]

> I do not find that either party has chronic debilitating disease. I find that the husband's physical condition is good, and the wife's is good except for the problems from which she's currently suffering which may prevent her from working more than eight hours a day. Next, 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. I don't see that as an issue. The minor child will be going to high school during the day. I don't see that as an issue. If the child were a lot younger and not in school, that would certainly be an issue.

In light of these considerations and Mr. Mitchell's testimony concerning the availability of minimum-wage jobs in Mother's area, Father contends that we should remand this matter to the trial court "to set Mother's income for child support purposes at $7.25 per hour for 40 hours per week." In effect, Father asks us to impute income to Mother and to conclude that the trial court erred in failing to find that Mother was willfully and/or voluntarily unemployed.

In setting child support, trial courts apply, "as a rebuttable presumption," the Child Support Guidelines that are promulgated by the Tennessee Department of Human Services. Tenn. Code Ann. § 36-5-101(e)(2) (2014). In certain circumstances, the Guidelines permit a trial court to impute income to a parent for the purpose of establishing the proper amount of child support. As this Court recently noted:

> The Tennessee Child Support Guidelines allow the court to "[i]mput[e] additional gross income to a parent . . . [i]f a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed [.]"

[5] These oral findings accompany the trial court's consideration of factors related to Mother's request for alimony.

> Tenn. Comp. R. & Regs. 1240–02–04–.04(3)(a)(2)(i) (2008). This regulation is designed to prevent parents from avoiding their financial responsibility to their children by unreasonably failing to exercise their earning capacity. *Massey v. Casals*, 315 S.W.3d 788, 795 (Tenn.Ct.App.2009). Under Tennessee law, there is no presumption that a parent is willfully or voluntarily underemployed or unemployed; to the contrary, the party alleging that a parent is willfully or voluntarily underemployed or unemployed carries the burden of proof. *Brewer v. Brewer*, No. M2005–02844–COA–R3CV, 2007 WL 3005346, at *8 (Tenn.Ct.App. Oct.15, 2007) (citing Tenn. Comp. R. & Regs.1240–2–4–.04(3)(a)(2)(ii) (2007) ("The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed."); *Richardson v. Spanos*, 189 S.W.3d 720, 727 (Tenn.Ct.App.2005)). Determining whether a parent is willfully and voluntarily underemployed or unemployed are questions of fact that require careful considerations of all the attendant circumstances[.]

Wheeler v. Wheeler, No. M2012-02154-COA-R3-CV, 2014 WL 1512828, at *6 (Tenn. Ct. App. Apr. 15, 2014), *perm. app. denied* (Tenn. Sept. 2, 2014). The following factors are among those that are to be considered by a court when making a determination of willful and/or voluntary underemployment or unemployment:

(I) The parent's past and present employment;

(II) The parent's education, training, and ability to work;

. . . .

(IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent;

(V) The parent's role as caretaker of a handicapped or seriously ill child of that parent, or any other handicapped or seriously ill relative for whom that parent has assumed the role of caretaker which eliminates or substantially reduces the parent's ability to work outside the home, and the need of that parent to continue in that role in the future;

(VI) Whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the parent's obligation to support his/her children and, to this end, whether the training or education will

> ultimately benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future[.]

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(iii). On appeal, we review a trial court's determination regarding willful and/or voluntary underemployment or unemployment using Tennessee Rule of Appellate Procedure 13(d) and accord substantial deference to the trial court's decision. *Richardson v. Spanos*, 189 S.W.3d 720, 726 (Tenn. Ct. App. 2005) (citation omitted).

Having reviewed the record transmitted to us, including the transcript of proceedings from the October 2014 divorce hearing, we observe that Father never raised the issue of Mother's willful and/or voluntary unemployment in the trial court. In this vein, we note that the trial court's final order does not make a specific finding regarding whether Mother is willfully or voluntarily unemployed. Father's failure to raise the matter in the trial court constitutes a waiver of the issue. *See Goodman v. Goodman*, No. W2011-01971-COA-R3-CV, 2012 WL 1605164, at *6 n.5 (Tenn. Ct. App. May 7, 2012) (declining to address parent's argument that the trial court should have imputed income to the other parent on account of the other parent's willful and/or voluntary underemployment when the issue was not raised in the trial court); *Parris v. Parris*, No. M2006-02068-COA-R3-CV, 2007 WL 2713723, at *12 (Tenn. Ct. App. Sept. 18, 2007) (noting that because the issue of willful underemployment was not raised at the hearing, the parent could not bring it up for the first time on appeal). In any event, we cannot conclude that the trial court erred by not determining that Mother is willfully and/or voluntarily unemployed. Although Mother's background and experience qualify her for minimum-wage work, the trial court placed much emphasis in this case on Mother's desire to pursue future employment as a surgical technician. It specifically awarded her rehabilitative alimony to enable her to pursue her surgical technician degree and found that her pursuit of this degree would ultimately benefit both parties. Indeed, at the close of trial, the trial court commented as follows: "I do find from the facts that the wife can rehabilitate herself if she follows the plan of rehabilitation that's been presented through her testimony, which I accept." Moreover, in speaking to Father, the trial court commented: "I'm giving [Mother] an opportunity to rehabilitate herself which will benefit you. You've got to think of the big picture." The trial court clearly endorsed Mother's commitment to pursuing a degree at Hohenwald, and this factor weighs heavily in Mother's favor with regard to the issue of imputed income. As previously indicated, the reasonableness of a parent's decision to pursue additional training or education may be considered in determining whether that parent is willfully and/or voluntarily unemployed or underemployed. *See* Tenn. Comp. R. & Regs. 1240-02-04-04(3)(a)(2)(iii)(VI). For the foregoing reasons, we will not disturb the trial court's decision to set Mother's income at $0.00.

Alimony

We next turn our attention to Father's issue with the trial court's rehabilitative alimony award. As just indicated, the trial court's rehabilitative alimony award was designed to aid Mother in her pursuit of a surgical technician degree at the Tennessee College of Applied Technology in Hohenwald. Pursuant to the trial court's order, the alimony award was composed of two components:

> 3. The husband is to pay to the wife the sum of $350 in rehabilitative alimony per month upon thirty (30) days beginning on the 1st of December 2014. Until December 1st, the husband is to continue to pay pursuant to the *pendente lite* Order.
>
> 4. This support is designed to rehabilitate the wife. It shall end by operation of law, which is contemplated to end upon the thirtieth (30th) month's payment to obtain a surgical technician assistant degree.
>
> 5. As an additional form of rehabilitative alimony, the wife will use every means possible to obtain grants and similar financing to fund her education. Any left over amount that is owed shall be paid by the husband and the wife should not incur any debt to obtain her degree. This amount paid by the Husband is taxable income to the Wife and tax deductable to the Husband.

In his brief, Father does not take issue with the base rehabilitative alimony obligation of $350.00 per month for thirty months. Instead, he challenges the trial court's imposition of the additional form of rehabilitative alimony under which he is required to pay for Mother's "left over" educational expenses. Father argues that this provision is illogical and vague, as it obligates him to finance Mother's education irrespective of any time restriction or amount limitation.

Courts within this state have broad discretion in determining whether spousal support is needed. *Mayfield v. Mayfield*, 395 S.W.3d 108, 114 (Tenn. 2012) (citations omitted). Likewise, courts have wide discretion in determining the "nature, amount, and duration" of spousal awards determined to be necessary. *Id.* (citations omitted). Because "a trial court's decision regarding spousal support is factually driven and involves the careful balancing of many factors," we are generally reluctant to second-guess it. *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011) (citations omitted). Indeed, our role is not to substitute our judgment for that of the trial court, "but to determine whether the trial court abused its discretion in awarding, or refusing to award, spousal support." *Mayfield*, 395 S.W.3d at 114 (quoting *Gonsewski*, 350 S.W.3d at 105). A trial court abuses its discretion when it "causes

an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski*, 350 S.W.3d at 105 (citations omitted). "[W]hen reviewing a discretionary decision by the trial court, such as an alimony determination, the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision." *Id.* at 105-06 (citations omitted).

In Tennessee, there are several distinct types of spousal support available. *Id.* at 107. The four forms of alimony recognized by statute are as follows: (1) alimony *in futuro*, (2) alimony *in solido*, (3) rehabilitative alimony, and (4) transitional alimony. *Mayfield*, 395 S.W.3d at 115 (citing Tenn. Code Ann. § 36-5-121(d)(1)(2010 & Supp. 2012)). In determining whether to award spousal support and, if so, determining the nature, amount, length, and manner of support, courts consider the factors outlined in Tennessee Code Annotated section 36-5-121(i). *Gonsewski*, 350 S.W.3d at 109-10. These factors are as follows:

> (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.

Tenn. Code Ann. § 36-5-121(i) (2014). "Among these factors, the two that are considered the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay." *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007) (citations omitted).

In the present appeal, it is the trial court's award of rehabilitative alimony that is at issue. As described by our Supreme Court, "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." *Gonsewski*, 350 S.W.3d at 108 (citations omitted). It "thus serves the purpose of assisting the disadvantaged spouse in obtaining additional education, job skills, or training, as a way of becoming more self-sufficient following the divorce." *Id.* (citations omitted).

In this case, there should be no question that Mother has a need for some support. Moreover, as we have noted, Father does not assert error on account of the trial court's decision to award Mother $350.00 per month for thirty months in rehabilitative alimony. What Father does challenge, however, is the trial court's additional requirement that he pay "[a]ny left over amount" pertaining to Mother's educational expenses. The contested provision challenged by Father is found in paragraph five of the ordering section of the trial court's final order. In pertinent part, the provision reads as follows:

> As an additional form of rehabilitative alimony, the wife will use every means possible to obtain grants and similar financing to fund her education. Any left

> over amount that is owed shall be paid by the husband and the wife should not incur any debt to obtain her degree.

Although perhaps the spirit of this provision is sound, we agree with Father that its vagueness could work an injustice upon him. Indeed, although linking Father's responsibility to "left over" amounts seems to diminish Father's obligation under the order, the absence of an amount limitation with respect to this particular provision means Father's duty to support could potentially be incommensurate with his financial ability to pay. An obligor spouse's ability to pay is an important factor that cannot be ignored in awarding alimony, and unfortunately, the structure of this provision fails to account for this consideration.[6] As this failure constitutes error on the part of the trial court, we hereby vacate the "additional" rehabilitative alimony provision.

Although the "additional" rehabilitative alimony provision cannot stand, the base rehabilitative alimony award of $350.00 per month for thirty months has not been challenged. In our opinion, this unchallenged provision is sufficient on its own to support Mother's efforts at rehabilitation. The testimony revealed that the associated cost of Mother's proposed surgical technician's degree would be approximately $8,000.00. Moreover, as the following excerpt from the trial transcript indicates, Mother represented that a significant portion of this amount would be covered through tuition assistance, scholarships, and grants:

> Q: You're going to get tuition assistance for the applied school, correct?
>
> A: Yes, but I have to make sure that I file right as far as all of that. But, yes, you get -- I'll get two thousand for getting my GED, and then for getting the award for having the valedictorian, I believe, is a credit on that, and the fact that -- taxes. Taxes have a lot to do with it.
>
> Q: You get grant money for your tuition.

[6] Although we recognize that the estimated cost of Mother's proposed education is $8,000.00, the terms of the additional rehabilitative alimony provision do not place any limit on Father's obligation to pay. Inasmuch as Father is obligated to pay *any* educational expenses for which Mother does not obtain grants or financial aid, the structure of the provision creates the potential that Father will be forced to pay amounts beyond his ability to do so. Mother is not required to attend any particular educational program, and as such, there is nothing technically preventing her from pursuing training at a program other than the one at Hohenwald. Moreover, her educational expenses could potentially be much greater than she testified to at trial. Alimony must be measured against an obligor spouse's ability to pay, but the broad terms of the challenged alimony provision obligate Father to pay for any "left over" expenses, without any qualifications or limitations. As there is no limit as to what Father might potentially be obligated to pay, the alimony provision at issue fails to appropriately consider Father's financial ability to pay.

A: (Witness nodding in the affirmative.)

THE COURT: Is that a yes?

Q: The grant money is given to you –

A: Yes.

Q: -- and is it your understanding you don't owe any out-of-pocket cash to Hohenwald for receiving this degree?

A: I don't know yet. What it looks like, it's not going to be much if I do.

Shortly after this exchange, the trial court inquired into the estimated costs Mother might be required to pay if she assumed student loans to pay for any remaining balances on her education:

THE COURT: Any idea how much that would cost you to have to pay for after awhile? Any idea at all?

[MOTHER]: How much I would have to pay?

THE COURT: If you get a student loan, you have to pay it back. You have to pay it back a certain amount per month at a very low interest rate usually. Any idea about what that's going to be?

[MOTHER]: What it looks like now, if everything was filed right as far as the taxes, I would only have to pay two hundred dollars.

THE COURT: The loan?

[MOTHER]: No.

THE COURT: Just two hundred dollars in tuition?

[MOTHER]: Everything.

THE COURT: That's it?

[MOTHER]: That's what it looks like so far.

Although we recognize that the trial court added the "additional" rehabilitative alimony provision to ensure that Mother would incur no debt in the pursuit of her degree, the trial court's attempt to include that provision, which is problematic in its own right, was an error in light of the testimony presented at trial. The unchallenged award of $350.00 per month for thirty months is more than sufficient to provide for Mother's rehabilitative efforts. As the trial court ordered, this support was "contemplated to end upon the thirtieth (30^{th}) month's payment to obtain a surgical technician assistant degree."

Attorney's Fees

The last issue for our review is Father's assertion that the trial court erred in ordering him to reimburse Mother for $6,000.00 of her attorney's fees. In its January 23, 2015 order, the trial court ordered Father to pay Mother the awarded $6,000.00 sum "no later than" January 31, 2015. "It is well settled that an award of attorney's fees constitutes alimony *in solido*." *Fickle v. Fickle*, 287 S.W.3d 723, 737 (Tenn. Ct. App. 2008) (citing *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996)). An award of attorney's fees is within the discretion of the trial court, and we will not interfere with the award absent a showing that the trial court committed an abuse of discretion. *Id.* (citations omitted). When a party lacks sufficient funds to afford his or her own legal expenses, or would have to deplete his or her resources in order to pay them, an award of attorney's fees is appropriate. *Id.* (citations omitted). Of course, mere demonstration of need is not sufficient to justify an award of attorney's fees. The party ordered to pay attorney's fees must also have the ability to pay them. *See Riggs*, 250 S.W.3d at 459-60.

In his brief, Father argues that the trial court erred in determining that he had the financial ability to reimburse Mother for her attorney's fees in light of his other obligations. Moreover, he asserts that the trial court erred in setting the attorney's fees in the absence of an affidavit submitted by Mother or her counsel. With respect to this latter contention, we note that "[t]here is nothing improper about a trial court making an award of attorney's fees without receiving a formal or detailed application for fees." *Douglas v. Douglas*, No. M2008-00219-COA-R3-CV, 2009 WL 21036, at *6 (Tenn. Ct. App. Jan. 2, 2009); *see also Wilson Mgmt. Co. v. Star Distribs. Co.*, 745 S.W.2d 870, 873 (Tenn. 1988) ("[A] trial judge may fix the fees of lawyers in causes pending or which have been determined by the court, with or without expert testimony of lawyers and with or without a prima facie showing by plaintiffs of what a reasonable fee would be."); *Kahn v. Kahn*, 756 S.W.2d 685, 696 (Tenn. 1988) (finding the *Wilson Management* quote applicable to divorce cases). In this case, Mother testified that she paid her attorney $6,500.00 and that she had to borrow the money from her parents in order to do so. She further stated that she had no way to pay her parents back for this amount. When the trial court orally ruled that Mother was entitled to attorney's

fees, Mother's attorney corrected the court that the amount paid to him by Mother was $6,000.00. The trial court then went on to state as follows:

> Six thousand dollars is a lump-sum payment for representation all the way through trial. I find that is a fair and reasonable amount of money based upon the time and effort and preparation of trial. That money, according to the same alimony factors, will be reimbursed to the wife.

At no point did Father press the trial court to have a hearing on the attorney fee issue, and we cannot conclude that the trial court's decision in this case to award an attorney's fee, without an affidavit, based on the lump sum fee paid to Mother's attorney, was an abuse of discretion. "Having heard the proof presented and the argument made by the attorneys at trial and having entertained the various pleadings filed in the cause, we think that the trial court was in a position to determine the nature and value of the services rendered by [Mother's] attorney." *Phillips v. Phillips*, No. M1999-00212-COA-R3-CV, 2000 WL 1030625, at *8 (Tenn. Ct. App. July 27, 2000). Indeed, although the trial court did not specifically cite to the factors discussed in *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980), which should be considered as guides when fixing a reasonable attorney's fee, the trial court was sufficiently familiar with the case such that it could make an award of fees in light of those factors. *See Kahn*, 756 S.W.2d at 696-97 (noting that the trial judge's familiarity with the record of the case and oversight of trial "had sufficiently acquainted him with the factors . . . delineated in *Connors* to make a proper award of an attorney's fee without proof or opinions of other lawyers"). Upon our own review of the record transmitted to us on appeal, from which we can weigh the *Connors* factors, we conclude that the awarded $6,000.00 sum was reasonable. We accordingly decline to reverse the award on that basis.

That the trial court properly considered $6,000.00 to be a reasonable fee, however, does not necessarily mean that it was proper to make Father pay it. Because the attorney's fees are an award of alimony *in solido*, Mother must have a need for the award, and Father must have the financial ability to pay it. Mother's need for the award should not be in question. At the time of trial, Mother was unemployed, despite her plans to pursue additional educational training. She testified that the she had to borrow money from her parents to even pay her attorney, and the divorce decree did not provide her with significant assets which are adequate for both her needs and attorney's fees. Regarding Father's ability to pay, we note that Father is a self-employed businessman with a monthly income that the trial court determined was over $5,300.00. Although he does have several financial obligations which cut into this income, such as child support and the payment of rehabilitative alimony, our review of the record does not lead us to conclude that the trial court erred in finding that he had the ability to pay for Mother's attorney's fees. Father has demonstrated an ability to earn a healthy income, and the evidence suggests that he will continue to be able to do so in the

future. With that said, we are of the opinion that the evidence does not support the trial court's determination that Father has the financial wherewithal to reimburse Mother with a single $6,000.00 payment. Having reviewed the record, there does not appear to be a ready pool of assets from which Father has the ability to satisfy the award of fees with a lump sum. Indeed, the most significant asset identified in his business is account receivables. That Father does not have the means to make a significant lump sum payment for Mother's attorney's fees is perhaps evident in the trial court's decision to create a payment schedule for a $14,695.00 *in solido* property adjustment that Father was ordered to pay Mother. The trial court ordered that this award be paid out at $100.00 a month for seven months, with Father's payment then increasing to $500.00 a month for each month thereafter until the award is satisfied. Although Father has the financial ability to reimburse Mother for her attorney's fees, the record does not support the trial court's decision to require Father to reimburse Mother in a single sum.

As we have noted, Father was earning a healthy income at the time of trial, and the most significant of his expenses, child support, was subject to a reduction in just a few short months.[7] We would agree with the trial court that Father has the financial ability to reimburse Mother for her attorney's fees, but only pursuant to a monthly payment schedule. Having reviewed the record transmitted to us, we hereby modify the trial court's award of attorney's fees and make the award payable in $200 monthly installments over a period of thirty months. We remand this case to the trial court for the entry of an order making this modification.

Conclusion

For the foregoing reasons, we affirm the trial court's determination of Mother's income, vacate the ordered "additional" rehabilitative alimony provision, and modify the award of attorney's fees to make the total award payable over a period of thirty months. Costs of this appeal are assessed one-half against the Mother, Alicia Ann Tidwell, and one-half against the Father, Christopher Eric Tidwell, and his surety, for which execution may issue if necessary. We remand this case to the trial court for the collection of costs, enforcement of the judgment, and for further proceedings as may be necessary and are consistent with this Opinion.

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ARNOLD B. GOLDIN, JUDGE

[7] At the time the divorce decree was entered, the parties' oldest child was a senior in high school and approximately one month away from his eighteenth birthday.