

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

December 8, 2009 Session

PAULA J. BRYANT v. JOHNNY ALAN BRYANT

**Appeal from the General Sessions Court for Roane County
No. 9244A Jeff Wicks, Judge**

No. E2009-01838-COA-R3-CV - FILED JANUARY 11, 2010

Paula J. Bryant (“Wife”) filed suit seeking a divorce from Johnny Alan Bryant (“Husband”) following a marriage of over twenty-one years. The parties were able to resolve all significant issues prior to trial except the amount and duration of alimony Wife would receive. Following a trial, the Trial Court awarded Wife rehabilitative alimony in the amount of \$850 per month for a period of eighteen (18) months, then \$500 per month for the next sixty (60) months. We affirm the Trial Court’s award of rehabilitative alimony to Wife, but modify the award and order Husband to pay rehabilitative alimony to Wife for a period of twenty-four (24) months in the amount of \$850 per month. As modified, the judgment of the Trial Court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General
Sessions Court Affirmed as Modified; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and JOHN W. MCCLARTY, J.J., joined.

James S. Smith, Jr., Rockwood, Tennessee, for the Appellant, Johnny Alan Bryant.

Martin W. Cash, Jr., Kingston, Tennessee, for the Appellee, Paula J. Bryant.

OPINION

Background

Wife filed a complaint seeking a divorce from Husband on the ground of adultery. More specifically, Wife alleged that in September of 2008, Husband moved out of the marital residence after informing Wife that he was involved in a sexual relationship with a coworker. Alternatively, Wife sought a divorce based on irreconcilable differences.

Husband answered the complaint and admitted that he was involved in a sexual relationship with a coworker. Husband then filed a counterclaim asserting that Wife was guilty of cruel and inhuman treatment. As an alternative basis for divorce, Husband also alleged that irreconcilable differences had arisen between the parties.

The parties have two children, only one of whom is a minor. The minor child currently is fifteen years old.

Prior to trial, Wife filed an affidavit of income and expenses showing monthly expenses of \$2,217. Wife had no monthly income as she was not employed outside of the home and was home-schooling the parties' minor child. Husband also filed an affidavit of expenses which showed monthly expenses of \$2,454. Husband's affidavit did not show the amount of his monthly income.

The parties mediated this case and were able to reach an agreement on almost everything. The parties agreed that Wife would be designated as the minor child's primary residential parent. The parties also agreed on a schedule for Husband's co-parenting time, that Husband would pay child support in the amount of \$797 per month, and that Husband would maintain health insurance on the minor child.

The parties also agreed on how to equitably divide the marital assets. The mediated settlement agreement is vague with respect to the property distribution. Wife received the house¹ and everything in the house except a gun cabinet, juke box, and Husband's personal effect and financial papers. Wife received a 1999 Dodge and a 1998

¹ There was considerable disagreement at trial pertaining to what the parties actually had agreed to at mediation with respect to the equity in the marital residence. The Trial Court interpreted the mediated settlement agreement as follows: "[T]he house is awarded to the wife with no equity going to the husband on that." As best we can tell from the record, there was approximately \$18,000 in equity in the marital residence, but tax consequences made it disadvantageous to sell the house in the near future. Although none of this is directly at issue on appeal, the division of marital property is a factor to be considered in an award of alimony, and we note the parties' single biggest marital asset was awarded solely to Wife.

Windstar. Husband received a 1996 Ford F150 truck. In addition, Wife was awarded separate property she had received from an inheritance. The record does not indicate the exact amount of the separate property awarded to Wife because she had made some purchases with this separate property, and the record does not indicate the value of what was purchased.

The only issue that the parties were unable to resolve in mediation was the amount and duration of alimony Wife was to receive. This sole remaining issue was tried in March 2009. Prior to trial, counsel for Husband acknowledged that Husband did not “take issue with the fact that some rehabilitative alimony is probably necessary here.”

Wife was the first witness at trial. Wife testified that she has been home-schooling the younger child for the past nine years. Wife testified that she was employed part-time at K-Mart when she married Husband in 1987. Wife worked outside the home only sporadically during the marriage as her primary responsibility was to stay home and raise the children and take care of the home. Wife had income nine of the last twenty-three years. For those years where at least some income was earned, Wife’s annual income ranged from a low of \$165 to a high of \$7,273.

Wife currently is enrolled in school. According to Wife:

Q What are you studying to be now?

A It’s business system technologies. You can go for an administrative assistant. I’ve chosen to do that along with medical and accounting. . . .

Q Okay. How much more time until you matriculate?

A. If I’m pushing myself I could probably – anywhere between nine and twelve months, but that is pushing it. In twelve I expect to graduate.

Q. All right. And after you graduate, do you intend to get a job?

A. Yes. . . .

Q Okay. Now, do you have any idea what your income will be?

- A. Not right off. It might start at ten. I have a young lady that works in Oak Ridge that will try to help me, and most likely start out between \$15.00 to \$17.00 an hour, if I can get in where she's at.

In addition to being responsible for caring for the children and the house, Wife also took care of the yard. Wife testified that she had monthly expenses of \$2,217, which is consistent with her affidavit of income and expenses previously filed with the Trial Court. Based on the mediated settlement agreement entered into before trial which resolved most of the issues, the parties agreed at that time that Husband's monthly income was \$4,583. Wife was not actively employed.

Husband also testified at trial. Husband testified that his monthly expenses were "about \$2,450." Husband is a mechanic and drives a dump truck. At the time of trial, Husband was earning \$13.80 per hour. Husband had been working a lot of overtime, but has no way of knowing if the overtime will last because of various factors, including available jobs, the weather, etc. Husband testified that with a lot of overtime, he earned "54 something" in 2008.

Following the trial, a final judgment was entered by the Trial Court which provided as follows:

1. The parties have stipulated that both parties are entitled to a divorce one from the other based upon Tennessee Code Annotated Section 36-4-129.² Each party is therefore awarded the divorce and the parties are hereby restored to all rights and privileges of single persons.

² Tenn. Code Ann. § 36-4-129 (Supp. 2009) provides as follows:

Stipulated grounds and/or defenses – Grant of divorce. – (a) In all actions for divorce from the bonds of matrimony or legal separation the parties may stipulate as to grounds and/or defenses.

(b) The court may, upon stipulation to or proof of any ground of divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce or if a divorce is to be granted on the grounds of irreconcilable differences, declare the parties to be divorced, rather than awarding a divorce to either party alone.

2. The parties' agreed upon permanent parenting plan has been approved by the Court and entered as the Order of this Court.
3. The parties' Settlement Agreement . . . is incorporated into this Final Decree of Divorce as if [fully] set forth verbatim herein.
4. During the marriage, [Husband] was the financial provider. The parties have stipulated that [Husband] earns \$4,583.00 per month and [Wife] does not presently have an income. [Wife's] normal monthly expenses are \$2,217.00 per month and [Husband's] normal monthly expenses are \$2,454.00 per month. [Wife] is currently in school and will graduate in nine to twelve months. Alimony is, in part, based upon one party's need and the other party's ability to pay. The parties are now living separate from one another. The Court therefore finds that [Wife] is in need of rehabilitative alimony and [Husband] has the ability to pay the alimony.³
5. The Court hereby awards [Wife] rehabilitative alimony in the amount of \$850.00 per month to be paid for the first eighteen (18) months following entry of the Final Decree of Divorce. The Court further awards [Wife] rehabilitative alimony in the amount of \$500.00 per month for five years (60 months) following the expiration of the first eighteen (18) months following entry of the Final Decree of Divorce. The total period of rehabilitative alimony is seventy eight (78) months. . . . (footnotes added)

Husband appeals raising the following issue, which we take verbatim from his brief:

³ For some unknown reason, the beginning of paragraph 4 is cut-off from the copy of the final judgment contained in the record. We, therefore, are beginning this paragraph with the first complete sentence contained in the copy that we have been provided.

Whether the Honorable Trial Court erred in awarding [Wife] rehabilitative alimony in the amount of \$850.00 per month for eighteen months and an additional \$500.00 per month for five years following the eighteen months, for a total period of rehabilitative alimony of seventy-eight (78) months.

Wife argues that the Trial Court's award should be affirmed. In addition, Wife requests that she be awarded her attorney fees incurred on appeal.

Discussion

This Court reviews a trial court's decision with respect to an award of alimony under an abuse of discretion standard. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996)

The pertinent statute is Tenn. Code Ann. § 36-5-121(i) (2005) which provides as follows:

(i) 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:

(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.

“The two most important factors a trial court must consider are the need of the disadvantaged spouse and the obligor spouse’s ability to pay.” *Mimms v. Mimms*, 234 S.W.3d 634, 638 (Tenn. Ct. App. 2007) (citing *Bratton v. Bratton*, 136 S.W.3d 595, 604 (Tenn. 2004)).

Other statutory factors we must consider in this case are set forth in Tenn. Code Ann. §§ 36-5-121(c)(2) and (d)(2) (2005) which provide:

(c)(2) The general assembly finds that the contributions to the marriage as homemaker or parent are of equal dignity and importance as economic contributions to the marriage. Further, where one (1) spouse suffers economic detriment for the benefit of the marriage, the general assembly finds that the economically disadvantaged spouse’s standard of living after the

divorce should 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.

* * *

(d)(2) It is the intent of the general assembly 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. To be rehabilitated means to achieve, with reasonable effort, 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.

When considering the applicable statutory factors set forth above, we agree with the Trial Court that an award of rehabilitative alimony to Wife was necessary. However, we think the duration of rehabilitative alimony awarded to Wife was excessive under the facts of this case. The record establishes that Wife was set to graduate in nine to twelve months following the date of trial. Wife testified that after graduation, she "most likely" would be earning \$15.00 to \$17.00 per hour. At the time of trial, Husband was earning \$13.80 per hour. Thus, within a matter of one year, Wife likely will be making more per hour than Husband. As discussed previously, Wife was awarded all of the parties' interest in the marital residence and almost everything in the house that the parties had accumulated during the lengthy marriage. Wife had separate property; Husband did not.

Based on the foregoing, we believe it is necessary to modify the award of rehabilitative alimony made to Wife. The judgment of the Trial Court is modified to reflect an award of rehabilitative alimony for a period of twenty-four (24) months in the amount of \$850 per month. This two year period of rehabilitation should be more than sufficient, according to Wife's testimony, to allow her both to graduate as well as to allow her additional time to find a job and establish herself in her new profession so that her standard of living after the divorce should be reasonably comparable to Husband's expected post-divorce standard of living. As modified, the judgment of the Trial Court is otherwise affirmed. *See Booker v. Booker*, No. M2005-01455-COA-R3-CV, 2006 WL 3044154, at *4

(Tenn. Ct. App. Oct. 26, 2006) (“Considering the two most critical factors in making an award of alimony, the ‘real need’ of the spouse and the ability of the obligor spouse to pay, as well as the remaining statutory factors set forth in T.C.A. § 36-5-121(i), this Court holds that an award of rehabilitative alimony of \$500 per month for 60 months is appropriate. This period coincides with Wife’s five-year education plan.”).

In light of the modification we have made to the award of rehabilitative alimony, we do not find it appropriate to award Wife attorney fees incurred on appeal.

Conclusion

The judgment of the Trial Court is modified to award Wife rehabilitative alimony for a period of twenty-four (24) months in the amount of \$850 per month. As so modified, the judgment of the Trial Court is affirmed. This case is remanded to the Trial Court solely for collection of the costs below. Costs on appeal are taxed to the Appellee, Paula J. Bryant, for which execution may issue, if necessary.

D. MICHAEL SWINEY, J.