

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 9, 2007 Session

CLARENCE ELWIN PROCTOR v. LINDA WEBB PROCTOR

**Appeal from the Circuit Court for Davidson County
No. 00D-2949 Muriel Robinson, Judge**

No. M2006-01396-COA-R3-CV - Filed on August 31, 2007

This appeal arises out of a post-divorce petition to reduce the husband's alimony in futuro obligation. Although the husband's income dropped significantly since the divorce, the trial court concluded he had not experienced a material and substantial change "in his lifestyle" based on a finding the husband's new wife contributed to the payment of some of his obligations. We have concluded there has been a material and substantial change in the husband's financial circumstances and therefore reverse and modify the decision of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Modified**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

D. Scott Parsley and Michael K. Parsley, Nashville, Tennessee, for the appellant, Clarence Elwin Proctor.

Phillip R. Robinson, Nashville, Tennessee, for the appellee, Linda Webb Proctor.

OPINION

Clarence Proctor and Linda Proctor divorced on December 20, 2001, at which time Mr. Proctor (Husband) was ordered to pay alimony in futuro to Ms. Proctor (Wife) in the amount of \$1,350 per month. At the time of the divorce, Ms. Proctor was unable to work, and Husband was working at SB International as a Distribution Manager making \$65,000 per year.

In February 2004, Husband lost his job with SB International due to a reduction in workforce. He immediately sought and obtained new employment as a Warehouse Manager with a company in North Carolina making \$55,000 per year. Unfortunately, Husband lost that job in November 2005.

Soon thereafter, he acquired employment with another company as a warehouse worker making \$10 per hour.

Husband soon realized his income was insufficient to cover his financial obligations and thus petitioned the court for a reduction in his alimony payment on January 18, 2006. Wife answered on February 16, 2006, and the matter came on for hearing on June 1, 2006.

At the time of the hearing, Wife's financial circumstances were substantially unchanged. Husband, however, had experienced numerous post-divorce changes. His income dropped from \$65,000 a year to approximately \$29,000 a year,¹ and he remarried a few months prior to the hearing.² Additionally, Husband purchased a residence for \$186,000, for which he made a down payment of \$91,000 toward the purchase price. The mortgage obligation on the house was \$871 per month. Husband's new wife was employed, earning approximately \$55,000 per year, and contributed toward the monthly bills, including specifically the mortgage of \$871 per month, household utilities, and other miscellaneous obligations including credit cards.

Following the hearing, the trial court filed a Memorandum Opinion in which the court found that ordinarily Mr. Proctor's situation would require the court to adjust the alimony obligation; however, the trial court denied the petition upon a finding Husband had not experienced a substantial and material change in his lifestyle due to the financial contributions by his new wife. This appeal followed.

STANDARD OF REVIEW

Our standard of review for a modification decision has been explained by our Supreme Court:

Because modification of a spousal support award is "factually driven and calls for a careful balancing of numerous factors," *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989), a trial court's decision to modify support payments is given "wide latitude" within its range of discretion, *see Sannella v. Sannella*, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999). In particular, the question of "[w]hether there has been a sufficient showing of a substantial and material change of circumstances is in the sound discretion of the trial court." *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999) (citations omitted). Accordingly, "[a]ppellate courts are generally disinclined to second-guess a trial judge's spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes." *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998); *see also Goodman v. Goodman*, 8 S.W.3d 289, 293 (Tenn. Ct. App. 1999) ("As a

¹The record states that he was making \$14 per hour at the time of the hearing, which is equivalent to \$29,000 a year, assuming he worked 40 hours per week for 52 weeks a year.

²Husband remarried after the petition for modification was filed.

general matter, we are disinclined to alter a trial court's spousal support decision unless the court manifestly abused its discretion”). When the trial court has set forth its factual findings in the record, we will presume the correctness of these findings so long as the evidence does not preponderate against them. *See, e.g., Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn.2000); *see also* Tenn. R. App. P. 13(d).

Bogan v. Bogan, 60 S.W.3d 721, 727 (Tenn. 2001)

ANALYSIS

In any action for divorce, the court may award alimony “to be paid by one spouse to or for the benefit of the other, or out of either spouse's property, according to the nature of the case and the circumstances of the parties.” Tenn. Code Ann. § 36-5-121(a). If the type of alimony awarded is subject to modification, the court may “award an increase or decrease or other modification of the award based upon a showing of a substantial and material change of circumstances.” *Id.*

Alimony in futuro, which is a payment of support and maintenance on a long term basis or until death or remarriage of the recipient, may be awarded when the court finds

there is relative economic disadvantage and that rehabilitation is not feasible, meaning that the disadvantaged spouse is unable to achieve, with reasonable effort, an earning capacity that will permit the 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(f)(1).

An award of alimony in futuro shall remain in the court's control for the duration of such award, and “may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances.” Tenn. Code Ann. § 36-5-121(f)(2)(A).

A party seeking a modification of alimony in futuro has two significant hurdles to overcome. First, the petitioner must establish that there has been a both a substantial and a material change in circumstances since the entry of the original support decree. *See Bogan*, 60 S.W.3d at 727-728 (citing Tenn. Code Ann. § 36-5-101(a)(1) (Supp.2000)). A change in circumstances is “substantial” when it significantly affects either the obligor's ability to pay or the obligee's need for support.” *Bogan*, 60 S.W.3d at 728 (citing *Bowman v. Bowman*, 836 S.W.2d 563, 568 (Tenn. Ct. App. 1991)). A change in circumstances is “material” when the change occurs since the date the alimony was ordered, and the change was not within the contemplation of the parties when then entered into the property settlement. *Bogan*, 60 S.W.3d at 728 (citing *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999))(other citations omitted).

If the petitioner establishes that both a substantial and a material change of circumstances has occurred, then the petitioner must overcome the second hurdle, proving that he or she is entitled to a modification. For the petitioner to be entitled to a modification of his or her alimony obligation, the petitioner must establish the modification is justified based upon the same factors that are relevant to an initial award of alimony. *Bogan*, 60 S.W.3d at 730; *Wright v. Quillen*, 83 S.W.3d 768, 773 (Tenn. Ct. App. 2002). Those factors are found in Tenn. Code Ann. § 36-5-121(i).

The factors set forth in Tenn. Code Ann. § 36-5-121(i), where relevant, should be considered in determining whether there has been a change in circumstances sufficient to warrant a modification of an alimony obligation. *See Threadgill v. Threadgill*, 740 S.W.2d 419, 422-423 (Tenn. Ct. App. 1987); *see also Hasty v. Hasty*, No. M2002-01756-COA-R3-CV, 2003 WL 21954190, at *2-3 (Tenn. Ct. App. Aug. 15, 2003). The statutory factors, if relevant, are:

- (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)(1-12). Of the statutory factors listed above, the factors the parties to this action have focused on include the relative earning capacity, obligations, needs, and financial resources of each party. *See* Tenn. Code Ann. § 36-5-121(i)(1).

In addition to the statutory factors set forth above, there is another circumstance that is at issue here. That circumstance pertains to a shifting of the burden of proof if and in the event it is established that the party who is *receiving* alimony in futuro lives with a third person. *See* Tenn. Code Ann. § 36-5-121(f)(2)(B). This circumstance is occasionally referred to by the courts as the “cohabitation” factor. *See Woodall v. Woodall*, No. M2003-02046-COA-R3-CV, 2004 WL 2345814, (Tenn. Ct. App. Oct. 15, 2004). As the statute provides, if the party *receiving* alimony in futuro lives with a third person, there is a rebuttable presumption that the third person is either contributing or receiving support from the alimony recipient and the alimony recipient does not need the amount of support previously awarded. Tenn. Code Ann. § 36-5-121(f)(2)(B).

Here, however, it is Husband, the party who is paying the support, who lives with a third person, not the party receiving the support. The statute expressly and unequivocally applies if the party *receiving* the alimony is cohabitating. It, however, makes no provision for the circumstance where the party *paying* alimony is cohabitating. Therefore, the rebuttable presumption created by the statute does not pertain to the facts of this case.³

Husband’s income dropped substantially, from \$65,000 a year at the time of the divorce to \$29,000 a year at the time of the hearing on the petition for modification. This change, being more than a 50% decrease in his annual income, constitutes a substantial change because it impairs Husband’s ability to pay the amount of alimony set at the time of the divorce. *See Bogan*, 60 S.W.3d at 728 (citing *Bowman*, 836 S.W.2d at 568 (holding that a change is substantial when it significantly affects the obligor's ability to pay)). The dramatic drop in his income is also material because it was not within the contemplation of the parties at the time of the divorce. *See Bogan*, 60 S.W.3d at 728 (citing *Watters v. Watters*, 22 S.W.3d at 821).

Where a substantial and material change in circumstances has been established, the party seeking the modification bears the additional burden of proving that the modification is warranted. *See Byrd v. Byrd*, 184 S.W.3d 686, 691 (Tenn. Ct. App. 2005) (citing *Freeman v. Freeman*, 147 S.W.3d 234, 239 (Tenn. Ct. App. 2003)); *see also Azbill v. Azbill*, 661 S.W.2d 682, 686 (Tenn.1983); *Wright*, 83 S.W.3d at 772; *Elliot v. Elliot*, 825 S.W.2d 87, 90 (Tenn. Ct. App. 1991).

³The parties spend a lot of energy debating whether the presumption under Tenn.Code Ann. § 36-5-101(a)(3) applies. Although we have found it does not, it should be noted that proof of cohabitation does not automatically end the right of the recipient to receive alimony; it merely shifts the evidentiary burden in a modification proceeding. *See Woodall*, 2004 WL 2345814, at *3 (citing *Isbell v. Isbell*, 816 S.W.2d 735, 738 (Tenn. 1991); *Wright*, 83 S.W.3d at 775). To the contrary, proof of cohabitation merely activates the presumption and, as a consequence, the alimony recipient then bears the burden of demonstrating a need for the previously awarded alimony, notwithstanding the cohabitation. *See Woodall*, 2004 WL 2345814, at *3 (citing *Azbill*, 661 S.W.2d at 686; *Wright*, 83 S.W.3d at 775).

Although Husband has established the requisite change of circumstances by proving he has suffered more than a 50% decrease in his annual income, he is not automatically entitled to a modification of his support obligation. To the contrary, the General Assembly has expressed its intent that a modification of alimony shall not be automatic upon proving that a substantial and material change of circumstances has occurred. This is evident from the permissive language used by the General Assembly in Tenn. Code Ann. § 36-5-121(f)(2)(A) which provides that an award of alimony in futuro *may* be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances. *See Woodall*, 2004 WL 2345814, at *2 (citing *Bogan*, 60 S.W.3d at 730) (noting that the permissive language in the statute indicates a legislative intent that a trial court has no duty to reduce or terminate an award merely because it finds a substantial and material change of circumstances). For Husband to be entitled to a modification of his alimony obligation, he must affirmatively establish that modification is justified based upon the relevant factors in Tenn. Code Ann. § 36-5-121(i). *See Bogan*, 60 S.W.3d at 730; *Wright*, 83 S.W.3d at 773.

Unlike child support, there are no guidelines to aid us in setting or modifying alimony. *See Anderton v. Anderton*, 988 S.W.2d 675, 682-683 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996) (holding there are no hard and fast rules for spousal support decisions). Alimony decisions require a careful balancing of the factors in Tenn. Code Ann. § 36-5-121(i) and typically hinge on the unique facts and circumstances of the case, *see Anderton*, 988 S.W.2d at 683; *see also Hawkins v. Hawkins*, 883 S.W.2d 622, 625 (Tenn. Ct. App. 1994), with the two most important factors being the need of the disadvantaged spouse and the obligor's ability to pay. *Varley v. Varley*, 934 S.W.2d 659, 668 (Tenn. Ct. App. 1996).

Although Husband's ability to pay was adversely impacted by a substantial decrease in his income, this substantial change should not be viewed in a vacuum. To the contrary, we must consider his ability to pay the obligation which can be impacted by a variety of factors. Income is but one of the factors to be considered. One's obligations are another of what could be many factors to be considered. As we look at Husband's current obligations, we see that he was receiving a benefit that did not exist at the time of the divorce. That benefit is the financial contributions being made by his new wife, which help minimize his monthly obligations, including the mortgage, utilities, and credit cards.

The obligor party's financial obligations are a statutory factor to be considered when setting or modifying alimony.⁴ *See* Tenn. Code Ann. § 36-5-121(i)(1). Accordingly, although we have concluded the statutory presumption under Tenn. Code Ann. § 36-5-121(f)(2)(B) does not apply, we should consider whether Husband is directly or indirectly receiving an economic benefit that reduces his financial obligations, regardless of the fact the economic benefit comes from his new wife or another person with whom he resides.

⁴ Although Husband's new wife has no obligation to assist Husband with his alimony obligations from his prior marriage, her contributions to their household expenses, including the mortgage, utilities, and credit cards, relieve Husband of the obligation to pay the entirety of these bills.

Having examined the evidence in the record, we have concluded that the reduction in Husband's monthly obligations is substantially less than the reduction in his income. However, his ability to pay alimony has diminished. Accordingly, after considering the relevant statutory factors and specifically the net change in Husband's income and obligations which impair his ability to pay alimony, we find Husband's alimony obligation should be reduced from \$1,350 per month to \$1,000 per month.

The judgment of the trial court is therefore modified as stated above, and this matter is remanded to the trial court with instructions to enter a judgment consistent herewith. Costs of appeal assessed against the parties equally.

FRANK G. CLEMENT, JR., JUDGE