

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 11, 2014

ROBERT C. LITTON v. JENNIFER M. LITTON

Direct Appeal from the Circuit Court for Sumner County
No. 83CCC12011CV1125 C. L. Rogers, Judge

No. M2013-01363-COA-R3-CV - Filed May 5, 2014

In the parties' divorce, the trial court denied Wife's request for spousal support and her request for reimbursement for medical expenses incurred. We affirm.

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

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

W. Justin Adams, Nashville, Tennessee, for the appellant, Jennifer Marie Litton

No Brief filed for the appellee, Robert C. Litton

OPINION

I. FACTS & PROCEDURAL HISTORY

Robert C. Litton (“Husband”) and Jennifer M. Litton (“Wife”) married on May 23, 1998. One child was born of the marriage, in 2003. In September 2011, Husband filed a Complaint for Divorce in the Sumner County Circuit Court alleging that Wife was guilty of inappropriate marital conduct. Wife filed an Answer and Counter-Claim for Legal Separation. Among other things, Wife sought spousal support and payment for medical expenses not paid by insurance.

A trial was held on November 27, 2012. Wife’s Statement of the Evidence, which was approved by the trial court without response or objection by Husband, describes Husband’s testimony, “in relevant part[,]” as follows:

Husband and Wife married on May 23, 1998.

Husband and Wife had one child together, . . . (“Child”), [in] 2003.

[Husband] separated from Wife on or about November 1, 2010, when he moved out of the marital residence.

Husband was an officer of the Hendersonville Police Department and will be entitled to benefits of approximately \$1100 per month from the Tennessee Consolidated Retirement System when he reaches retirement age.

Husband and Wife own a house . . . valued at approximately \$129,000.

Husband is solely indebted on a promissory note with a remaining balance of approximately \$100,000, which is secured by a mortgage on the house.

From the time this action was filed until approximately July 31, 2012, Husband was employed as an officer of the Hendersonville Police Department earning a gross monthly income of \$3,100 plus approximately \$500 per month in off-duty income.

As of the date of the hearing, Husband was employed by Macy’s approximately 36 hours per week making \$10.36 per hour.

When Wife became pregnant with Child, Husband and Wife agreed that Wife would no longer work outside the home but instead stay home to care for

Child.

When Child reached school age, Husband and Wife agreed that Wife would home school Child.

Husband valued Wife's contributions as a homemaker, as a caregiver for Child, and as a teacher for Child.

Additionally, the Statement of the Evidence describes Wife's trial testimony as follows:

Wife was 39 years old on the date of the final hearing in this action.

Wife had a high school education and no college education.

Wife worked outside the home for four years after marrying Husband as a cook, waitress, and hostess at Cracker Barrel.

When Wife became pregnant with Child, Husband and Wife agreed that Wife would no longer work outside the home but instead stay home to care for child. When Child reached school age, Husband and Wife agreed that Wife would home school Child.

As of the date of the final hearing in this action, Wife had not worked outside the home for approximately six years.

As of the date of the final hearing in this action, Wife's monthly expenses were approximately \$3,111.00.

Following Husband's termination by the Hendersonville Police Department, Wife lost her health insurance.

Husband did not inform Wife that she and Child were not covered by his health insurance.

Not knowing she and Child were no longer covered by Husband's insurance, Wife subsequently incurred medical expenses for Wife and Child of approximately \$13,500, which Wife has been unable to pay.

As of the date of the final hearing in this action, Wife had attempted but failed to find employment in various retail positions.

Wife required additional education or job training due to her absence from the workforce for six years.

Wife had no retirement savings of her own and had depended on Husband's retirement savings.

On January 3, 2013, the trial court entered a Final Decree of Divorce declaring the parties divorced and dividing the marital assets, in pertinent part, as follows: allowing Wife to occupy the marital home until it is sold, at which point the proceeds would be divided equally;¹ awarding one-half of Husband's retirement account to each spouse; awarding one vehicle to each spouse; allocating credit card debt to the spouse who incurred the debt; and holding the parties jointly responsible for IRS filings and obligations. The trial court denied Wife's request for reimbursement for unpaid medical expenses finding "there was no proof whatsoever presented to the Court this day of any expense[.]" The trial court took under advisement the issue of spousal support.

Also on January 3, 2013, the trial court entered a Permanent Parenting Plan Order naming Mother as the primary residential parent of the parties' minor child, awarding Father standard visitation, and requiring Father to pay monthly child support of \$430.00 based upon his gross monthly income of \$2049.49.

Wife filed a Motion to Alter or Amend Final Divorce Decree and Permanent Parenting Plan. Following a hearing, the trial court entered an Order, on April 23, 2013, as relevant to this appeal, denying Mother's request for spousal support. An Amended Final Decree of Divorce was entered on May 9, 2013 reflecting the amendments made pursuant to Wife's motion to alter or amend. Regarding the trial court's denial of spousal support to Wife, the decree stated, "The Husband has no ability to pay [spousal support] based upon the income, expenses, property and debt division herein."

Wife timely appealed to this Court. As stated above, she filed a Statement of the Evidence which was approved by the trial court.

¹The Amended Final Decree of Divorce indicated that the fair market value of the marital home is \$125,000.00 and that a mortgage in excess of \$100,000.00 is owed on the property. The decree provided: "In the event the Wife is delinquent or late on any payment due to the mortgage company, the Husband may by Motion, bring this matter back before the Court to ask that the Circuit Court Clerk's office advertise and sell the property at that time, pay the mortgage and divide the proceeds. The Wife will pay the mortgage payments each month."

II. ISSUES PRESENTED

Wife presents the following issues for review:

1. Whether the trial court abused its discretion by denying Wife alimony based on Husband's inability to pay without considering all mandatory statutory factors or awarding property in lieu of cash alimony;
2. Whether the trial court's finding that Husband was unable to pay alimony is against the preponderance of the evidence; and
3. Whether the trial court erred by denying Wife reimbursement for medical expenses on the basis that she provided no proof when she in fact provided unrebutted, unequivocal proof of the expenses.

For the following reasons, we affirm.

III. DISCUSSION

A. Spousal Support

On appeal, Wife argues that the trial court erred in denying her request for spousal support because, she contends, the trial court did not consider all of the relevant statutory factors, particularly her need for spousal support. She also argues that the evidence preponderates against the trial court's finding that Husband lacked an ability to pay spousal support, and in any event, that if Husband lacked the ability to finance a *cash* spousal support award, the trial court should have awarded her additional marital property in lieu of spousal support. Husband has not filed a brief on appeal.

“For well over a century, Tennessee law has recognized that trial courts should be accorded wide discretion in determining matters of spousal support.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011) (citing *Robinson v. Robinson*, 26 Tenn. (7 Hum.) 440, 443 (1846)). This broad discretion extends to the determinations of “whether spousal support is needed and, if so, the nature, amount, and duration of the award.” *Id.* (citing *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000)). “[A]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision.” *Id.* (quoting *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998)). We review an award or denial of spousal support for an abuse of discretion “to determine whether the trial court applied the correct legal standard and reached a decision that is not

clearly unreasonable.” *Id.* (quoting *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006)). The abuse of discretion standard “does not permit an appellate court to substitute its judgment for that of the trial court, but ‘reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives,’ and thus, ‘envisions a less rigorous review of the lower court’s decision and a decreased likelihood that the decision will be reversed on appeal.’” *Id.* (quoting *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). We must presume the correctness of the trial court’s decision and review the evidence in the light most favorable to the decision. *Id.* (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010)).

In considering an award of spousal support, the trial court is to consider a number of factors:

- (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). Although all relevant factors must be considered, the two most important factors are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Gonsewski*, 350 S.W.3d at (citing *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007)).

We first address Wife's argument that the evidence preponderates against the trial court's finding that Husband lacked the ability to pay spousal support. In support of her argument, Wife points out that Husband previously earned \$3,600.00 per month, that he will receive \$550 per month when he reaches retirement age, and that he will receive one-half of the equity in the marital home whenever it is sold—retirement and equity awards which Wife also received. We must presume the correctness of the trial court's factual finding regarding Husband's inability to pay spousal support, and we have been cited to no evidence that preponderates against this finding. **See Tenn. R. App. P. 13(d)**. Importantly, Wife has pointed to no evidence indicating that Husband's earnings—or even his purported earning capacity—exceed his legitimate, reasonable expenses, whatever those may be. **See, e.g., *Floyd v. Floyd***, No. M2007-02420-COA-R3-CV, 2008 WL 5424014, at *12 (Tenn. Ct. App. W.S. Dec. 30, 2008) (affirming the trial court's finding that Husband lacked the ability to pay spousal support where Husband operated on a monthly deficit). Wife, as the appellant, bears the burden of providing a record that allows us to consider her issues, and her Statement of the Evidence does not include Husband's expense information nor does it indicate what evidence, if any, was presented at trial regarding such. **See Tenn. R. App. P. 24(b)**. Moreover, although Wife contends that Husband's marital residence equity and retirement benefits enable him to pay spousal support, we fail to see how these awards, which may not become liquid for many years, render Husband capable of providing support to abate Wife's current alleged need.

Having upheld the trial court's factual finding regarding Husband's inability to provide spousal support, we now consider whether the trial court, nevertheless, erred by failing to consider certain statutory factors—specifically, earning capacity, employment experience, length of the marriage, contributions as homemaker and educator, and

undesirability of outside employment.

As stated above, the trial court's explanation for its denial of spousal support is as follows: "Husband has no ability to pay based upon the income, expense, property, and debt division herein." Although we would have preferred a more-thorough analysis, "we are not required to interpret the trial court's silence with respect to factors that were not particularly weighty as a refusal or failure to consider those factors." *K.B.J. v. T.J.*, 359 S.W.3d 608, 613 (Tenn. Ct. App. 2011). Of course, the disadvantaged spouse's need is typically a primary and "weighty" consideration; however, where, as here, the obligor spouse lacks an ability to pay, the "need" factor may be rendered less controlling. In any event, even when the trial court fails to discuss important factors, we may review the record to determine whether the evidence supports the trial court's award. *See, e.g., Vachon v. Vachon*, No. M2013-00952-COA-R3-CV, 2014 WL 819448, at *8 (Tenn. Ct. App. Feb. 27, 2014) (noting that the trial court failed to discuss need or ability to pay, but reviewing the record to determine whether the evidence supported the trial court's spousal support award).

The evidence in this case shows that Husband and Wife are of similar age—approximately forty years old at the time of trial—and have similar educational backgrounds. Although Wife has not worked for a period of time, she has experience in the food service industry. Husband has previously worked as a police officer grossing \$3,600.00 per month, but at the time of time trial, he was grossing only approximately \$1,600.00 per month working as an hourly employee in a department store. Both parties received similar distributions in the divorce: each received one-half of Husband's retirement and one-half of the equity in the marital home, each received one vehicle, each received the credit card debt incurred by him or her, and each received a one-half responsibility for IRS filings and obligations.

Wife has presented no evidence to indicate that she is unable to work. Although Wife has acted as a homemaker and home-school educator to the parties' child and she desires to continue doing so, "[i]t is an unfortunate reality of divorce that two households are more expensive to maintain than one, and, therefore it is not always possible for the ex-spouses to enjoy the same standard of living following a divorce as they did when they were married." *Schroer v. Schroer*, No. M2010-01478-COA-R3-CV, 2011 WL 3793499, at *9 (Tenn. Ct. App. Aug. 25, 2011) (quoting *Anzalone v. Anzalone*, E2006-01885-COA-R3-CV, 2007 WL 3171132 (Tenn. Ct. App. Oct. 30, 2007)). To that end, in order to maintain two households, it may become necessary for both ex-spouses to seek employment outside of the home.

After reviewing the record, we have determined that the denial of spousal support to Wife is not clearly unreasonable. *Gonsewski v. Gonsewski*, 350 S.W.3d at 105 (citing *Broadbent*, 211 S.W.3d at 220). At best, reasonable minds could disagree about whether Wife, having been out of the work force for several years, should have received some amount of support for the short term—the very essence of a discretionary decision. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)) (“Under the abuse of discretion standard, a trial court’s ruling ‘will be upheld so long as reasonable minds can disagree as to the propriety of the decision made.’”). Accordingly, we affirm the trial court’s denial of spousal support to Wife.

B. Medical Expenses

On appeal, Wife also argues that the trial court erred in denying reimbursement for medical expenses. At trial, Wife testified that Husband failed to inform her that her health insurance coverage ceased upon the termination of his employment with the Hendersonville Police Department. Thus, according to Wife, she and the parties’ child incurred approximately \$13,500.00 in uncovered medical expenses which she has been unable to pay.

The trial court denied reimbursement stating that “there was no proof whatsoever presented to the Court . . . of any expense.” In her appellate brief, Wife points to her own testimony regarding the alleged expenditure and she contends, citing the Statement of the Evidence, that Husband did not rebut her testimony.

From the trial court’s statement, it appears that the trial court was not satisfied with Wife’s testimony regarding the alleged medical expenses without any corroborating documentary evidence. We must give great weight to the trial court’s implicit credibility determination. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997). Moreover, assuming *arguendo* the validity of the expenses, Wife has presented no evidence demonstrating Husband’s obligation to cover the medical expenses at issue. For these reasons, we affirm the trial court’s denial of reimbursement for \$13,500.00 in medical expenses.

IV. CONCLUSION

For the aforementioned reasons, we affirm the decision of the circuit court. Costs of this appeal are taxed to Appellant, Jennifer M. Litton, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.