

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 16, 2016 Session

DANIEL RAY HAUF v. LORA MARIE HAUF

**Appeal from the Circuit Court for Montgomery County
No. MCCCCVDN 09-1673 William R. Goodman, III, Judge**

No. M2015-00736-COA-R3-CV – Filed August 26, 2016

This appeal involves an obligor’s petition to terminate his \$1,500 monthly alimony obligation due to his retirement from overseas contractual government employment. The trial court held that a substantial and material change in circumstances occurred when the obligor elected to not renew his employment contract due to a change in his work schedule and reduced the alimony payments to \$900 per month. The recipient appeals. We hold that the evidence preponderates against the trial court’s factual findings. Based on our review of the evidence, the obligor failed to demonstrate that a substantial and material change in circumstances had occurred such that a modification of his spousal support obligation was warranted. We reverse the trial court’s decision, reinstate the previous alimony award, and remand for further proceedings.

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

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

Helen Sfikas Rogers and Lawrence J. Kamm, Nashville, Tennessee, for the appellant, Lora Marie Hauf.

Steven C. Girsky, Clarksville, Tennessee, for the appellee, Daniel Ray Hauf.

OPINION

This case involves a proposed modification of an award of alimony *in futuro*. Daniel Ray Hauf (“Husband”) and Lora Marie Hauf (“Wife”) were divorced on May 5, 2010, following a twenty-seven year marriage. Husband is a helicopter pilot who retired

from the Army prior to the divorce and then worked as a pilot for military contractors in the Middle East; his employment contracts were renewed annually and required him to be overseas for 60 days at a time. Wife did not work outside the home during the marriage. The final decree of divorce incorporated a Marital Dissolution Agreement, in which Husband agreed to pay alimony *in futuro* in the amount of \$1,500 per month. When the employment contracts began to require him to be overseas for 90 days at a time instead of 60, Husband chose not to renew his contract, and it was set to expire in August 2013.

In July 2013, Husband filed a “Petition to Amend Alimony and Support Obligation” on the grounds that his annual employment contract would terminate in August 2013 and thus his income would be reduced, making payment of his \$1,500 obligation to Wife “difficult.” At the conclusion of a hearing on the petition the court issued a ruling from the bench, subsequently memorialized in an order, holding that Husband “no longer had the ability to do a ninety (90) day rotation” overseas and reducing Husband’s obligation to \$900 per month upon the holding that a material and substantial change in circumstances existed.

Husband filed a motion for an additional finding of fact as to whether or not the alimony modification was retroactive to the date of the filing of his Petition; Wife filed a motion to alter or amend the January 20 order. After a hearing the court entered an order denying both motions. Wife appeals, contending that the finding of a substantial and material change in circumstances is not supported by the evidence.

ANALYSIS

I. THE MODIFICATION OF THE ALIMONY AWARD

Alimony *in futuro* is a form of long-term spousal support that can be awarded “when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible.” Tenn. Code Ann. § 36-5-121(f)(1). Such an award remains “in the court’s control for the duration of the 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). The party seeking to modify an alimony award “bears the burden of proving that a substantial and material change in circumstances has occurred.” *Malkin v. Malkin*, 475 S.W.3d 252, 258 (Tenn. Ct. App. 2015), *reh’g denied* (Apr. 10, 2015), *appeal denied* (July 21, 2015) (quoting *Wiser v. Wiser*, 339 S.W.3d 1, 12 (Tenn. Ct. App. 2010)). In the context of subsection (f)(2)(A), the terms “substantial” and “material” have been defined by this court as follows:

A change in circumstances is “substantial” when it significantly affects either the obligor’s ability to pay or the obligee’s need for support. A change in circumstances is “material” when the change occurs since the

date the alimony was ordered, and the change was not foreseeable at the time of the final decree or within the contemplation of the parties when they entered into a property settlement agreement.

Osesek v. Osesek, No. M2011-00984-COA-R3CV, 2012 WL 729880, at *2 (Tenn. Ct. App. Mar. 6, 2012) (internal citations omitted) (citing *Bogan v. Bogan*, 60 S.W.3d 721, 728 (Tenn. 2001)). Modification of a spousal support award is factually driven, *Bogan*, 60 S.W.3d at 727, and “whether there has been a sufficient showing of a substantial and material change of circumstances is in the sound discretion of the trial court.” *Malkin*, 475 S.W.3d at 258 (quoting *Bogan*, 60 S.W.3d at 727). We review the court’s factual findings “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).

Upon concluding that Husband had established a substantial and material change in circumstances, the court made findings with respect to the factors for determining whether an award of spousal support is appropriate, found at Tenn. Code Ann. § 36-5-121(i). Pertinent to this appeal, the court made the following findings of fact:

6. *The Court finds that at the time of the divorce in 2010, Mr. Hauf anticipated and did obtain employment as a contractor. He was able by calendar year 2012 to earn in excess of \$200,000.00. His employment after leaving the Army started out with Blackwater then went into DynCorp and things went well.*

8. *Furthermore, the evidence is, that DynCorp went from having sixty (60) day rotations to ninety (90) day rotations. One reason is because there is not as much opportunity for that type of work.*

9. In light of the foregoing, Court finds that there was a material change in circumstances, which was the opportunity for contracting work with DynCorp that went from the sixty (60) day contract rotations to ninety (90) day rotations.

10. The Court further finds that Mr. Hauf’s circumstances changed, to the extent that *he no longer had the ability to do a ninety (90) day rotation*, that there comes a time whether you are in the Army or whether you’re flying a helicopter with hostile fire coming at you, that you simply cannot do what you once did. The Court believes this is a proper basis for

the finding that there has been a material and substantial change in circumstances.^[1]

Upon our review of the record, the evidence preponderates against the finding in Paragraph 10 that Husband no longer had the ability to do a 90-day rotation and the conclusion in Paragraph 9 that this change in his rotation length alone constituted a material change in circumstances. Husband testified that he had the ability to work, that he had no type of physical or mental inability to prevent him from working full-time, that the overseas job was available to him, and that he could have continued to do the job if he had wanted to, but “decided [he] would take a break.” There is no evidence to support the finding that Husband “no longer had the ability to do a ninety (90) day rotation.”² Standing alone, the change in the length of Husband’s rotation does not constitute a material change in his circumstances for purposes of Tenn. Code Ann. § 36-5-121(f)(2)(A).

At the hearing on the petition to modify, Husband testified that, at the time of the divorce, he was between employment contracts, and that his overseas employment contracts, like the ones he had entered into before the parties’ divorce, were always for a

¹ Certain portions of the order contain language that does not constitute factual findings; in the interest of clarity, we have italicized those portions we deem factual findings.

² We disagree with Husband’s contention that the court did not abuse its discretion by concluding from the following testimony that Husband had established a material change in circumstances:

Q. Well, is it fair to say that your income went up every year from 2010 to 2012?

A. I already established that, yes. But it all comes at an expense.

Q. What do you mean by that?

A. Have you ever been in a combat zone? Have you ever had people shoot you?

Q. Sir - -

THE COURT: All right. Mr. Hauf, answer the question, okay?

THE WITNESS: What’s the question?

Q. Well, you said it comes at a cost and I asked you what you meant by that.

A. Yeah, and I was trying to explain.

Q. Sir, in your petition that you filed in this case . . . If you’ll turn to the third page, paragraph 11. If you’ll look and see that you say, The petitioner will no longer be going overseas for government contractual work and seeks to live out his retirement in Alabama with his current wife and her child.

Are you now saying that you aren’t actually seeking to retire? Are you seeking to retire right now?

A. Right now?

Q. Yes.

A. No. I just hired on down in Louisiana.

This testimony does not support the finding in Paragraph 10 that Husband does not have the ability to work.

year. Thus, at the time Husband entered into the marital dissolution agreement, the potential for a change in his employment was foreseeable, specifically, that his employment would either be terminated or subject to change each year. This foreseeability further undermines Husband's argument that his decision not to renew his contract and to take a lower-paying job was a material change in circumstances.

The evidence was clear that Husband chose not to renew his contract to retain the position and income he held; this decision resulted in a period of time in which he was unemployed until he found a new job which did not pay as well. Notwithstanding the decrease in his income, Husband testified that he was earning approximately \$65,000 per year working two weeks a month. His income and expense statement reflected that, inclusive of the \$1,500 alimony payment, his monthly expenses outweighed his income by only \$55. In addition, he testified that in the year between December 2013 and November 2014, he spent approximately \$140,000 from one of his accounts, \$70,000 of which was used to purchase additional property in Alabama to which he hoped to retire, and the remainder of which was used for "living expenses." From this evidence, we conclude that the change in his employment did not significantly affect his ability to pay his alimony obligation and, accordingly, was not a substantial change in circumstances.

Applying the appropriate standard of review,³ we reverse the determination that Husband established a substantial and material change in circumstances. The evidence did not establish an inability to complete the 90 day rotations; rather it shows a voluntary decision on Husband's part, one effect of which was to decrease his income. Husband testified that he had the ability to pay support in the amount of \$1,500, and Wife testified, as reflected on her income and expense statement, that she needed support. We thus reverse the court's reduction of alimony and reinstate the obligation of \$1,500 per month. If Husband has been paying \$900 per month while this case has been pending on appeal, Wife is entitled to recover the difference between what Husband paid and what he would have paid had the obligation remained at \$1,500.

³ As set forth in *Malkin*:

The role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable." *Id.* (citing *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006)). We will find an abuse of discretion "when the trial court 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." *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)).

Malkin, 475 S.W.3d at 257 (Tenn. Ct. App. 2015).

II. ATTORNEY'S FEES

Wife has asked this court, in the event that we reverse the trial court, to award her the attorney's fees she incurred in defending this action at the trial court. She also asks for her attorney's fees incurred in this appeal.

The trial court divided the court costs equally and required each party to pay its own attorney's fees. Citing the Marital Dissolution Agreement and Tenn. Code Ann. § 36-5-103(c), Wife argues that she is entitled to her attorney's fees.

Tenn. Code Ann. § 36-5-103(c) reads:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

This Court has interpreted the above statute to authorize an award of attorney's fees incurred in the trial court and on appeal "to an alimony recipient who is forced to defend an action to reduce or terminate that alimony." *Malkin*, 475 S.W.3d at 263 (citing *Henderson v. Henderson*, No. M2013-01879-COA-R3-CV, 2014 WL 4725155, at *12 (Tenn. Ct. App. Sept. 23, 2014); *Evans v. Evans*, M2002-02947-COA-R3-CV, 2004 WL 1882586, at *13-14 (Tenn. Ct. App. Aug. 23, 2004)); *see also Owens v. Owens*, No. M2012-01186-COA-R3-CV, 2013 WL 3964793, at *6 (Tenn. Ct. App. July 30, 2013) *perm. app. denied* (Tenn. Nov. 13, 2013).

Wife was forced to defend Husband's petition to modify his alimony obligation, and on appeal, has been successful. In light of our reversal of the trial court's decision, we reverse the portion of the court's order requiring each party to pay its own attorney's fees and remand the matter for the trial court to reconsider the appropriateness of an award of reasonable attorney's fees to Wife in accordance with Tenn. Code Ann. § 36-5-103(c) and the Marital Dissolution Agreement.⁴

⁴ In a section titled "Court Costs and Counsel Fees," the Marital Dissolution Agreement provides:

[I]f any suit or action is brought to declare or to enforce the rights of one of the parties under this agreement, the court may in its sound discretion award attorney fees and costs to the prevailing party; and the court shall make such an award if the suit or action is brought successfully to enforce a child or spousal support obligation.

With respect to Wife’s fees on appeal, we have determined — taking into account the issues involved in this matter, each party’s financial position, and Wife’s success on appeal — that it is appropriate to grant Wife’s request. On remand, the trial court will determine the amount of reasonable fees incurred by Wife on appeal.

CONCLUSION

For the foregoing reasons, we reverse the trial court’s modification of alimony *in futuro*, reinstate the previous award, and remand the matter for further proceedings.

RICHARD H. DINKINS, JUDGE

Wife acted “to enforce the rights of one of the parties under this agreement” by hiring counsel to defend Husband’s petition; thus the Agreement permits the court, in its discretion, to award attorney’s fees to Wife. *See Duke v. Duke*, No. M2001-00080-COA-R3CV, 2003 WL 113401, at *5 (Tenn. Ct. App. Jan. 14, 2003).