

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 1, 2016

WILMA J. WHITE v. JAMES DALE WHITE, JR.

**Direct Appeal from the Circuit Court for Clay County
No. T-1907 Kristi M. Davis, Judge**

No. M2015-02388-COA-R3-CV – Filed July 22, 2016

This is an appeal of an order denying Husband’s motion to alter or amend the trial court’s judgment modifying Husband’s alimony obligation. Husband argues that he was not provided adequate notice that a hearing held on July 6, 2015 was the final hearing in the matter and was therefore deprived of due process. We affirm.

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

BRANDON O. GIBSON, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and JOHN W. MCCLARTY, J., joined.

John Melton Meadows, III, Livingston, Tennessee, for the appellant, James Dale White, Jr.

Charlene Robin Vance, Watertown, Tennessee, for the appellee, Wilma J. White.

OPINION

Background and Procedure

James White (“Husband”) and Wilma White (“Wife”) were married for nineteen years before divorcing on October 18, 2006. At the time of the divorce, the parties submitted a marital dissolution agreement (“MDA”) requiring Husband to pay Wife \$2,500 per month in transitional alimony until September 25, 2019, which was to be secured by several life insurance policies. The MDA further provided that the alimony was to be non-modifiable except in the event Husband became disabled or lost his judicial position after September 1, 2014.

Husband filed a motion to modify the final judgment and MDA on January 11,

2014, asserting that the balance of alimony owed to Wife was substantially lower than the value of the life insurance policies Husband was required to maintain to secure the alimony payments. The motion requested that the amount paid to Wife as beneficiary of the life insurance policies should be an amount equal to the remaining indebtedness, if any, owed under the MDA at the time of Husband's death and that the balance of the policies be vested in Husband. While no specific date is provided in the record, the pleadings contained therein reveal that Husband subsequently failed to be re-elected to his judicial position. On August 8, 2014, Husband filed a petition to modify his alimony obligation. In his petition, Husband claimed that his failure to be re-elected to his judicial position triggered his ability to seek modification under the parties' MDA and also reasserted his claims with respect to the life insurance policies. Wife then filed her answer and a counter-petition for civil contempt on October 16, 2014, alleging that Husband had failed to make alimony payments for the months of September 2014 and October 2014. On February 10, 2015, Wife filed a motion to compel Husband to pay his existing alimony obligation, which Wife alleged was six months in arrears. In response, on March 3, 2015, Husband filed a motion to suspend or significantly reduce his alimony obligation pending a final hearing.

A hearing was held on Wife's motion to compel payment and Husband's motion to suspend his alimony obligation on March 13, 2015, and the circuit court issued an order on April 27, 2015, denying Husband's request to prorate Husband's life insurance policy and requesting additional financial information from the parties before reaching a determination. Specifically the circuit court's order stated:

1. That the Court, upon review of the pleadings of Husband, finds that with regard to Husband's request for proration of the life insurance policy purchased by Husband pursuant to the terms of the MDA, the court finds that Husband's request is not consistent with the terms of the MDA as there is nothing in the MDA which discusses the possibility of the policy being apportionable and therefore, Husband's request is hereby denied;
2. That the primary issue with respect to the ongoing alimony is something that the Court is going to have to have additional information on before being able to make a determination;
.....
5. That upon receipt of such information, the Court will review the information and then determine whether there needs to be a modification based upon Mr. White's income and Mrs. White's need prior to a final hearing being conducted in this matter;
6. That dependent upon the information submitted by the Parties, the Court shall either issue a memorandum ruling or schedule another

- hearing by notifying counsel for the Parties;
7. That upon announcement of counsel, it is agreed that a scheduling order shall be submitted by agreement between counsel for the respective parties; and
 8. That all other matters shall remain unchanged pending further orders of the court.

In response, Husband filed a motion to alter or amend the judgment, alleging that the court's ruling on his life insurance claim was made *sua sponte* without the benefit of a hearing or allowing Husband to present any proof or argument. The parties subsequently reached an agreement allowing Husband to reduce the face amount of the life insurance policy to the total of the outstanding alimony.

After receiving the requested financial information, the court conducted a hearing on July 6, 2015, in order to glean additional financial information from both parties. The hearing was not preserved for the record; however, the parties' appellate briefs and the appellate record indicate that the court directly questioned both Husband and Wife under oath and provided counsel for each party the opportunity to question the parties and follow up with direct examination and cross-examination. On July 17, 2015, the circuit court entered a memorandum opinion and final order on Husband's petition for modification of alimony and modification of the final judgment and MDA. In its six-page order, the court made findings of fact with respect to the parties' finances and considered the necessary statutory factors in making a modification, including Wife's need and Husband's ability to pay. The court then concluded that "the initial alimony of \$2,500 per month clearly contemplated [Husband's] judicial income" and, because of the loss of that income, modified Husband's obligation to \$2,000 per month until Husband's or Wife's death, Wife's remarriage, or September 25, 2019. The court also noted that counsel for both parties announced to the court that they had reached an agreement with respect to the life insurance policies that allowed Husband to reduce the face amount of the policies to the total of the outstanding alimony obligation.

Both Husband and Wife subsequently filed competing motions to alter or amend the judgment. Wife's motion simply requested that the court consider an award of attorney's fees, while Husband asserted in his motion that he was unaware that the court would be treating the July 6, 2015 hearing as a final hearing, that he did not have adequate notice to prepare for the hearing and also requested that the court make additional findings of fact with respect to Wife's use of divorce settlement funds. The circuit court heard the motions on September 18, 2015. Husband argued that based on the language of the previous order, he assumed the July 6 hearing was merely a continuation of the previous hearing on the motions to compel payment and reduce or suspend alimony prior to the final hearing and, therefore, that he was not afforded the due

process of having proper notice that the hearing was going to be the final hearing. Additionally, he noted that there was still discovery outstanding and that depositions had not yet been taken. On October 29, 2015, the circuit court entered an order denying both parties' motions. Specifically, the court found:

2. That the competing Motions were initially heard by this Court in May at which time this Court remained in need of additional financial documents from both Parties before a determination could be made;
3. That in order for this Court to determine whether there should be a modification, relief or compelling of payments, the Court was in need of additional financial information from both Parties;
.....
5. That the Court found the financial documents submitted required further explanation as they were difficult to understand contextually in terms of a need verses [sic] ability to pay analysis;
6. That as a result of the need for additional information, this Court requested the Parties appear before the Court for a second hearing for clarification and explanation of the supplemental financial documents provided by each Party;
7. That a second hearing was conducted July 6, 2015, at the onset of which counsel for both Parties sought direction from the Court as to how the Court wished to proceed or conduct the July 6, 2015, hearing;
8. That the Court thereupon instructed the Parties and counsel the Court needed to hear directly from the respective Parties on the underlying financial issues and documentation;
9. That at the July 6, 2015, hearing Counsel for the Parties additionally requested instruction from the Court regarding any specific questions the Court may have regarding the financial information provided;
10. That the Court thereafter undertook direct questioning of both Parties under oath following which counsel for each party had the opportunity to question the Parties and follow-up with direct examination and cross-examination;
11. That the Court finds given the above, there was an opportunity for a full hearing on the underlying issues before the Court;
12. That with respect to whether it was a pendente lite hearing, obviously that is not what the Court intended the July 6, 2015, hearing to be given the nature of the pleadings that had been filed;
13. That the Court finds that ultimately all the information the Court

needed to make a final determination was given to the Court at the July 6, 2015, hearing;

14. That addressing Husband's argument that there was additional discovery he wished to undertake, the Court is unclear what if any additional information could have been provided beyond what had already been submitted to the Court in the Parties' respective supplemental financial documentation[.]

The court also denied Husband's request for clarification or making a finding of additional facts, stating that it did not find Wife's use of her divorce settlement relevant to the issue of Husband's ability to pay or Wife's financial need. Lastly, the court also denied Wife's request for attorney's fees, stating that neither party technically lost and neither party technically won, given that Wife's motion to compel and Husband's petition to modify alimony were both granted. Husband appealed.

Issue

Husband presents one issue for review on appeal, which we have reworded slightly.

- I. Whether the trial court failed to give adequate notice that the hearing held on July 6, 2015 would be a final hearing held on the merits as opposed to a continuation of a pre-trial motion hearing, and if so, whether that was reversible error?

Standard of Review

In nonjury cases, this Court's review is *de novo* upon the record of the proceedings in the trial court, with a presumption of correctness as to the trial court's factual determinations, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are afforded no such presumption. *Campbell v. Florida Steel*, 919 S.W.2d 26, 35 (Tenn. 1996).

Analysis

Husband's only assignment of error in this case is whether the trial court failed to provide Husband with adequate notice that the July 6, 2015 hearing would be the final hearing in the matter, and if so, whether the lack of notice constitutes reversible error. Husband does not appeal the factual findings or the conclusions of law made by the circuit court. Further, the absence of a transcript of the July 6, 2015 hearing or a proper

statement of the evidence¹ “means the facts found by the trial court are conclusively presumed to be correct.” *Humphrey v. Humphrey*, No. 01A01-9802-CV-0010, 1999 WL 452318 at *2 (Tenn. Ct. App. July 1, 1999) (citing *J.C. Bradford & Co. v. Martin Constr. Co.*, 576 S.W.2d 586 (Tenn. 1979)).

With respect to the issue of whether Husband was provided adequate notice that the July 6, 2015 hearing would be the final hearing, Husband argues that the language in the court’s prior order demonstrates that the July 6 hearing being a final hearing was not contemplated by either party. First, he notes that that paragraph five (5) of the April 27, 2015 order provided “That upon receipt of [the requested financial information], the Court will review the information and then determine whether there needs to be a modification based upon [Husband’s] income and [Wife’s] need *prior to a final hearing being conducted in this matter;*” (emphasis added). Paragraph six (6) then states “That dependent upon the information submitted by the Parties, the Court shall either issue a memorandum ruling or schedule another hearing by notifying counsel for the Parties.” Husband argues that paragraphs five (5) and six (6), read together, indicate that the issue before the court on April 27, 2015 and July 6, 2015 was whether or not Husband’s alimony obligation should be modified prior to a final hearing being conducted and that if the court had questions regarding the financial information provided by the parties, then another hearing would be scheduled. Husband further notes that the only notice provided to him of the July 6, 2015 hearing was a phone call from Wife’s counsel and a follow-up fax confirming a “Hearing to Clarify Assets and Income.”

While Husband does not deny that he received notice that a hearing was to be held on July 6, 2015, he argues that because he was not aware that the court considered the hearing to be a final hearing, he was not provided the opportunity to complete discovery and to develop his proof in order to adequately present his case. Because of this, he claims that he was deprived of due process in that due process requires that he have an opportunity to be heard in a “meaningful manner.” Husband further contends that he was prejudiced “in that his erroneous belief that the hearing was a continuation of the pre-trial motion hearing resulted in his not having a court reporter present to make a transcript of the hearing and thus preventing him from being able to seek appellate review of the Court’s ruling concerning the merits of his Petition and the modification of his alimony.” Finally, Husband argues that his “inference that the hearing held on July 6, 2015 was only as to the pre-trial motions that were pending” falls within the purview of mistake, inadvertence and excusable neglect on his part warranting relief from the final judgment. *See Campbell v. Archer*, 555 S.W.2d 110, 112 (Tenn. 1977); *Henson v. Diehl Machs., Inc.*, 674 S.W.2d 307, 310 (Tenn. Ct. App. 1984); *Ferguson v. Brown*, 291 S.W.3d 381, 387 (Tenn. Ct. App. 2008).

¹See Tenn. R. App. P. 24.

Our review of the record suggests that the April 27, 2015 order was, at the very least, ambiguous with respect to whether a hearing requested by the court to clarify the provided financial documents would be the final hearing in the matter. The order itself was “On Wife’s Motion to Compel Payment of Existing Alimony Obligation and Husband’s Motion to Suspend And/Or Significantly Reduce Alimony Pending Final Hearing.” Paragraph two (2) of that same order states that the “primary issue with respect to the *ongoing alimony* is something that the Court is going to have to have additional information on before being able to make a determination.” (Emphasis added.) Following a request for additional information, paragraph five (5) of the April 27, 2015 order, as Husband points out, refers to a potential modification “prior to a final hearing being conducted” The order further anticipates that an agreed scheduling order would be submitted by counsel for the respective parties. Whether or not the court intended for a clarification hearing to be, in fact, a final hearing in the matter, the language in the April 27, 2015 order does not clearly convey that intent. The order, plainly read, with each paragraph in its proper context, appears to suggest that the order itself and a potential hearing requested by the court were limited to the pre-trial motions filed by each party. Additionally, the fact that Wife filed a motion to alter or amend the judgment in order to request attorney’s fees suggests that Wife did not anticipate the July 6 hearing to be the final hearing. To the extent that he was not provided notice that the July 6, 2015 hearing was a final hearing, we agree with Husband.

However, the issue then becomes whether the failure to provide notice of the final hearing deprived Husband of due process or prejudiced him in any way. “The essence of procedural due process is [that an interested party be provided with] notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Manning v. City of Lebanon*, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003) (citing *State v. AAA Bail Bonds, Inc.*, 993 S.W.2d 81, 86 (Tenn. Crim. App. 1998)). Moreover, adequate notice is considered to be essential to due process because the opportunity to be heard “has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” *Baggett v. Baggett*, 541 S.W.2d 407, 410 (Tenn. 1976). First, Husband himself initiated the proceedings in this case, so there is no question that Husband was fully aware that his alimony obligation was under review. Second, as noted by the circuit court in its order on the motions to alter or amend its final judgment, Husband was provided the opportunity to present all necessary financial evidence to support his case and was given further opportunity to explain that evidence to court. Similarly, the court provided both parties the opportunity to cross-examine the other regarding the financial information provided at the July 6, 2015 hearing.

In denying Husband’s motion to alter or amend the final judgment, the circuit court noted its finding that it had received all the information necessary to make its

determination with respect to the ongoing alimony and that the court was unclear as to what additional information Husband could have possibly provided. Despite asserting that he was prejudiced insofar as there was outstanding discovery, Husband failed to provide the circuit court in his motion to alter or amend and fails to provide this Court in his appellate brief with any argument of what additional discovery might have possibly shown. In *Humphrey v. Humphrey*, No. 01A01-9802-CV-0010, 1999 WL 452318 (Tenn. Ct. App. July 1, 1999), we considered whether an incarcerated individual who claimed he was not provided proper notice of the final hearing in his divorce was deprived of his due process rights. In that case, Mr. Humphrey, who was incarcerated, filed a motion with the trial court for an extension of time in which to file his answer, and a hearing was held on that motion. During the hearing, the trial court denied Mr. Humphrey's request for an extension and then proceeded to hear the merits of the case without prior notice to Mr. Humphrey. *Id.* at *3. Mr. Humphrey's testimony in the hearing made it clear that his wife was entitled to a divorce, and on appeal, we determined that "[e]ven if it were error for the trial court to hear the merits of the case without proper notice, Mr. Humphrey has failed to show how he was harmed by the granting of the divorce [to his wife]. *Id.* at *5. Here, Husband has likewise failed to demonstrate how he was harmed by the July 6, 2015 hearing being the final hearing in his case.

Husband's argument that the lack of notice caused his failure to preserve the record is also without merit. Tennessee Rule of Appellate Procedure 24(c) provides a means for an appellant to preserve the record when no report, recital, or transcript of the evidence is available. Tenn. R. App. P. 24(c). Despite this avenue being available to him, Husband provided no statement of what evidence was provided at the July 6, 2015 hearing.

Lastly, Husband argues that the circuit court's decision should be vacated because there were pre-trial motions still pending. This argument is similarly without merit. While Husband is correct insofar as noting that reviewing courts often vacate judgments where a trial court has adjudicated the merits of the claim while failing to rule on litigant's pending motions, *see Gilliam v. Gilliam*, No. M2007-02507-COA-R3-CV, 2008 WL 4922512 at *3-4 (Tenn. Ct. App. Nov. 13, 2008), here, the pending motions went directly to the merits of the claim. The circuit court ultimately granted Husband's petition and motion by modifying his alimony obligation and granted Wife's motion to compel payment by ordering Husband to pay his alimony obligation. Simply put, this argument is wholly devoid of merit. Accordingly, we conclude that the trial court's decision to treat the July 6, 2015 hearing as a final hearing in this matter did not result in any reversible error.

Conclusion

For the foregoing reasons, the judgment of the circuit court is affirmed. Costs of this appeal are taxed to the appellant, James D. White Jr., and his surety, for which execution may issue if necessary.

BRANDON O. GIBSON, JUDGE