

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 11, 2009 Session

SUSAN MACKOWSKI PEDINE v. THOMAS MARK PEDINE

**Appeal from the Circuit Court for Bradley County
No. V-06-257 John B. Hagler, Jr., Judge**

No. E2008-00571-COA-R3-CV - FILED MARCH 9, 2009

This appeal involves the dissolution of the second marriage between Susan Mackowski Pedine (“Wife”) and Thomas Mark Pedine (“Husband”). Following a trial, the Trial Court granted Wife a divorce, classified the parties’ property as either marital or separate, and then divided the marital assets. The Trial Court also awarded Wife rehabilitative alimony of \$6,000 per month for a period of four years, to be followed by alimony *in futuro* of \$3,000 per month. Husband and Wife both appeal the Trial Court’s classification of certain property as marital or separate, as well as the overall division of marital property. Husband appeals the type and amount of alimony awarded to Wife. We modify the Trial Court’s classification of certain property as either marital or separate, and modify the overall distribution of marital property. We affirm the Trial Court’s judgment as to the amount and type of alimony awarded to Wife. As modified, the judgment of the Trial Court is affirmed.

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

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and J. STEVEN STAFFORD, J., joined.

James F. Logan, Jr., Cleveland, Tennessee, for the Appellant, Thomas Mark Pedine.

Roger E. Jenne, Cleveland, Tennessee, for the Appellee, Susan Mackowski Pedine.

OPINION

Background

Husband and Wife originally married in October 1975. They divorced, then remarried in July 1990. The parties had three children during their first marriage, all of whom are now adults. In March of 2006, Wife filed a complaint for divorce alleging that Husband was guilty of inappropriate marital conduct including, but not limited to, mental abuse and infidelity. Husband responded to the complaint and denied that he had engaged in any inappropriate marital conduct. Husband claimed that it was Wife who had engaged in inappropriate marital conduct or, alternatively, that irreconcilable differences had arisen between them.

In December of 2006, an agreed order was entered by the Trial Court incorporating the parties' agreement with respect to division of the equity in the marital residence as well as the funds contained in a money market account. According to this order:

The agreement announced pertaining to the real estate is that [Husband] shall pay over unto [Wife] on or before December 3, 2006 an agreed upon equity of \$189,630.45 at which time [Wife] shall quitclaim her interest [in the marital residence] unto [Husband]. [Husband] shall take said real estate subject to the debts, mortgages, and encumbrances thereon, he to indemnify and hold harmless [Wife] with respect to said obligations.

The parties further announced that the aforesaid money market account at Southern Heritage Bank, Cleveland, Tennessee, would be divided equally between the parties at this time with each party receiving \$46,286.04.

The aforesaid shall be subsequently utilized by the Court in making the appropriate equitable adjustments in the event a divorce is granted in this cause.

The Court being satisfied that the agreement as announced and herein above set out is just, fair, and equitable and in the manifest best interest of the parties. . . .

Following a trial, the Trial Court granted Wife a divorce, classified property as either separate or marital, divided the marital property, and awarded Wife alimony. We first will explain what the Trial Court did with respect to the marital property. The Trial Court valued the marital residence at \$525,000.00. The outstanding balance on the mortgage was \$239,073.89, thereby leaving equity of \$285,926.11 to be divided between the parties. Based on the entry of the order quoted above, Husband paid Wife \$189,630.45. This left Husband with the remaining \$96,295.66 of the equity in the marital residence as calculated by the Trial Court.

As already noted, the parties had a money market account valued at \$92,572.10. Pursuant to the order quoted above, these funds were divided equally with each party receiving \$46,286.05. By the time of trial, Husband has used his \$46,286.05 to buy a 2007 Lexus GX. Because this Lexus was purchased with funds previously split by the parties, the value of this vehicle cannot be used in determining the total assets Husband was awarded or we would be counting that same money twice. Simply stated, each party received \$46,286.05, regardless of what they did with the money.

The parties had two other automobiles. The Trial Court accepted Wife's value of \$24,680.00 as to her vehicle, a 2001 Lexus. Wife was awarded that vehicle with the corresponding value of \$24,680. The other vehicle that the parties owned was a 2002 BMW that was used by the parties' son. According to Wife's brief on appeal, she did not testify as to the BMW's value, but she was awarded that vehicle. Husband testified that the BMW was worth \$20,000. We will use the value expressed by Husband as Wife gave no corresponding value for that asset.

The household furnishings were divided equally and the Trial Court valued those furnishings at \$49,000. Thus, each party was awarded \$24,500. The division of the household furnishings is not at issue on appeal.

Husband has a pension with his employer. This pension is payable when Husband retires or if he is terminated from employment. The Trial Court determined that the value of this pension plan was \$212,884.00, that the entire amount was marital property, and that the entire plan should be awarded to Husband.

Husband also had a 401k with his employer which the Trial Court valued at \$1,006,886. The Trial Court determined that the 401k was worth \$65,813.67 at the time of the marriage and this amount was Husband's separate property. The Trial Court then found that any appreciation of the \$65,813.67 during the marriage was marital property because Wife had substantially contributed to the appreciation of that asset. Even though the Trial Court found that \$65,813.67 was Husband's separate property, that amount apparently was not deducted from the overall value of the 401k and the Trial Court treated the entire \$1,006,886.00 as marital property. The Trial Court divided this 401k such that Wife received \$455,415.00, and Husband received \$551,471.00.

The only other assets were the parties' checking accounts. Husband's checking account had a balance of \$16,638.00. Husband was awarded the entire balance in his account which the Trial Court determined was marital property.¹ Wife also had a checking account. At trial Husband testified that he thought Wife had between \$35,000 to \$50,000 in this account. Because Wife was not employed outside of the home during the marriage, any funds in this account would

¹ Prior to trial, Husband was ordered to make temporary alimony payments to Wife. Husband fell behind in these payments. The Trial Court determined at trial that Husband was over \$12,000 behind in these payments. The Trial Court ordered Husband to pay this arrearage from the funds in his checking account, and to use the remainder toward paying Wife's attorney fees. Notwithstanding the fact that Husband ultimately did not get to keep any of the \$16,638.00, that property still counts as being awarded to him.

be from the payout of the \$189,630.45 on the marital residence or the division of the money market account, both of which already have been counted as money received by Wife. Therefore, we cannot consider these funds further as they are now Wife's separate property; otherwise, they would be counted twice in the marital property division.

Based on the foregoing, the Trial Court's marital property distribution looks like this:

<u>Asset & Total Marital Value</u>	<u>Husband</u>	<u>Wife</u>
Marital Residence/\$285,926.11 (net)	\$96,295.66	\$189,630.45
2001 Lexus/\$24,680.00	-----	\$24,680.00
2002 BMW/\$20,000.00	-----	\$20,000.00
Money Market/\$92,572.10	\$46,286.05	\$46,286.05
Furnishings/\$49,000.00	\$24,500.00	\$24,500.00
Husband's checking/\$16,638.00	\$16,638.00	-----
401k/\$1,006,886.00	\$551,471.00	\$455,415.00
Pension/\$212,884.00	\$212,884.00	-----
Value of all marital assets:	\$1,708,586.21	
Amount and percentage awarded to Husband:	\$948,074.71 (55.49%)	
Amount and percentage awarded to Wife:	\$760,511.50 (44.51%)	

Even though Husband was awarded over 55% of the marital assets as classified by the Trial Court, this was not the stated intent of the Trial Court. After discussing the relevant statutory factors, the Trial Court expressly concluded that an equal division of marital property would be an equitable result based on the facts of this case. Post-trial, Husband convinced the Trial Court to amend its original judgment and consider the loan he took out to pay Wife the \$189,630.45 as a marital debt. The Trial Court also neglected to include in its final judgment the value of the BMW awarded to Wife and the checking account awarded to Husband when calculating the overall amount of property each party received. In short, because an item that should not have been considered was considered, and because various items that should have been considered were not considered, the overall percentage of marital property awarded to Husband was 55.49%, even though the Trial Court expressly intended to award him only 50%.

With regard to Wife's request for alimony, after reviewing the various statutory factors the Trial Court determined that Wife was entitled to rehabilitative alimony in the amount of \$6,000 per month for a period of four years. Thereafter, Wife was to receive \$3,000 per month as alimony *in futuro*.

As stated previously, both parties appeal the Trial Court's classification of certain property as either marital or separate, as well as the overall division of marital property. In addition, Husband appeals the type and amount of alimony awarded.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first will address the Trial Court’s division of marital property. The relevant statutory factors are set forth in Tenn. Code Ann. § 36-4-121(c) (2005) which provides as follows:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

(1) The duration of the marriage;

(2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;

(3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;

(4) The relative ability of each party for future acquisitions of capital assets and income;

(5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;

(6) The value of the separate property of each party;

(7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective;

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

(10) The amount of social security benefits available to each spouse; and

(11) Such other factors as are necessary to consider the equities between the parties.

The parties were married for seventeen years when the final judgment granting Wife a divorce was entered. At the time of the divorce, Husband was 53 years of age and Wife was 54. Wife did not work outside of the home during the marriage. Husband has been employed by Georgia Pacific Corporation since June of 1975. Husband's average annual gross income from 2002 through 2005 was \$311,212.75. The amount of Husband's income at the time of trial is difficult to discern from the record. At one point, Husband admitted that his income for 2007 would be at least \$225,000. He later stated that his base salary was \$182,000. However, Husband did receive a bonus in January 2007 in the amount of \$50,000.²

Husband's vocational skills are quite good, as evidenced by the fact that he has an excellent, well-paying job. Wife does have a bachelor's degree in economics, although it does not appear that she ever used that degree in any employment setting. At the time of trial, Wife was a student at Cleveland State Community College and her goal was to earn a nursing degree in four years. After earning her degree, Wife anticipates making between \$40,000 to \$50,000 annually. Thus, both parties will have the ability to acquire capital assets and income in the future, although Husband's ability certainly is far greater than Wife's.

The Trial Court stated that Wife played an "absolutely essential" role in raising the parties' three children and that Wife's duties as a homemaker prevented her from being gainfully employed outside of the home. The evidence does not preponderate against this finding. Thus, pursuant to Tenn. Code Ann. §36-4-121(c)(5), Wife's contribution as homemaker is to be given equal weight to Husband's role as wage earner. Wife is in good health. Husband has some medical issues, including back problems and a claimed addiction to pain medication. Husband entered a drug treatment program prior to trial, although he apparently did not complete the entire program.

Before we can determine what division of the marital property is equitable, we must determine the appropriate values to be assigned to the various items. We will begin with the marital residence. The Trial Court valued the marital residence at \$525,000. Husband claims, however, that the value assigned to the house should be \$470,000. During Wife's testimony at trial, she admitted that she agreed to sell her interest in the marital residence to Husband and they agreed that the house was valued at \$470,000 at that time. They further agreed that Husband would pay her \$189,630.45, which would later be used by the Trial Court in making the appropriate equitable adjustments. Given this concession by Wife, and the parties agreement as to the value of the house when the order quoted at the beginning of this Opinion was entered, we agree with Husband that the Trial Court incorrectly found the house to be worth \$525,000, and the agreement of the parties should and will be enforced. When the agreement was reached, the outstanding balance on the mortgage was \$239,073.89. Since the parties agreed that the marital residence was worth \$470,000, there was equity of \$230,926.11 to be divided between the parties, rather than the \$285,926.11 used by the

² Husband testified that he voluntarily demoted himself so that he could tend to his addiction to pain medicine. The Trial Court was unpersuaded by this, as are we. We will utilize his average earnings for the years 2002-2005.

Trial Court. Of this amount, Wife received \$189,630.45, thereby leaving Husband with the remaining \$41,295.66.³

Husband's attorney acknowledged that as of the date of trial, Husband's 401k was worth \$1,008,000.00, even though the Trial Court used an earlier value of \$1,006,886.00 when valuing that asset. We will use the value Husband agreed to at trial. Of the total value of the 401k, Wife's counsel acknowledged that \$65,813.67 which Husband had in his 401k prior to the marriage "would be a separate asset. I don't think there's any question about that." The primary issue with regard to the 401k is whether any increase in value to the \$65,813.67 is marital property as found by the Trial Court, or whether the increase is Husband's separate property.

Kevin Lusk, a certified public accountant, was called as an expert witness on behalf of Husband. Mr. Lusk testified that since 1990, funds in a 401k could be expected to have grown at a rate of 10% per annum.⁴ Nevertheless, assuming that Husband's separate \$65,813.67 grew at a rate of only 5%, Lusk concluded that the value of that separate property at the time of the divorce would be \$157,347.00. Wife presented no proof to the contrary.

In *Langschmidt v. Langschmidt*, 81 S.W.3d 741 (Tenn. 2002), the Tennessee Supreme Court noted that "marital property" includes "any increase in value during the marriage of . . . separate property . . . if each party substantially contributed to its preservation and appreciation and the value of vested pension, retirement or other fringe benefit rights accrued during the period of the marriage." *Id.* at 745 (quoting Tenn. Code Ann. § 36-4-121(b)(1)(B)). In addition, "separate property" includes "appreciation of property owned by a spouse before marriage" except when that property is properly characterized as marital property. *Id.* (quoting Tenn. Code Ann. § 36-4-121(b)(2)(C)). The Court further explained:

As we stated in *Harrison* [*v. Harrison*, 912 S.W.2d 124 (Tenn. 1995)], the appreciation of Husband's separate property during the marriage may be classified as [marital] property only if Wife substantially contributed to its preservation *and* appreciation. 912 S.W.2d at 127. Although it is clear in this case that Wife contributed to the marriage as a homemaker, there is no evidence that she substantially contributed to the preservation and appreciation of Husband's non-IRA accounts. To the contrary, it is evident that

³ Because we used the net value of the house when determining that Husband was awarded \$41,295.66 of the equity, this figure already takes the value of the mortgage into account. If we would have included the original mortgage, then Husband would have received \$280,369.55 in total assets from the division of the marital residence, along with a corresponding marital debt of \$239,073.89, which still equals a net award of \$41,295.66. Husband incorrectly argues that the loan he took out to pay Wife the \$189,630.45 should also be included as a marital debt. Because Husband received \$189,630.45 of real property to completely offset that loan, this additional debt should not be included as a marital debt in the overall calculation. The result would be the same as would occur if the house was purchased by a third party.

⁴ The trial was on June 20, 2007, before the significant downturn in the stock market.

appreciation in the value of these assets was entirely market-driven. Further, although it is certainly clear that Tennessee courts recognize a homemaker's contribution when making a determination of marital property, *see* Tenn. [Code Ann.] § 36-4-121(b)(1)(C); *Gragg v. Gragg*, 12 S.W.3d 412, 415 (Tenn. 2000), in the spirit of *Harrison*, we require that some link between the marital efforts of a spouse and the appreciation of the separate property must be established before the separate property's appreciation is considered marital property.

Langschmidt, 81 S.W.3d at 746 (emphasis in the original). How to characterize retirement accounts that accrue during the marriage is much simpler to answer as such benefits "clearly are marital property under Tennessee law." *Id.* at 749 (citing Tenn. Code Ann. § 36-4-121(b)(1)(B); *Gragg v. Gragg*, 12 S.W.3d 412 (Tenn. 2000); *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996)).

Returning to the present case, while Wife no doubt fulfilled her role of homemaker, there is absolutely no evidence that she contributed in any way to the appreciation of Husband's separate 401k property. Any increase in value was purely market-driven. In addition, the proof at trial preponderates in favor of a finding that 5% per annum would be a reasonable appreciation of the original \$65,813.67. Accordingly, we agree with Husband that \$157,347.00 should be deducted from the overall value of the 401k and that this amount is Husband's separate property. In summary, as to the 401k, we find that the overall value of that asset is \$1,008,000.00, and of that total, \$157,347.00 is Husband's separate property, with the remaining \$850,653.00 being marital property.

As mentioned previously, Husband also has a pension with his employer. The value of this pension is based on years of service. Counsel for Husband acknowledged at trial that the plan was valued at \$214,497 on the day of trial.⁵ Because we know the exact value of the pension as of the trial date, it is much easier to determine the amount that is separate property since "[o]nly the portion of the retirement benefits accrued during the marriage are marital property subject to equitable division." *Cohen v. Cohen*, 937 S.W.2d 823, 830 (Tenn. 1996). As of the trial date, Husband had been employed with the same employer for thirty-two years. Fifteen of those years were prior to the marriage at issue, and seventeen years of service were earned while the parties were married for the second time. Accordingly, 47% of the \$214,497, or \$100,813.59, is Husband's separate property, and the remaining 53%, or \$113,683.41, is properly characterized as marital property.

Finally, we conclude that the facts do not preponderate against the Trial Court's finding that an equal division of the marital property is, under the facts of this case, an equitable division. The judgment of the Trial Court is, therefore, modified to reflect the following division of marital property:

Asset & Total Marital Value

Husband

Wife

⁵ The Trial Court found that this pension was worth \$212,884, but this was its value at the end of the month preceding trial. We will, therefore, use the value as of the date of trial.

Marital Residence/\$230,926.11 (net)	\$41,295.66	\$189,630.45
2001 Lexus/\$24,680.00	-----	\$24,680.00
2002 BMW/\$20,000.00	-----	\$20,000.00
Money Market/\$92,572.10	\$46,286.05	\$46,286.05
Furnishings/\$49,000.00	\$24,500.00	\$24,500.00
Husband's checking/\$16,638.00	\$16,638.00	-----
401k/\$850,653.00	\$456,673.19	\$393,979.81
Pension/\$113,683.41	\$113,683.41	-----
Value of all marital assets:	\$1,398,152.62	
Amount and percentage awarded to Husband:	\$699,076.31 (50.0%)	
Amount and percentage awarded to Wife:	\$699,076.31 (50.0%)	

On remand, the Trial Court is instructed to enter a new Qualified Domestic Relations Order consistent with the modified award.

Finally, we note that Husband challenges the Trial Court's property distribution because Wife was awarded more cash than he was and because of the negative tax consequences if he withdraws money from his 401k prior to retirement age. The only reason Wife was awarded more cash than Husband was because he agreed to buy out her interest in the marital residence. When excluding Wife's payment for the marital residence, Husband actually was awarded more cash than Wife. Husband cannot be heard to complain about the amount of cash Wife received when he voluntarily agreed pre-trial to the cash payout. As to the tax consequences, the 401k was by far the largest marital asset of the parties. Their respective interest in the 401k is the largest asset each party was awarded. Thus, both Husband and Wife face the same tax consequences if they withdraw funds early from the 401k. Therefore, we conclude that the tax consequences, standing alone, are insufficient to alter the marital property distribution set forth above.

The next issue is the Trial Court's award of alimony to Wife. The pertinent statute is Tenn. Code Ann. § 35-5-121(i) (2005) which states:

(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.

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.

Wife filed an income and expense statement prior to trial. That statement shows Wife's expenses totaled \$5,015.43 per month. However, the statement included a mortgage payment of \$1,750.00 which Wife did not have because she actually was paying rent of \$600.00 per month. The statement reflects utility payments of \$385.00 per month, but Wife testified at trial they actually were "90ish" a month. Thus, Wife's actual expenses are roughly \$1,445.00 per month less than what is listed on her statement of income and expenses. However, Wife has yet to purchase a house so her estimated mortgage payment may well come into play down the road.

Husband's argument with regard to the alimony award is simple. He claims that Wife does not need that much money every month. Wife's need is an important consideration. *See Edwards v. Edwards*, No. E2007-01680-COA-R3-CV, 2008 WL 3245569 (Tenn. Ct. App. Aug. 8, 2008) ("While all relevant factors must be considered when setting the amount of an alimony award, need and the ability to pay are the critical factors.") (quoting *Dube v. Dube*, 104 S.W.3d 863, 869 (Tenn. Ct. App. 2002) which cites *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002)). However, Husband's ability to pay also is a highly important consideration, as is the parties' standard of living post-divorce. Unfortunately, Husband cites us to nothing in the record showing that he does not have the ability to pay or that the amount awarded by the Trial Court was more than needed for the post-divorce standard of living for the two parties to be reasonably comparable. Husband has not provided us with his monthly expenses or otherwise provided us with anything from which we could conclude that he is unable to make the alimony payment.

Our General Assembly has made it clear that it is the policy of this state as determined by the General Assembly to favor rehabilitation of the economically disadvantaged spouse but that such rehabilitation must be measured against "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." Without this necessary information, we are unable to conclude that the Trial Court abused its discretion with the amount or type of alimony awarded. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996) ("This Court reviews alimony decisions under an abuse of discretion standard.").

Conclusion

The judgment of the Trial Court is affirmed as modified. This cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed one-half to the Appellant, Thomas Mark Pedine, and his surety, and one-half to the Appellee, Susan Mackowski Pedine, for which execution may issue, if necessary.

D. MICHAEL SWINEY, JUDGE