IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 3, 2006 Session

THOMAS FAIN DALTON v. LYNDA FAYE DALTON

Appeal from the Circuit Court for McMinn County
No. 19410 John B. Hagler, Judge

Filed April 17, 2006

No. E2002-01797-COA-R3-CV

Thomas Fain Dalton ("Father") and Lynda Faye Dalton ("Mother") were divorced in 1995. The parties have returned to court numerous times since the divorce, and continue to do so even though the youngest of their three children is now nineteen years old. The present appeal involves the Trial Court's resolution of the most recent set of issues. In summary, the Trial Court denied Mother's request for an increase in rehabilitative alimony, found Mother to be voluntarily underemployed, denied Mother's motion for recusal, increased Mother's child support payment, credited against Father's child support arrearage medical bills which Father paid but which should have been paid by Mother, and declined to award attorney fees to Mother incurred on a previous appeal in this case. Mother appeals everything. We affirm.

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

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Linda Faye Dalton, *pro se* Appellant.

Donald B. Reid, Athens, Tennessee, for the Appellee Thomas Fain Dalton.

OPINION

Background

This is the third appeal in this domestic relations case following a divorce granted over eleven years ago. Although the parties originally were divorced in January of 1995, declaring the parties divorced and all three of their children becoming emancipated has done little to end this protracted litigation. In November of 2001, the Trial Court entered an extensive memorandum opinion resolving many outstanding issues and summarizing the long and tortured history of this case up to that point in time. Seeing no need to reinvent the wheel, we will set forth the relevant part of the detailed summary provided by the Trial Court. Any footnotes contained within the summary are in the original. According to the Trial Court:

> This memorandum will attempt to give some structure (the goal of finality having long been abandoned) to the various motions, pleadings, letters, and other papers which have engaged the court's attention over the past several years in hopes of assisting appellate review.
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> The husband was originally granted a divorce in 1995 with the mother receiving custody of the parties' three minor children. The mother, who was represented by counsel during the divorce, filed a pro se petition for increase in child support January 29, 1996. Before the petition could be heard (it was set and passed numerous times by the parties[1]), the father filed, on December 11, 1997, a petition for change in custody.
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> On July 2, 1999, after forcing the issues to trial, this court changed custody of all children to the father, but erroneously declined to award the mother an increase in child support. While the case was on appeal, the parties agreed that the father, who had moved to North Carolina when his Tennessee employer eliminated his position, should have custody of the two minor boys and the mother custody of the older girl. Therefore, there was no custody issue on appeal.
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> The Court of Appeals, in an opinion issued October 27, 2000, held that child support for the mother should have been increased from $1,393.00 (the amount set at the divorce trial) to $1,617.00 per month (the guideline amount based on the father's income at the time

[1] Five attorneys were in and out of the case for Mrs. Dalton during this period. She has had ten attorneys in all, but she has represented herself much, if not most, of the time.

of trial) and that the increase should be retroactive to January 29, 1996, the date she filed her petition.

On August 28, 2000 (two months before the Court of Appeals' opinion was released), the parties, as noted above, agreed to a split custody arrangement[2] and, through experienced, competent counsel, assured the court that they had agreed in principle to a parenting plan, including mutual support obligations, all of which would be presented to the court. It never happened.

In January 2001, the father's attorney submitted a proposed order. The mother's attorney did likewise. Both attorneys submitted excellent, helpful explanatory letters. With one minor change, the court entered the father's proposed order on February 15, 2001. The father's support for one child, based on income of $6,666.00 per month was set at $981.00 per month and the mother's support for two children, based on assumed income of $1,280.00 per month, was set at $338.00 per month, thus requiring that the father pay the mother $643.00 net difference per month.

Assuming that the mother's gross income was $1,280.00 monthly, the court noted, by transmittal letter, that she "could be found underemployed based upon her impressive qualifications (a college degree) and the time which has been available to her to find employment commensurate with those qualifications."

A few days later, on February 21, 2001, the mother filed a pro se petition with the Referee to reduce her support and increase the father's support. It is unclear why either party filed the pleadings with the Referee rather than this court.

The Mother also filed, on March 19, 2001, a motion for new trial of the August 28, 2000, trial at which split custody had been agreed upon and at which the parties had announced they would present a parenting plan.

The motion for new trial averred that the parenting plan (including visitation and her support obligation) set forth in the February 15, 2001, order had not been "discussed" or ruled upon at the August 28, 2000, hearing; that the visitation schedule did not

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[2] Actually, the parties agreed that they would, subject to the court's approval, agree to the preferences expressed by the children in chambers.

provide enough time for the mother with the boys; that newly discovered evidence relating to the father's business travel and his recent denial of her scheduled visitation showed that the relocation, previously agreed upon by the parties, was both unreasonable and vindictive.

When the mother called her motion for hearing on May 4, 2001, with both parties present, the court felt it imperative to hear evidence regarding the alleged denial of visitation and the alleged deficiencies in the parenting plan since summer visitation was approaching. Also, the court desired to hear testimony from the mother regarding her employment efforts and understood that the parties agreed to present testimony on the mother's support obligation.…

After an evidentiary hearing on May 4, 2001, the court concluded that the parties had previously agreed upon the relocation; that there was no credible evidence that the mother was denied visitation so as to render the removal vindictive; that the father's travel schedule was not such [a] change of circumstances … [to warrant] a change of custody; that the mother's income was not, in fact, $1,280.00 per month but that, as earlier indicated by the court, the mother was willfully underemployed and was capable of earning at least that amount…. [Following the hearing,] Mrs. Dalton, by ex parte letter of May 8, 2001,[3] complained that she never agreed or understood that child support issues were going to be presented and that a "transcriptionist" needed to be present for such a hearing.… [The court], on its own motion, entered the order of June 15, 2001, to deal with all remaining issues, including the mandate of the Court of Appeals, filed May 17, 2001.

This proved to be another triumph of hope over experience. On June 25, 2001, the parties announced that they had agreed to pass the case.… When the court, somewhat skeptical of the agreement, asked if the parties had made any other agreements, the mother said "yes" and the father's counsel, just as clearly, said "no" but that he would "speak to his client" about certain requests of the mother. The court, already sensing disaster ahead, asked the parties again if they

[3] Ex parte communications from pro se litigants such as this are very common. They tend to be highly self-serving and to record "facts" the court does not recall. In this instance, for reasons stated above, the court considered the letter and copied the other side.

wished to pass the case. Both sides again said "yes." The case was then passed to August 24, 2001, the latest "final hearing."

Before that date, the undersigned was the recipient of a flurry of letters and Sunday morning telephone calls from the mother and law enforcement officials, trapped in the middle, all concerning promises "made and broken" about visitation and asking for "telephonic" justice.

On August 24, 2001, the hearing was held despite the mother's objection that the trial judge had checked out the file a few days earlier preventing her from reviewing it.

From the hearings of December 13, 1999, January 24, 2000, August 28, 2000, May 4, 2001 and August 24, 2001, as well as the Court of Appeals mandate of May 17, 2001, the court disposes of the following issues:

1. The Alimony Issue. Although the motion to increase alimony has never, to the court's recall, been noticed for hearing, Mrs. Dalton often reminds the court that it is yet to be heard. The motion is overruled, not only because it was filed well after the court lost jurisdiction to order or increase alimony (Mrs. Dalton had originally received four years rehabilitative alimony), but also because it is premised on the specious assertion that movant needs alimony because she no longer receives sufficient child support since two of the three children now reside with father.

2. The Motion to Reduce the Mother's Support Payments. When the court changed custody on July 19, 1999, the mother's child support obligation ($305.00 per month) was based on the minimum wage. At that time the court found that, based on her educational background, the mother was capable of "full employment." Mrs. Dalton soon filed a petition to reduce her support and fell behind in her payments. Following hearings on December 13, 1999, and January 24, 2000, the court found that Mrs. Dalton was willfully or voluntarily underemployed and that she was in civil contempt of court for $1,770.00 arrearage. This arrearage was paid, and Mrs. Dalton was not incarcerated.

On February 15, 2001, as previously noted, the court assumed that Mrs. Dalton's gross monthly income was $1,280.00 and, therefore, set her guideline support at $337.00 per month for two

> children against Mr. Dalton's monthly obligation of $980.00 for one child or a difference of $643.00. The court was not impressed by Mrs. Dalton's gross monthly income and stated that she "could be found underemployed based upon her impressive qualifications…." After full evidentiary hearings on May 4, 2001, and August 24, 2001, the court remains convinced that she is willfully underemployed and that she is entitled to no reduction in her child support obligation.… She is under the impression that she has the absolute right to further her education at the expense of either her ex-husband or her child support obligation.… It is unacceptable for a person of Ms. Dalton's ability and education to provide only $337.00 per month for two teenagers 6 years after the divorce.
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> 3. Mother's Motion to Increase the Father's Support Obligation. The mother's petition to increase the father's support is frivolous. She filed her petition to increase within weeks of her excellent counsel's agreement that the father's child support obligation was based on a gross income of $6,666.00 per month. Thus, there is not only not a "significant variance," there is no variance at all.… (footnotes omitted in part and renumbered).

Two other matters were addressed by the Trial Court. The first matter involved Father's child support arrearage. In accordance with the mandate of this Court, the Trial Court determined that Father was in arrears a total of $12,916.00. The Trial Court then determined that Father was entitled to a credit of $2,767.16 for medical bills paid by Father but which should have been reimbursed by Mother, and to a credit of $300 for attorney fees incurred when Mother was found to be in civil contempt. After applying the credits, Father's total arrearage was $9,848.84.[4] Father was ordered to pay this amount within thirty days or "a contempt citation will issue." The final matter addressed by the Trial Court was each parties' visitation schedule.

The Trial Court entered its Order in January of 2002 which adopted the numerous findings set forth in the Memorandum Opinion quoted at length above. In this order, the Trial Court noted that it had "spent considerable time hearing the parties testify and upon conclusion of the hearing the Court felt it necessary to make a full review of the complete file in an effort to bring finality to all outstanding matters." The Trial Court then denied Mother's request for an increase in alimony, Mother's motion to reduce her child support payment, and Mother's petition to increase Father's child support payment as there was no significant variance. The Trial Court also ordered Father to pay the child support arrearage of $9,848.84.

Motions continued to be filed and another hearing was held in April of 2002. Thereafter, the Trial Court entered an order which, in relevant part, stated that the Trial Court

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[4] The order inaccurately totaled the arrearage at $9,849.16.

required another hearing regarding the issue of medical bills paid by Father but which were owed by Mother. The Trial Court also stated that the "Court has previously heard so much testimony as to the financial status of both parties that it is the opinion of the Court that further alimony would not be appropriate; therefore, the Motion for continued alimony is overruled."

In June of 2002, Mother sent a lengthy letter to the Trial Court informing the Trial Court of her numerous disagreements with its various rulings. Yet another hearing was conducted in August of 2002 and the Trial Court eventually entered its final ruling in September of 2004. In the final order, the Trial Court credited the testimony of Father over Mother with regard to the medical bills Mother was responsible for paying but did not pay, resulting in the previous credit to Father of $2,767.16. With regard to Mother's request for additional rehabilitative alimony, the Trial Court stated it had erred previously when it concluded Mother's request was untimely. However, the Trial Court then concluded Mother was not entitled to additional rehabilitative alimony for the other reasons set forth in the previous memorandum, including the fact that four years was sufficient time for Mother to be rehabilitated. The Trial Court once again concluded that Mother was not entitled to a reduction in her child support obligation because she continued to be underemployed. The Trial Court also held that Father had become current on his child support payments and any issues surrounding his being in contempt were dismissed. The Trial Court then stated that "[a]s for the motion for attorney fees addressed in [Mother's] motion to alter or amend judgment filed on March 29, 2000, the Court addressed that issue in the hearing of April 26, 2002, and denied her motion for attorney fees." The Trial Court then concluded that each party would be responsible for his or her own attorney fees.

Mother appeals raising six issues, which we quote:

> I. The Trial Court has never had an evidentiary hearing on Appellant's peoperly (sic) filed motion for an increase in rehabilitative alimony, and it abused its discretion in overruling Appellant's motion without hearing any evidence.
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> II. The Trial Court was collaterally estopped in finding the mother to be voluntarily underemployed and that her ability to earn was greater.
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> III. The Trial Court abused its discretion in not recusing itself, because an objective person knowing all the facts of this case would find a reasonable basis for questioning the Judge's impartiality.[5]

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[5] Mother's first brief in this appeal was prepared and filed by her then counsel of record, which we assume to be attorney number 11. This brief raised the first three issues set forth above. After a dispute arose over whether additional issues could or should be raised in light of there being no transcripts from the relevant hearings in the record, Mother's attorney withdrew from the case. Mother then filed a brief *pro se* raising the same first three issues, but setting forth three additional issues as well.

IV. The Trial Court abused its discretion in modifying the child support of the mother without a petition before the court to modify the support.

V. The Trial Court abused its discretion in crediting the father to pay his court ordered child support obligation by both crediting the father medical bills against his child support obligation from September 2000 through February 2001 and not requiring him to pay at all his last payment of child support from June 1999.

VI. The Trial Court abused its discretion in not awarding attorney fees to the mother for the appeal on child support modification in which the Court of Appeals for the Eastern District of Tennessee at Knoxville overturned the lower court on the this matter.

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).

At the outset, it is important to note that this Court has not been provided transcripts of the numerous hearings conducted by the Trial Court.[6] Our ability to address Mother's various challenges to the Trial Court's factual findings is essentially destroyed by the absence of either the transcripts of the hearings or a statement of the evidence prepared in accordance with Tenn. R. App. P. 24. Rule 24(a) of the Tennessee Rules of Appellate Procedure requires that the record on appeal shall consist of, among other things, the trial transcript or a statement of the evidence of the trial court if they exist. Tenn. R. App. P. 24(a). Mother had the duty "to prepare a record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal." *Nickas v. Capadalis*, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997) (quoting *State v. Boling*, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992)). "This court cannot review the facts de novo without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992).

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[6] At the end of the hearing on August 30, 2002, the Trial Court attempted to summarize its findings. This Court has been provided a transcript of the Trial Court's valiant attempt at summarizing its findings. Unfortunately, the Trial Court did not get very far in its summary as Mother repeatedly interrupted the Trial Court to the point that it simply gave up and adjourned court. The only other transcript in the file is from a hearing in 1996, is seven pages in length, and pertains to outstanding medical bills.

Mother's first issue is her claim that the Trial Court erred when it failed to conduct an evidentiary hearing on her request for an increase in rehabilitative alimony. As set forth above, the Trial Court acknowledged that Mother repeatedly reminded the court that there had never been a hearing focusing solely on this motion. Nevertheless, Mother's motion was initially denied in November of 2001, when the Trial Court overruled the motion after concluding that the motion was untimely and the amount and duration of the rehabilitative alimony originally awarded to Mother was sufficient. Following a hearing in January of 2002, the Trial Court again denied Mother's request for an increase in alimony. Yet another hearing was conducted in April of 2002, and for the third time the Trial Court denied Mother's request after hearing "so much testimony as to the financial status of both parties that it is the opinion of the Court that further alimony would not be appropriate…." Following even more hearings, in September of 2004, the Trial Court reversed its previous ruling that Mother's motion was untimely, but again concluded that Mother was not entitled to any further alimony because four years of rehabilitative alimony as previously ordered was sufficient.

While litigants generally are entitled to a hearing on a properly filed motion, a trial court is, nevertheless, allowed wide latitude in controlling its docket. We do not believe that a trial court is required to provide a separate hearing on a motion when, in numerous previous hearings, it already has been provided with sufficient proof to properly rule on that motion. Because the amount of alimony to be awarded, if any, is within the sound discretion of the trial court in light of the particular circumstances of the case, appellate courts will not alter such awards absent an abuse of discretion. *Lindsey v. Lindsey*, 976 S .W.2d 175, 180 (Tenn. Ct. App. 1997). Without transcripts from the several hearings which were conducted after Mother filed her motion, we are unable to determine whether the Trial Court was presented with sufficient proof to properly conclude that Mother was not entitled to an increase in rehabilitative alimony, even if Mother had not officially noticed her motion for a hearing. In short, we cannot determine if the Trial Court abused its discretion, and we will not just assume that it did. Without the appellate record containing these facts, we instead must assume that the record would have contained sufficient evidence, had it been preserved and presented to us, to support the Trial Court's factual findings. The Trial Court's conclusion that Mother was not entitled to an increase is rehabilitative alimony must, therefore, be affirmed.

As Mother's second and fourth issues are somewhat related, we will address these issues together. In these issues, Mother claims that the Trial Court is "estopped in finding" that she was voluntarily underemployed and that her ability to earn was greater than what she actually was earning. Mother notes that when Father obtained custody of all three children in January of 1999, her child support obligation for all three children was set at $305 per month. Mother argues that, thereafter, when Mother resumed being the primary residential parent for the parties' daughter, her child support obligation for the remaining two children was improperly increased to $337 per month. Mother claims that the Trial Court's initial determination regarding her earning capacity cannot change because no additional proof was elicited by the Trial Court as to Mother's earning capacity. In other words, since there was no proof taken after January 1999 regarding her earning capacity, if she was required at that time to pay $307 per month for three children, it necessarily follows that her

child support had to be decreased, not increased, when she began paying child support for only two children. Mother also claims the Trial Court erred when it increased her child support payment without Father having filed a motion seeking to have that support increased.

Whether Mother was underemployed and the extent of her earning capacity was a factual determination. Mother's brief references exhibits presented to the Trial Court addressing her earnings and earning capacity. The dates on two of these exhibits, January 31, 2000, and June 22, 2001, flatly contradict Mother's assertion that no proof was offered as to her earning capacity after 1999. After Mother's initial child support obligation was set, Mother filed a motion for a new trial challenging, among other things, the Trial Court's determination regarding child support. A hearing on Mother's motion was conducted in May of 2001 and the Trial Court concluded that a hearing would be necessary regarding, among other things, the amount of Mother's child support payment. Because we do not have a transcript from the relevant hearings, we are unable to examine what proof pertaining to Mother's earning capacity actually was offered to the Trial Court at the various hearings. We simply do not know if there was sufficient proof to support an upward deviation in Mother's child support obligation due to her being voluntarily underemployed. Without the necessary transcript(s), we must assume that sufficient facts were presented to the Trial Court at one or more of these hearings to support its findings and ultimate ruling that Mother was voluntarily underemployed and that the amount of child support ordered was consistent with the guidelines.

As previously noted, Mother's child support obligation was set at $305 when Father originally obtained custody of all three children. Although Father did not file a petition to have the amount of Mother's child support increased, the parties later agreed to a split custody arrangement. This change in custody required the Trial Court to set appropriate guideline child support based on that new custody arrangement, regardless of whether the new amount would be more or less than what was previously ordered. Furthermore, as noted above, Mother put the amount of her $305 child support payment at issue when she filed a motion for new trial. Having determined that the Trial Court's conclusion that Mother was voluntarily underemployed must be affirmed, in order for Mother to successfully challenge her new child support obligation, she must do more than simply complain that the amount of her child support should not have been increased. Rather, Mother would have to show that the amount of $337 per month for two children was inconsistent with the guidelines based on her imputed income as found by the Trial Court. Since Mother does not argue that this amount was inconsistent with the guidelines assuming the amount of imputed income was correct, we affirm the Trial Court's judgment on this issue.

Mother's third issue is her claim that the Trial Judge erred "in not recusing itself, because an objective person knowing all the facts of this case would find a reasonable basis for questioning the Judge's impartiality." We review a trial court's determination on a motion for recusal under the abuse of discretion standard. *See In re C.T.S.*, 156 S.W.3d 18, 22 (Tenn. Ct. App. 2004). In *Yeubanks v. Methodist Healthcare Memphis Hospitals*, No. W2003-01838-COA-R3-CV, 2004 WL 2715338 (Tenn. Ct. App. Nov. 18, 2004), *no appl. perm. appeal filed,* this Court observed:

> Litigants are entitled to have their cases heard by fair and impartial judges. *See Kinard v. Kinard*, 986 S.W.2d 220, 227-8 (Tenn. Ct. App. 1998). The need to preserve public confidence in the judicial system further requires that the judge "not only be impartial in fact, but also that the judge be perceived to be impartial." *Id.* at 228. As our Supreme Court stated in the case of *Davis v. Liberty Mutual Ins. Co.*, 38 S.W.3d 560 (Tenn. 2001):
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>> Given the importance of impartiality, both in fact and appearance, decisions concerning whether recusal is warranted are addressed to the judge's discretion, which will not be reversed on appeal unless a clear abuse appears on the face of the record. A motion to recuse should be granted if the judge has any doubt as to his or her ability to preside impartially in the case. However, because perception is important, recusal is also appropriate when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. Thus, even when a judge believes that he or she can hear a case fairly and impartially, the judge should grant the motion to recuse if the judge's impartiality might reasonably be questioned. Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias. *However, the mere fact that a judge has ruled adversely to a party or witness in a prior judicial proceeding is not grounds for recusal....* If the rule were otherwise, recusal would be required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the impartiality issue for strategic advantage, which the courts frown upon.
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> *Id.* at 564-5 (internal citations omitted).

Yeubanks, 2004 WL 2715338, at *4 (emphasis added).

Mother's first motion for recusal was filed in August of 2000, and an order denying that motion was entered in February of 2001. Mother filed another motion for recusal in August of 2002 and, for reasons unknown to this Court, the Trial Court eventually transferred this case to another Judge in July of 2003. For the most part, the record on appeal contains only pleadings and orders, and there is absolutely nothing in these pleadings or orders that indicates that the Trial Judge was in any way biased or partial. Since we have only one small transcript, we cannot ascertain if there was anything which occurred at one of the hearings which might demonstrate that the Judge

was not impartial. In one of the two transcripts we do have, the Trial Court attempted to summarize its findings, but was repeatedly interrupted and challenged by Mother. In fact, Mother's behavior was so inappropriate that Father's attorney requested that Mother be immediately taken into custody. As difficult as it may have been, the Trial Court declined the invitation to have Mother incarcerated and instead respectfully adjourned court. Since there is absolutely nothing in the record indicating that the Trial Judge was in any way bias or partial, we can only assume that Mother's request for recusal was based solely on the fact that she was not pleased with many of the Trial Court's rulings. This certainly is no basis for a recusal motion. *Yeubanks*, 2004 WL 2715338, at *4 (citing *Davis v. Liberty Mutual Ins. Co.*, 38 S.W.3d 560, 564-65 (Tenn. 2001)). We would be hard pressed to affirm the Trial Court's various rulings and, at the same time, conclude that the Trial Court was being partial in making those rulings which we now affirm. Although we do not know why the Trial Court eventually transferred the case to another trial judge, we find nothing in the record to indicate that the Trial Court was ever bias or partial or that there was a reasonable basis to question his impartiality, up to and including the time when the Trial Court eventually did transfer the case for whatever reason.

Mother's fifth issue is her claim that the Trial Court erred when it credited against Father's child support arrearage the amount of the medical bills Father paid but which should have been paid by Mother. Mother also claims the Trial Court erred by not requiring Father to pay the full amount of his June 1999 child support payment. Mother's main argument with regard to the medical bills is that she actually paid some of the bills for which Father was given a credit and the bills were for medical treatment which was provided too long ago. Before making its ruling, the Trial Court heard testimony from the parties and specifically credited the testimony of Father over that of Mother. In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

Given the Trial Court's specific credibility determination and the fact that we have not been provided a transcript of the evidence pertaining to this issue, we affirm the Trial Court's decision to give a credit to Father for the medical bills he paid but which should have been paid by Mother.

With regard to Mother's claim that Father did not make the full June 1999 child support payment, Mother simply states in her brief that she "never received the June 1999 last child support payment." Mother cited us to nowhere in the record which establishes that Father did not make this payment, and we note the Trial Court's specific finding following the 2002 hearing that Father was current on his child support payments. Given that there is no evidence in the record contrary to this determination, we affirm the Trial Court on this issue as well.

Mother's final issue is her claim that the Trial Court erred in not awarding her attorney fees incurred on the second appeal where this Court determined that the Trial Court erred in not retroactively increasing Mother's child support payment from the date she filed a petition for an increase up until the time custody was transferred to Father. In *Brasher v. Brasher*, No. W2004-01314-COA-R3-CV, 2005 WL 756249, (Tenn. Ct. App. Apr. 1, 2005), *no appl. perm. appeal filed*, this Court addressed attorney fees in child support cases. We affirmed a trial court's award of attorney fees incurred at the trial court level, but declined to award attorney fees incurred on appeal. In so doing, we stated:

> It is well settled in Tennessee that an appellate court shall not interfere with the trial court's decision, concerning attorney's fees, except upon a showing of an abuse of that discretion. The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives. *State ex rel. Vaughn v. Kaatrude,* 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). While we will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative.…
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> In addition, Ms. Brasher asks this Court to award her attorney fees and costs incurred in defending this appeal. In addressing requests for attorney fees on appeal, we are guided by the following:
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> > Our Courts have defined the factors that should be applied when considering a request for attorney's fees incurred on appeal. These factors include the ability of the requesting party to pay the accrued fees, the requesting party's success in

> the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered.
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> *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454 (Tenn. Ct. App. Sept. 3, 2003) (citing *Folk v. Folk*, 210 Tenn. 367, 357 S.W.2d 828, 829 (Tenn. 1962)).

Brasher, 2005 WL 756249, at *5.

There is noting in the record to establish that Mother first directed her request for attorney fees incurred on the second appeal to this Court when we were deciding that appeal. There were two issues to be resolved in the second appeal, and Mother was successful on one of those two issues. *See Dalton v. Dalton*, No. E2000-00255-COA-R3-CV, 2000 WL 1599456 (Tenn. Ct. App. Oct. 27, 2000), *app. denied Apr. 9, 2001*.[7] It appears that Mother first made her request on remand to the Trial Court. The Trial Court denied Mother's request, stating: "[a]s for the motion for attorney fees addressed in [Mother's] motion to alter or amend judgment filed on March 29, 2000, the Court addressed that issue in the hearing of April 26, 2002, and denied her motion for attorney fees." Without any of the pertinent transcripts, we cannot determine if there was a proper "evidentiary foundation" for the Trial Court to deny Mother's request for attorney fees incurred on that particular appeal. We have no way of knowing what motivated the Trial Court to deny the fees. Without this information, we are unable to conclude that the Trial Court abused its discretion when denying Mother's request.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are assessed against the Appellant Lynda Faye Dalton, and her surety, if any.

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D. MICHAEL SWINEY, JUDGE

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[7] The first appeal in this divorce litigation is *Dalton v. Dalton*, No. 03A01-9606-CV-00201, 1997 WL 280038 (Tenn. Ct. App. May 28, 1997), *no appl. perm. appeal filed*. Interestingly, in that case we affirmed the Trial Court on three of the issues raised by Mother stating: "Although [Mother] raises these issues on appeal, we have neither a transcript nor statement of the evidence in the record concerning that hearing. 'In the absence of a portion of the record, we must conclusively presume that the findings of the trial court are supported by evidence heard in the trial court.' *J.C. Bradford & Co. v. Martin Construction Co.*, 576 S.W.2d 586, 587 (Tenn. 1979). We are therefore unable to reach the merits of these issues, but must conclusively presume that the evidence presented justified the judgment of the trial court. *See In re: Rockwell v. Arthur*, 673 S.W.2d 512 (Tenn. App. 1983)."