

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 28, 2015 Session

DEBORAH ANN TREADWAY v. GREGORY STEVEN TREADWAY

**Appeal from the Circuit Court for Sumner County
No. 2011CV53 Jane W. Wheatcraft, Judge**

No. M2014-00898-COA-R3-CV - Filed March 24, 2015

The trial court awarded Wife a judgment in the amount of \$28,000 for back alimony and ordered Husband to honor his obligations, under the parties' marital dissolution agreement, with respect to life insurance and disability insurance. Husband appeals. We affirm and remand the case for further proceedings as are necessary and consistent with this Opinion.

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

ARNOLD B. GOLDIN, J. delivered the opinion of the Court, in which J. STEVEN STAFFORD P.J., W.S. and KENNY ARMSTRONG, J. joined.

Kimberley L. Reed-Bracey, Goodlettsville, Tennessee, for the appellant, Gregory Steven Treadway.

Craig H. Brent, Franklin, Tennessee, for the appellee, Deborah Ann Treadway.

MEMORANDUM OPINION¹

¹Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

The gravamen of this action is the interpretation of the word “cohabitating” for the purpose of Husband’s alimony obligation as set-out in the parties’ Marital Dissolution Agreement (“MDA”). Deborah Ann Treadway (“Ms. Treadway”) and Gregory Steven Treadway (“Mr. Treadway”) were divorced in March 2011 after a nineteen-year marriage. Pursuant to their MDA, Mr. Treadway was obligated to pay Ms. Treadway rehabilitative alimony in the amount of \$2,000 per month for 180 months. The MDA provided that Mr. Treadway’s alimony obligation would terminate upon Ms. Treadway’s death or remarriage. It defined remarriage to include “both the ceremonial marriage and cohabitation with an unrelated person of the opposite sex for a total of more than thirty (30) days.” The parties’ detailed MDA also provided, in relevant part, that Mr. Treadway would maintain life insurance naming Ms. Treadway as beneficiary for a period of fifteen years or until her death or remarriage. It additionally provided that he would furnish proof of compliance within thirty days of any request for proof. The MDA also required Mr. Treadway to pay for Ms. Treadway’s life insurance, to maintain disability insurance of at least \$2,000 per month on himself, and to provide proof of disability insurance upon request. It also provided for an award of reasonable attorney’s fees to the successful party in any action to enforce the agreement and contained a severance clause providing that, if any portion of the agreement should be found to be invalid, that portion would be struck or modified and the remainder of the agreement would remain in full force.

In April 2013, Ms. Treadway filed a petition for civil contempt in the Circuit Court for Sumner County. In her petition, Ms. Treadway asserted that, despite numerous requests, Mr. Treadway had refused to provide proof of either the life insurance or disability insurance required under the MDA. She also asserted that he had refused to pay alimony for the months of January, February, and March 2013. Ms. Treadway prayed for an order requiring Mr. Treadway to appear and to provide evidence of life insurance and disability insurance, as well as evidence of his income from January 1, 2013, to the present, and for other relief and attorney’s fees.²

Mr. Treadway answered and asserted, as an affirmative defense, that Ms. Treadway’s petition for contempt

should be dismissed as unfounded in that a condition precedent (sic) for termination of any and all support obligations have occurred in that Deborah Ann Treadway has cohabitated with an individual for more than a total of 30 days since the entry of the Final Decree. Therefore, this Petition for Civil Contempt is heretofore moot by the terms of the Marital Dissolution

²We observe that Ms. Treadway’s petition was styled as one for civil contempt, but she prayed for Mr. Treadway to be found guilty of civil contempt and criminal contempt, and punished by fine and/or imprisonment.

Agreement which the Petitioner herself helped draft and did so execute and sign.

Mr. Treadway asserted that Ms. Treadway had come before the court with unclean hands. He also asserted that the case should be dismissed on the basis of *res judicata* because Ms. Treadway had “brought these same issues before this Court and then voluntarily dismiss[ed] the same.” Mr. Treadway asserted that Ms. Treadway had “admittedly cohabitated with an unrelated person of the opposite sex for a total of more that 30 days” and denied her allegations of contempt as “moot.”

In September 2013, Mr. Treadway filed a motion for summary judgment. Following a hearing in January 2014, the trial court denied the motion by order entered January 29, 2014. In its order, the trial court concluded that Mr. Treadway had failed to establish that Ms. Treadway was cohabitating with a person of the opposite sex.

The trial court heard Ms. Treadway’s petition for contempt on March 27, 2014.³ After observing that “the facts [were] fairly well undisputed[,]” the trial court found that Mr. Treadway had remarried and was living in Nevada; that he had obtained life insurance as required by the MDA, but had removed Ms. Treadway as the beneficiary and substituted his current wife; and that he had a disability policy through his employment, but had not provided proof of the policy to Ms. Treadway. The trial court found that Ms. Treadway began dating Kenneth Robert Greer (“Mr. Greer”) approximately six months after the parties’ divorce, that the parties’ interpreted the term “cohabitation” differently, and that there “was clearly not a meeting of the minds on the term cohabitation.” After reviewing case law and the dictionary definition of cohabitation, the trial court found that Mr. Treadway had failed to meet his burden of proof to demonstrate that Ms. Treadway and Mr. Greer were cohabitating based on the facts. The trial court also found that Mr. Treadway had testified that he had the means and ability to pay the amount of back alimony owed and attorney’s fees. The trial court awarded Ms. Treadway a judgment in the amount of \$28,000 for back alimony through March 2014 and ordered Mr. Treadway to fulfill the life and disability insurance requirements contained in the MDA. The trial court did not find Mr. Treadway in contempt “because [he] was acting pursuant to his attorney’s advice.” The trial court entered judgment on April 4, 2014. On April 15, Mr. Treadway filed a motion styled “Motion to Reconsider[,] Motion to Alter or Amend[,] Motion to Stay Pending Appeal[,] Motion to Disregard costs of Attorney Fee Affidavit Not Awardable Pursuant to Rule[,] Motion to be Heard on Attorney Fee Award Objecting to Fee[.]” The trial court heard the motion on May 8, 2014, and denied it by order entered May 27, 2014. Mr. Treadway filed a timely notice

³We observe that Mr. Treadway’s motion for summary judgment and Ms. Treadway’s petition for contempt were heard by different judges.

of appeal. We affirm.

Issues Presented

Mr. Treadway presents the following issues for our review, as stated by him:

1. Did the Trial Court err in failing to terminate the alimony obligation of the ex-Husband for all of the proven behaviors and activities that demonstrated Ms. Treadway and her lover were engaged in “cohabitation?”
2. Did the Trial Court err in finding that the lack of financial intermingling rendered the alimony not terminable? E.g. Honeycutt?
3. Did the Trial Court err in finding that the prior *two* Petitions as filed by the ex-Wife were not “germaine” to this proceeding to demonstrate the Wife’s clear and admitted mistake regarding the meaning of the MDA and her lack of credibility to change her position thereafter?
4. Did the Trial Court err in failing to terminate the ex-Husband’s alimony on the language of cohabitation spelled out and agreed to in the parties’ MDA of a *total* of thirty (30) days?
5. Did the Trial Court err in awarding the ex-Wife her attorney fees in this cause?
6. Did the Trial Court err in failing to award the ex-Husband his attorney fees in this cause?

Standard of Review

We review the trial court’s findings of fact *de novo* with a presumption of correctness. Tenn. R. App. P. 13(d); *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000). We will not reverse the trial court’s factual findings unless they are contrary to the preponderance of the evidence. *Id.* Our review of the trial court’s conclusions on matters of law is *de novo* with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Discussion

We begin our discussion by noting that the trial court found that there had been no “meeting of the minds” between the parties with respect to the meaning of the word

“cohabitation” in their MDA. It then resolved the issue arising from the parties’ differing interpretation by using the ordinary, dictionary definition of the word.

It is well-settled that “[a] marital dissolution agreement is essentially a contract between a husband and wife in contemplation of divorce proceedings.” *Vicks v. Hicks*, No. W2013–02672–COA–R3–CV, 2014 WL 6333965, at *2 (Tenn. Ct. App. Nov. 17, 2014) (quoting *Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App.1998)). Therefore, MDA provisions generally are interpreted using the rules applicable to contract interpretation. *Johnson v. Johnson*, 37 S.W.3d 892, 896 (Tenn. 2001) (citations omitted). The interpretation of a contract presents a question of law. *Buettner v. Buettner*, 183 S.W.3d 354, 358 (Tenn. Ct. App. 2005).

When interpreting a contract, the courts seek to ascertain and effectuate the intent of the parties at the time the agreement was executed. *Johnson*, 37 S.W.3d at 896. “When resolving disputes concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language.” *Id.* (quoting *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)). “Such interpretation is not possible when material contract terms are ambiguous. Ambiguity, however, ‘does not arise in a contract merely because the parties may differ as to interpretations of certain of its provisions.’” *Id.* (quoting *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc.*, 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994)). “A contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one.” *Id.* (quoting *Farmers–Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975)).

When an MDA is incorporated into a trial court’s order, the portion of the MDA awarding alimony of a type subject to modification loses its contractual nature, and it becomes part of the order of the court.⁴ *Penland v. Penland*, 521 S.W.2d 222, 224 (Tenn. Ct. App. 1975) (citations omitted). As we observed in *Beck v. Beck*:

A Court has the authority to modify its own orders pertaining to custody and support, even if the provisions of the court’s order were incorporated by reference from the parties’ MDA. The provisions of the marital agreement are merged into the decree and lose their contractual nature to the extent that they address matters over which the court has continuing statutory power to modify.

On the other hand, those provisions that are not within the power of the court

⁴We note that, in their MDA and throughout these proceedings, the parties’ characterize the alimony award to be one of rehabilitative alimony. Rehabilitative alimony is statutorily subject to modification. *Beck v. Beck*, No. W2011-01806-COA-R3-CV, 2012 WL 1656228 (Tenn. Ct. App. May 11, 2012).

to modify do not lose their contractual nature upon incorporation into the decree. Additionally, the court may not modify such provisions because to do so would violate the constitutional prohibition against interference with contracts.

Beck v. Beck, No. W2011-01806-COA-R3-CV, 2012 WL 1656228 , at *5 (Tenn. Ct. App. May 11, 2012) (quoting Janet Richards, *Richards on Tennessee Family Law*, § 13-9 (footnotes omitted)).

As the trial court observed in its April 2014 order in this case, the parties understood “cohabitation” differently. Neither party asserted that the provision in the MDA was not enforceable. Rather, the dispute between the parties in this case was whether Ms. Treadway was properly considered to be cohabitating with Mr. Greer where she undisputedly had an intimate relationship with him for more than thirty days, and where she and Mr. Greer spent more than 30 total, but not consecutive, nights together. With this background in mind, we turn to the issues raised on appeal.

Cohabitation

Before turning to the trial court’s finding that Ms. Treadway was not cohabitating with Mr. Greer based on the facts in the record, we turn first to Mr. Treadway’s assertion in his April 2013 answer that Ms. Treadway’s petition for contempt was “moot” under the terms of the MDA because Ms. Treadway had cohabitated with another man for more than thirty days. We note that, because the portion of the parties’ MDA addressing alimony lost its contractual nature when it became part of the trial court’s order, whether Mr. Treadway’s alimony obligation was terminable was a determination for the court to make. An obligor spouse may not unilaterally determine that their alimony obligation may be stopped or suspended based on their determination that a contractual condition precedent has not been met. *Beck v. Beck*, 2012 WL 1656228 , at *5. In short, the determination is one for the court to make, not an obligor spouse acting unilaterally. *Id.* We turn to Mr. Treadway’s assertion that the trial court erred by finding that Ms. Treadway and Mr. Greer were not cohabitating. The trial court made the following factual findings in its April 2014 order:

1. [Ms. Treadway and Mr. Greer] have separate homes.
2. Neither contributes to the maintenance and upkeep of the other’s residence.
3. Neither contributes to paying utilities on each other’s house.
4. Neither receives mail at the other’s residence.

5. Each has his/her own car and maintains it separately.
6. They have no joint funds; i.e. each has their own checking account.
7. Neither has a key to the other's home.
8. Neither keeps clothes or toiletries at the other house (on one occasion Husband's mother photographed 2 shirts in Wife's house, one of which Mr. Greer explained he planned to wear on a dancing date that evening.)
9. Each cooks for the other and buys groceries but they don't support each other.
10. They sleep together 2 or 3 nights a week, sometimes at his house sometimes at hers.
11. They take trips and share expenses.

The trial court also found that Ms. Treadway and Mr. Greer testified that they do not want a committed relationship; that Mr. Greer had been married three times; and that Ms. Treadway testified that she had been "badly burned" by the divorce from Mr. Treadway. It additionally found that the record contained no proof that Mr. Greer contributed to Ms. Treadway's expenses, except when they went on dates or traveled, and that Ms. Treadway also contributed to dating and travel expenses.

In his brief, Mr. Treadway does not dispute these findings. Rather, Mr. Treadway asserts that the high level of intimacy between Ms. Treadway and Mr. Greer, coupled with the amount of time the two spend in each other's company and their on-going sexual relationship, constitutes cohabitation. He also argues that a finding of financial intermingling is not required for a finding of cohabitation under *Honeycutt v. Honeycutt*, 152 S.W.3d 556 (Tenn. Ct. App. 2003). Mr. Treadway contends that the plain language of the MDA provides that his alimony obligation to Ms. Treadway ceases upon a finding of cohabitation for a total of thirty days, regardless of whether those days were consecutive.

Ms. Treadway, on the other hand, submits that she "interpreted the clause (in the parties' MDA) to mean thirty (30) consecutive days and [that] she didn't think spending the night with a paramour 2 or 3 nights a week constituted cohabitation." She does not deny that she and Mr. Greer have a close, intimate relationship, but asserts that they do not live

together, do not support each other, and do not maintain clothes and personal items in each other's homes.

In its April 2014 order, the trial court stated:

From the testimony it appeared to this Court Husband intended cohabitation to be defined as having an intimate sexual relationship for a total of 30 days during the 15 years or so Wife would be receiving alimony. Wife opined that to accept Husband's interpretation of cohabitation she might as well join a convent. Wife interpreted the clause to mean 30 consecutive days and she didn't think spending the night with a paramour 2 to 3 nights a week constituted cohabitation.

The trial court determined that, under *Mabee v. Mabee*, No. M2012-02430-COA-R3-CV (Tenn. Ct. App. 2013 June 27, 2013), and as defined by Webster's Third New International Dictionary (1993), cohabitation means:

to live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependant on sexual relations.

Clearly, the parties did not have the same understanding with respect to the meaning of cohabitation. Like the parties in *Mabee*, the parties in this case did not define cohabitation in their MDA. See *Mabee v. Mabee*, 2013 WL 3355236, at *3. We noted in *Mabee* that "cohabit" is defined as:

1: to live together as or as if as husband and wife (without formal marriage)[;]
2a: to live together or in company[;] b: to be intimately together or in company[.]

Id. (quoting *Honeycutt v. Honeycutt*, 152 S.W.3d 556, 563 n.4 (Tenn. Ct. App. 2003) (quoting *Black's Law Dictionary* 236 (5th ed. 1979)). As the trial court stated, we also quoted the definition of cohabitation contained in Webster's Third New International Dictionary 440 (1993), which essentially defines cohabitation to mean living together as spouses in a manner generally manifested by married people, regardless of the parties' sexual relationship. *Id.* (quoting *id.* (quoting Webster's Third New International Dictionary 440 (1993))). In *Mabee*, we held:

Based upon the foregoing definitions for "cohabit" and "cohabitation," we have concluded, as the trial court did, that the term cohabitation with another man requires more than an intimate or sexual relationship and more than spending the night on several occasions with another man. The term cohabitation with another man additionally requires something akin to the mutual assumption of duties and obligations that are customarily manifested by a married couple or life partners.

Id.

Mr. Treadway asserts that, although Ms. Treadway and Mr. Greer maintain separate homes, they are cohabiting because they are “consistently in each other’s company” and “shar[e] life experiences.” He further asserts that, under *Honeycutt v. Honeycutt*, 152 S.W.3d 556 (Tenn. Ct. App. 2003), financial intermingling is not required for a finding of cohabitation.

Honeycutt also involved parties who ascribed different definitions to the term cohabitation. *Honeycutt*, 152 S.W.3d at 562. As Mr. Treadway asserts, we noted in *Honeycutt* that cohabitation does not necessarily require a finding of financial support. *Id.* at 564. In *Honeycutt*, however, we observed that the wife and her paramour in that case not only took trips together and had a sexual relationship, but that the wife also kept belongings at her paramour’s home and that:

According to the 1999 calendar, Wife spent 41 consecutive days in Barclay’s home from October 3, 1999 through November 13, 1999. The 2000 calendar reveals that Wife stayed with Barclay in his Tampa home for 206 days during a period spanning January 2000 through September 2000. Collective Exhibit 3, the 2001 calendar, indicates that Wife stayed in Barclay’s Tampa home for 175 days from January 1, 2001 through September 8, 2001.

Id. Thus, unlike Ms. Treadway and Mr. Greer, the wife and her paramour in *Honeycutt* were, as a factual matter, living together for significant consecutive amounts of time per year.

Based on the undisputed facts in this case, although Ms. Treadway and Mr. Greer have an extremely close relationship, it is a dating relationship. They are not living together in a shared home; they are not contributing to the maintenance of one another’s homes; they own and maintain their separate cars; they do not intermingle their finances. Regardless of the intimacy of their relationship, Ms. Treadway and Mr. Greer do not *live together* as spouses.

The evidence contained in the record in this case does not preponderate against the trial court’s finding that Ms. Treadway and Mr. Greer were not cohabiting. We affirm the trial court’s determination that Mr. Treadway failed to carry his burden of proof on this issue.

Mr. Treadway additionally asserts that the trial court erred by finding two previous petitions allegedly filed by Ms. Treadway as “not germane ” (sic) to the current petition. Upon review of the record transmitted to this Court on appeal, we observe that it contains neither the previous petition nor any previous order of the trial court other than the parties’ divorce decree. It is well-settled that it is the appellant’s duty to prepare a record for our review that includes everything contained in the trial court record that is necessary for our

examination of the issues presented on appeal. *Aurora Loan Servs., LLC v. Woody*, No. W2014-00761-COA-R3-CV, 2014 WL 7463032, at *3 n.4 (Tenn. Ct. App. Dec. 30, 2014) (citing Tenn. R. App. P. 24(a)). This argument accordingly is waived.

Attorney's Fees

We turn next to Mr. Treadway's argument that the trial court erred by awarding Ms. Treadway her attorney's fees and by denying his request for attorney's fees. Mr. Treadway's request for reversal of the trial court's award of attorney's fees to Ms. Treadway is predicated on his assertion that the trial court erred by finding that Ms. Treadway was not cohabitating with Mr. Greer. In light of the foregoing discussion, we affirm the award of attorney's fees to Ms. Treadway.

In her brief, Ms. Treadway requests attorney's fees arising from the appeal of this matter. The parties' MDA provides:

Should either party incur any expense or legal fees in a successful effort to enforce this marital dissolution agreement, in whole or in part, the Court shall award reasonable attorney's fees and suit expenses to the party seeking to enforce this agreement.

We accordingly grant Ms. Treadway's request for attorney's fees on appeal.

Holding

In light of the foregoing, the judgment of the trial court is affirmed. Costs on appeal are taxed to the Appellant, Gregory Steven Treadway, and his surety, for which execution may issue if necessary. This matter is remanded to the trial court for enforcement of the judgment, a determination of the amount of Appellee's attorney's fees incurred on appeal, and further proceedings as may be necessary and are consistent with this opinion.

ARNOLD B. GOLDIN, JUDGE