

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 10, 2013

JOHN SCOTT TERRY v. TINA LYNN TERRY

**Appeal from the Circuit Court for Marion County
No. 17866 Buddy D. Perry, Judge**

No. M2012-01784-COA-R3-CV - Filed November 20, 2013

This is a divorce case in which Wife asserts the trial court erred in failing to award her alimony. Having concluded that the trial court did not abuse its discretion in declining to award spousal support, we affirm.

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

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

Alan R. Beard, Chattanooga, Tennessee, for the appellant, Tina Lynn Terry.

M. Kieth Davis, Dunlap, Tennessee, for the appellee, John Scott Terry.

OPINION

I. Factual and Procedural History

John Scott Terry (“Husband”) and Tina Lynn Terry (“Wife”) were married in March 1992; one child was born of the marriage.¹ At the time of the marriage, Husband worked at his family’s service station, and Wife worked full-time at Blue Cross Blue Shield of Tennessee. Husband owned an unencumbered home which became the marital residence. In 1995, Husband began driving a commercial truck “over-the-road” which caused him to be away from home several nights per week. Subsequently, Wife left her full-time job and stayed home with the children. In 2002, Husband was accepted into the Boilermakers Union

¹ Wife also has one child from a previous marriage. Both children had reached the age of majority at the time of trial.

and began working on welding jobs across the country.

In 2005, the parties separated; Wife and the children left the marital home and went to live with her parents. Following the parties' separation, Wife began working as a receptionist at a doctor's office. Husband filed a complaint for divorce in April 2008. After a failed attempt to reconcile, the trial court held a final hearing on the complaint on May 22, 2012. At the conclusion of trial, the parties stipulated to the grounds for divorce, and the court entered a Final Decree of Divorce on July 6, 2012. The court entered a separate order on July 23, 2012 that included findings of fact and conclusions of law regarding the division of assets and alimony.

With respect to the marital property, the court ordered that the parties' home and real estate be sold, with \$80,000 of the sale proceeds being paid to Husband to reimburse him for his pre-marital contributions towards the home, and the remaining proceeds to be divided equally between the parties. The court distributed the parties' additional assets giving \$120,238.52 to Husband and \$97,416.86 to Wife. The trial court acknowledged that the distribution was not "equal," but deemed the distribution "equitable." The trial court declined to award Wife spousal support. Wife appeals.

II. Standard of Review

On appeal, we review the trial court's factual findings de novo with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000). A trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001) (citing *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997)).

A trial court has broad discretion to determine the need for spousal support, as well as the appropriate nature, amount, and duration of that support. Tenn. Code Ann. § 36-5-121; *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). As our Supreme Court has discussed, a trial court's decision regarding alimony is "factually driven and involves the careful balancing of many factors." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). As such, the "role of an appellate court is not to second guess the trial court or to substitute its judgment for that of the trial court," but rather to "determine whether the trial court abused its discretion in awarding, or refusing to award, spousal support." *Mayfield v. Mayfield*, 395 S.W.3d 108, 114 (Tenn. 2012). A reviewing court will find an abuse of discretion only if the trial court "applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that causes an injustice to the complaining party." *Konvalinka v.*

Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346, 358 (Tenn. 2008); *see also Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). Therefore, “when reviewing a discretionary decision by the trial court, such as an alimony determination, the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision.” *Gonsewski*, 350 S.W.3d at 105-06.

III. Analysis

Wife’s only issue for our review is whether the trial court erred in declining to award her alimony. In determining that Wife was not entitled to alimony, the court reasoned as follows in its July 23, 2012 order:

Spousal Support

The parties have been married for twenty (20) years. However, they have been separated for nearly seven (7) years. At no point in the past seven years has the Wife found it necessary to actively pursue any type of spousal support. The reason is readily apparent when the Court considers the fact that the Wife has been able to accumulate \$17,000.00 in her bank account since the parties’ separation. While it is true that the legislature has enumerated various factors for courts to consider when determining whether an award of spousal support is appropriate,[] the two most important factors which a court must consider are (1) the financial needs of the disadvantaged spouse and (2) the other party’s ability to pay. [citations omitted] This court finds that the Wife has not met her burden of showing that there is a need for spousal support. While it is true that the Husband has a greater income than the Wife, the Tennessee Supreme Court has previously acknowledged that

the prior concept of alimony as lifelong support enabling the disadvantaged spouse [to] maintain the standard of living established during the marriage has been superseded by the legislature’s establishment of a preference for rehabilitative alimony.

[citations omitted] In regards to her rehabilitation, the Wife did not present any evidence that she was seeking to further her education or needed any type of re-training. Furthermore, in regards to the Wife’s alleged need for support in order to aid in her transition to being single, the Court specifically acknowledges that the parties’ [sic] have been separated for nearly seven (7) years and that the Wife has not actively pursued any form of spousal support during this period of time in which she was able to accumulate \$17,000.00 in

her bank account. Additionally, as noted above, the Wife is being awarded substantial assets which she will be able to liquidate should the need for monies arise in the future. Additionally, it is important to note that there was absolutely no showing that she was either physically or mentally disabled while the Husband is an insulin dependent diabetic. In regards to the parties' lifestyle during their marriage, the evidence presented at trial was that the parties lived fairly frugally and vacationed only occasionally--some of which were paid for by each of the parties' respective parents. Finally, it should be noted that, at the time of the parties' marriage, the Husband was in very good financial shape and was the sole owner of an unencumbered and furnished home. In contrast, the only assets which the Wife brought to the parties' marriage was a bed and an encumbered 1991 Chevrolet Lumina automobile for which the parties were required to make monthly payments for five (5) years. After considering all of the factors enumerated in T.C.A. § 36-5-121(i), the Court concludes that the Wife has failed to meet her burden of establishing a need for spousal support.

The following factors set forth at Tenn. Code Ann. § 36-5-121(i) guide courts in determining whether to award a party alimony, and if appropriate, the nature, amount, duration, and manner of payment:

- (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.

Although, each factor is to be considered, “the two that are considered the most important are the disadvantaged spouse’s need and the obligor spouse’s ability to pay.” *Gonsewski*, 350 S.W.3d at 110 (quoting *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007)).

In reviewing the trial court’s alimony decision, we are mindful that the trial court’s determination was a discretionary one. Therefore, we proceed with our analysis by reviewing the evidence in the light most favorable to the decision. *Id.* at 105-06. The record establishes that the parties were married for approximately twenty years but had been living separately for seven years prior to the entry of the final decree of divorce. *See* Tenn. Code Ann. § 36-5-121(i)(3). Husband was forty-seven and Wife was forty-five years old at the time of the divorce. *See* Tenn. Code Ann. § 36-5-121(i)(4). Both parties are high school graduates. *See* Tenn. Code Ann. § 36-5-121(i)(2). The record is silent regarding whether either party needed or desired further training or education to improve their earning capacity. Husband testified that he is a diabetic and suffers from diabetic ulcers on his feet that cause him a great deal of pain and may interfere with his ability to work in the future. *See* Tenn. Code Ann. § 36-5-121(i)(5). Wife was in good mental and physical health at the time of trial. Husband received a greater share of the marital property and was also awarded \$80,000 in separate property. *See* Tenn. Code Ann. § 36-5-121(i)(7)-(8). Wife received \$97,416.86 in marital property. Testimony indicated that the parties did not live extravagantly during the marriage. *See* Tenn. Code Ann. § 36-5-121(i)(9). The parties stipulated to the divorce pursuant to Tenn. Code Ann. § 36-4-129, so the relative fault of the parties was not at issue

on the facts presented. *See* Tenn. Code Ann. § 36-5-121(i)(11).

In declining to award alimony to Wife, the trial court focused on Wife's need in light of the assets she was awarded, Husband's diabetes and resulting complications, as well as Wife's ability to save \$17,000 during the parties' extended separation. The trial court considered the statutory factors as relevant to the facts presented and deemed that an award of alimony was not warranted. We cannot say the trial court abused its discretion in reaching this conclusion.

IV. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of appeal are assessed against Wife, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE