

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 15, 2013 Session

ELIZABETH KAY TOMES v. MICHAEL JOE TOMES

**Appeal from the Circuit Court for Montgomery County
No. MCCCCVDN11119 Michael R Jones, Judge**

No. M2012-02441-COA-R3-CV - Filed November 22, 2013

In this divorce case, Wife appeals the trial court's determination that she was not entitled to an award of alimony. We find the trial court did not abuse its discretion in declining to award alimony and affirm the trial court.

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 PATRICIA J. COTTRELL, M.S., P.J., and FRANK G. CLEMENT, J., joined.

Roger Alan Maness, Clarksville, Tennessee, for the appellant, Elizabeth Kay Tomes.

Sharon T. Massey, Clarksville, Tennessee, for the appellee, Michael Joe Tomes.

OPINION

I. Facts and Procedural History

Elizabeth Tomes ("Wife") and Michael Tomes ("Husband") were married in October 1972; they have two adult sons. After working for the TVA for thirty years, Husband retired in 2004 and received a monthly pension of \$4,473.02. Following his retirement, Husband continued to work as a consultant and as a construction manager until being laid off in July 2011. Wife worked as an accountant until the parties' youngest son was born in 1982. Thereafter, she was hospitalized with post-partum depression, and she received long-term disability benefits through a private insurance provider as a result of her ongoing depression in the amount of \$951.00 per month.

Wife filed for divorce on January 18, 2011 alleging inappropriate marital conduct and

irreconcilable differences. Following a failed mediation, the court entered an order requiring Husband to pay \$2,000.00 per month in temporary support and to pay for Wife's insurance and medical prescriptions. The trial court held a hearing on the complaint for divorce on June 12, 2012.

On July 11, 2012, the court entered an Opinion granting Wife a divorce on the ground of inappropriate marital conduct. The court classified and divided the parties' separate and marital property awarding Wife \$114,778.90 in separate property and Husband \$561.00 in separate property.¹ The court valued the marital property at \$712,680.65, which included \$558,784.84 in insurance proceeds the parties' received as a result of a fire destroying the marital residence, and gave half to each of the parties. In addition, the ten-acre lot on which the marital residence stood was ordered to be sold and the proceeds divided equally between the parties. The court awarded Wife one half of Husband's \$4,473.02 monthly retirement payment and declined to award Wife alimony, stating: "Based on the income of the parties, the husband has no ability to pay. The wife actually does not have the need that she claims. The wife has sufficient assets to purchase a home, to invest her other monies and to receive her portion of the marital retirement."

On July 31, 2012, Wife filed a motion to reopen the proof to address issues related to her health insurance premiums. The trial court entered a Final Decree of Divorce on August 20, 2012 incorporating the court's previous Opinion and held that Wife was to pay her own insurance premiums. On September 14, 2012, Wife filed a motion to alter or amend to which Husband responded on September 18. The court held a hearing on Wife's motions to reopen the proof and to alter or amend on October 2, 2012. The court denied Wife's motions by order entered October 23, 2012. 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;

¹ Wife's separate property included a settlement from a personal injury lawsuit and jewelry. Husband's separate property was an inheritance.

Bratton v. Bratton, 136 S.W.3d 595, 605 (Tenn. 2004). An award of spousal support will not be disturbed on appeal absent an abuse of the trial court's discretion. *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006). Under the abuse of discretion standard, a reviewing court cannot substitute its judgment for the trial court's judgment. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011). Rather, 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 v. Gonsewski*, 350 S.W.3d 99, 105-06 (Tenn. 2011).

III. Analysis

Wife's sole issue on appeal is whether the trial court erred in failing to award her spousal support. In determining whether to award a party alimony, and if appropriate, the nature, amount, duration, and manner of payment, courts must consider the following statutory factors set forth at Tenn. Code Ann. § 36-5-121(i):

- (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)).

The record establishes that Husband and Wife were married for thirty-eight years and were both fifty-nine years old at the time of trial. *See* Tenn. Code Ann. § 36-5-121(i)(3)-(4). Wife has a college degree and worked outside the home for several years at the beginning of the marriage. *See* Tenn. Code Ann. § 36-5-121(i)(2). At the time of trial, Wife received \$951 per month from a private disability insurance policy. *See* Tenn. Code Ann. § 36-5-121(i)(1). Testimony indicated Wife also sold Mary Kay products and prepared taxes for her friends; however, the amount of income, if any, that was generated from these side jobs was unclear from the record. Husband is a high school graduate and worked in various roles for the TVA before and after his retirement. *See* Tenn. Code Ann. § 36-5-121(i)(2). At the time of trial, Husband was unemployed after being laid off from his contractor position and received \$4,896.10 per month from his pension, annuity, and unemployment benefits. *See* Tenn. Code Ann. § 36-5-121(i)(1). Wife has battled depression since the birth of the parties’ second child, but is in good physical health. *See* Tenn. Code Ann. § 36-5-121(i)(4). Husband is in good physical and mental health. The record is silent regarding whether either party desired to secure further education and training. *See* Tenn. Code Ann. § 36-5-121(i)(2).

With respect to the separate assets and marital property of the parties, Wife received

more assets than Husband. *See* Tenn. Code Ann. § 36-5-121(i)(1). Wife was awarded \$114,778.90 in separate property and \$356,340.33 in marital property (not including the value of the real property which will be sold and the proceeds divided equally between the parties). *See* Tenn. Code Ann. § 36-5-121(i)(7). In total, Wife was awarded \$471,119.23, most of which was cash or liquid investments. Additionally, the trial court awarded Wife half of Husband's monthly retirement income which is approximately \$2,200 per month. The evidence shows that Wife will continue to receive \$951 per month in disability benefits for a total monthly income of over \$3,000. The value of the separate and marital property awarded to Husband is \$356,901.33.

Wife briefly asserts that Husband was voluntarily underemployed and that the trial court failed to consider his "earning capacity" in rendering its decision. The trial court made no specific finding regarding Husband's underemployment or earning capacity; however the court expressly stated that Husband "has no ability to pay" alimony. Husband testified that he was actively seeking employment at the TVA, but that "there's no work out there, even for contractors." He also testified that he tried his hand at making and selling flower pots but that he "ended up giving more away than [he] sold." Husband's earning capacity is only one of the factors the trial court was required to consider in determining whether Wife was entitled to alimony. *See* Tenn. Code Ann. § 36-5-121(i)(1)-(12); *see also* *Gonsewski*, 350 S.W.3d at 115 (emphasizing that the need of the spouse seeking support is the "single most important factor" in determining whether alimony is appropriate). The evidence does not preponderate against the trial court's finding that Husband had no ability to pay spousal support.

After reviewing the evidence in the light most favorable to the decision, we cannot say the trial court abused its discretion in determining alimony was not warranted in this case. *See* *Gonsewski*, 350 S.W.3d at 105-06. Wife has immediate access to \$471,119.23 and will receive approximately \$2,200 per month of Husband's retirement income for a total monthly income of more than \$3,000. We affirm the trial court.

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