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1986 | Cited 0 times | Court of Appeals of Tennessee | February 20, 1986

HIGHERS, J.

This case concerns a petition by the husband for termination of alimony in futuro payable to the wife. The trial court reduced the payments of \$950.07 by \$450.00. The husband appeals, alleging that the trial court erred in not terminating the payments.*

A final decree of divorce was entered on November 24, 1976, awarding the wife an absolute divorce from the husband on grounds of cruel and inhuman treatment. The only child of the marriage was an adult at the time of the decree. The wife took title to a residence in Germantown, Tennessee, as well as the contents therein. The husband took title to a 185 acre farm in Madison County, Tennessee. The husband was ordered to pay \$950.07 as alimony in futuro and to make a monthly note payment, which was secured by the lien of a second Deed of Trust on the residence. The decree ruled that the alimony payments were to be made until the plaintiff-wife either remarried, or died, or until a material change of circumstances occurred. The husband thereafter made these monthly payments. On September 11, 1984, he filed a petition for modification of this final decree based on a material change in circumstances.

The three circumstances alleged by the husband as warranting the termination of his obligation of support are: (1) that the wife is living with a third person within the meaning of T.C.A. § 36-5-101(a)(3); (2) that it is the public policy of this State that alimony be rehabilitative and temporary and that he has sufficiently provided for the wife's rehabilitation; and (3) that the wife's ability to meet her reasonable needs has increased while his ability to provide support has decreased.

T.C.A. § 36-5-101(a)(3) provides, in pertinent part:

In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is thereby raised that:

(A) The third person is contributing to the support of the alimony recipient and the alimony recipient therefore does not need the amount of support previously awarded, and the court therefore should suspend all or part of the alimony obligation of the former spouse . . .

In *Azbill v. Azbill*, 661 S.W.2d 682 (Tenn. App. 1983), the husband filed a petition to suspend or terminate his obligation to pay alimony because he alleged that the wife was living at her residence with another man. Mrs. Azbill denied this allegation. The trial court held that the proof showed that



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she was living with another man and reduced the alimony payments from \$500 to \$200 per month. On appeal, the court upheld the trial court's finding that Mrs. Azbill did in fact live with another person within the meaning of the statute. The court stated that the statute merely contemplated the alimony recipient residing with another person - no "liaison, sexual or otherwise" need be proved - and upon proof of this residing with a third person, the burden of proof shifted from the one seeking the alimony reduction to the alimony recipient. 661 S.W.2d at 686. The recipient must prove that he or she still needs the alimony despite having a third person residing in the house.

The court went on to hold that the wife had not shown by the greater weight or preponderance of the evidence that she needed the amount of support previously awarded. The court, accordingly, suspended the entire amount of \$500 per month alimony. The husband contends that this case is authority for his request that his alimony obligation be suspended rather than merely reduced.

There is no question but that the trial court has the authority to suspend either "all or part of the alimony obligation." The statute so provides. The question is as to proof. Did the wife in the instant case rebut the presumption as to the \$500.07 that the trial court ordered the husband to continue paying?

In the present case, we agree with the trial court's finding that "learly, Mrs. Stanton 'lived with' Mr. McKinney under circumstances sufficient to create a presumption under the foregoing statute." Proof introduced at trial showed that a Mr. McKinney moved some of his furniture and personal effects into the wife's residence in January 1982. She testified that Mr. McKinney was there as a roomer or boarder, paying her \$15 for each day that he spent at the house. Mr. McKinney's voter registration and car license both listed the wife's address. Mr. McKinney paid all of the telephone bills except for the wife's long-distance charges. He also paid her \$100 per month (later increased to \$150 per month) for receiving phone calls, handling mail, and doing filing. In November 1982, she also received an automobile from Mr. McKinney, worth approximately \$3,000. At the time of the trial the wife had not paid Mr. McKinney for the automobile. These facts raise the presumption under the foregoing statute that the wife does not need the amount of alimony previously awarded. The question on appeal, then, is whether the trial court was correct in merely reducing the support payments rather than terminating them. Did the wife rebut the presumption as to the \$500.07 that the trial court ordered the husband to continue paying?

The wife produced proof at trial that her needs now are substantially the same as at the time of the divorce. She also testified that the checks introduced at trial (totaling approximately \$500 per month for the period Mr. McKinney lived at the residence) represented the entire amount of payments made by Mr. McKinney to her during the time that he resided at her home. Although the husband states he is dubious as to this assertion, the trial Judge had the benefit of seeing the witnesses and evaluating their credibility. The finding of fact by the trial court based on credibility is entitled to great weight and will be accepted by this Court in the absence of any real evidence to the contrary. Thus we concur with the trial court that the wife rebutted the statutory presumption as to the \$500.07 that the



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husband was ordered to continue paying.

The husband further contends that his alimony obligation should be considered rehabilitative and temporary because of the 1984 amendment to T.C.A. § 36-5-101(d). This statute reads, in pertinent part:

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, temporary support and maintenance. Where there is such relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors, including those set out in this subsection, then the court may grant an order for payment of support and maintenance on a long-term basis or until the death or remarriage of the recipient except as otherwise provided in subdivision (3) of subsection (a) of this section.

The divorce in this case was decreed November 24, 1976. The alimony provision in the final decree stated that the husband should pay \$950.07 "as periodic alimony" and that these payments were to be made "until plaintiff either remarries, dies or there occurs a material change in circumstances." This decree was made by the trial court pursuant to the terms of T.C.A. § 36-820, the forerunner of § 36-5-101(a). These provisions kept the order for support within the court's control. Section 36-820 allowed the court to increase or decrease the payments "on cause being shown" and § 36-5-101(a) allows these changes "upon a showing of a substantial and material change of circumstances." Under either statute, the court had the power to make the alimony either indefinite or temporary as the circumstances warranted. In this case, the trial Judge in the original divorce action made the decision, based upon the individual circumstances of this case, that the alimony should be periodic and indefinite. The addition of § 36-5-101(d) to the support statute does not in itself change that decree. The factors listed in that statute merely codify the relevant factors to which a trial Judge must look in the decision of whether to grant support payments. Neither can this statute be used to make the final decree contingent upon rehabilitation. This would work a substantive change in the rights of the parties. Along with the ability to pay, need is the cornerstone of all alimony payments. *Lancaster v. Lancaster*, 671 S.W.2d 501 (Tenn. App. 1984). Rehabilitation is but one factor to consider in pre-1984 decrees to determine the need of the alimony recipient.

The question in this case, then, becomes: Have the wife's needs materially changed since the original decree so as to justify a decrease in the alimony payments?

The trial court found that the wife had accumulated approximately \$16,000 in liquid assets since the date of divorce. She reported \$4,500 in income from these investments in 1983. The equity in her house has, of course, increased. The husband, on the other hand, receives approximately \$13,000 more in income now than he did at the time of the divorce.

We cannot say that the trial court erred in its finding that the wife's need for the amount of alimony



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awarded has not changed so as to justify a further reduction in the alimony payments. Neither has the husband's situation changed materially. Although he now supports his second wife and a child, responsibilities of marriage and parenthood voluntarily assumed since the divorce are not circumstances that this Court may consider in determining whether an alimony modification should be made. *Dillow v. Dillow*, 575 S.W.2d 289 (Tenn. App. 1978).

The trial court's judgment is, therefore, affirmed. Costs on appeal are adjudged against the husband.

* For convenience the parties will generally be referred to as the husband and the wife.

