

CAROLYN FAYE BALL WILLIAMS,)	
)	
Petitioner/Appellee,)	Appeal No.
)	01-A-01-9510-CH-00486
v.)	
)	Rutherford Chancery No.
VICTOR LEGRAND WILLIAMS, SR.,)	93DR-953
)	
Respondent/Appellant.)	

<p>FILED</p> <p>June 28, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR RUTHERFORD COUNTY

AT MURFREESBORO, TENNESSEE

THE HONORABLE DON R. ASH, JUDGE

WM. Kennerly Burger
301 N. Spring Street
P.O. Box 398
Murfreesboro, Tennessee 37133-0398
ATTORNEY FOR RESPONDENT/APPELLANT

R. Steven Waldron
Terry A. Fann
202 West Main Street
Murfreesboro, Tennessee 37130
ATTORNEYS FOR PETITIONER/APPELLEE

AFFIRMED, MODIFIED, AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

This is an appeal by respondent/appellant, Victor Legrand Williams, Sr. ("Husband"), from an order of the trial court modifying the final decree entered in the divorce of Husband and petitioner/appellee, Carolyn Faye Ball Williams ("Wife"). The modification reduced Husband's alimony obligation to Wife by \$400.00 per month. The pertinent facts are as follows.

On 5 August 1994, Judge Whitney Stegall entered a final decree divorcing Husband and Wife. The decree ordered Husband to pay Wife alimony of \$750.00 per month. In addition, the decree provided that Husband was to pay that amount until Wife remarried or he retired. The court did not, however, define or restrict the retirement term.

During the marriage and at the time of the divorce hearing, Husband worked for Nissan Corporation and earned approximately \$50,000.00 per year. Because of a substantial raise, Husband took a job with Behr Systems, Inc ("Behr") on 5 June 1994. His new position paid \$60,000 per year. In addition, Husband received a \$10,000 bonus and a car allowance of \$5,000 per year.

Husband resigned or, as stated by him, retired from Behr on 14 October 1994 because the "unforeseen stresses" were too much. More specifically, Husband claims that he became depressed when he realized that he could not do the job. After leaving Behr, Husband moved to Conyers, Georgia and lived with his sister and her three children. Husband cared for the children while their mother worked. At some point in time, Husband's mother had a stroke so he began to care for her as well as the children.

Husband's mental problems date back to 1988. From approximately 1991 to 1993, Husband took Prozac off and on to

control his depression. In August 1993, after being off Prozac for six months, Husband began seeing his current psychiatrist, Dr. Patricia Williams, who continued to use Prozac in Husband's treatment. Husband did not contact Dr. Williams from 1 June 1994 until 23 January 1995. Prior to January 1995, Husband had quit taking his Prozac. After seeing Husband, Dr. Williams resumed his Prozac treatment and determined that he could not maintain any employment. She further opined that, although Husband would eventually return to the work force, "no management-type position would be expected in the foreseeable future. . . ."

Concurrent with his alleged retirement, Husband fell behind in making his alimony payments. Thereafter, in January 1995, Wife filed a petition for contempt. She also sought to attach Husband's 401K monies and asked the court for a declaratory order defining retirement as used in the final decree of divorce. On 27 January 1995, Husband filed his response. He alleged that he had not worked since October 1994 because of severe emotional problems and depression which began prior to the parties' divorce and that he had retired as described in the final decree.

On 21 February 1995, Husband filed a petition to suspend the alimony payments. He alleged that his mental disorder had deteriorated to the point that he could not work and that this was a substantial and material change in circumstances. He asked the court to eliminate the alimony payments until he could return to work. He also asked for immediate termination of the alimony pursuant to the final decree and for attorney's fees. In March, Wife filed her answer and a petition asking the court to order Husband to pay his 1994 income tax refund into the court.

During the pendency of this action, the court entered several orders. The effect of these orders were as follows: 1)

required Husband to pay Wife \$3,000.00, the October 1994 to January 1995 arrearage amount; 2) restrained Wife from taking any action which would diminish the value of her real property; 3) required Husband to deposit with the clerk a portion of his 401K funds and his tax refund. As to this last order, the court excepted \$1,500.00 to assist Husband with his living expenses.

A hearing was held before Judge Don R. Ash on 18 May 1995. The parties testified, and Husband presented the deposition testimony of Dr. Williams. On 5 June 1995, the court entered its final order. The court held that Husband was not retired, that Husband was in contempt of court, that Husband had voluntarily terminated his employment, that there was "some change in circumstances" warranting a modification, and that Husband declined other employment offers. The court reduced the monthly alimony to \$350.00 and awarded Wife \$1,400.00 for the alimony which had accrued from February 1995 to May 1995. The court ordered the clerk to pay out the monies held by the court as follows: 1) \$350.00 per month to Wife; 2) \$1,400.00 to Wife for the arrearage; 3) \$150.00 per month to Husband; 4) \$2,000.00 to Wife's attorney; 5) \$2,000 to Husband's attorney; and 6) the costs of the action. In addition, the court ordered Husband to "immediately attempt to secure appropriate gainful employment. . . ." Finally, the court sentenced Husband to serve thirty days in the Rutherford County Workhouse, but suspended the sentence upon Husband's compliance with the order.

Husband filed his notice of appeal on 15 June 1995 and asked this court to address the following issues:

A. Are the issues related to the medical condition of the [husband] subject only to proof by a qualified medical expert?

B. Is the wording set forth in the original Final Decree of Divorce self-executing, terminating the requirement for the [husband's] payment of alimony as of the date of his "retirement" September, 1994?

C. Does any credible evidence in the record support the wife's contention that the husband has willfully disregarded the orders of the court and, accordingly, is in contempt?

D. Based upon the facts of the case, do circumstances exist which would justify the continuation of [husband's] payment of alimony to the [wife]?

In addition, Wife presented two issues. Wife's first issue relates to the correctness of the court's decision to modify the alimony award. We address this issue within our discussion of Husband's issues. Wife's second issue is: "Whether the [Wife] should be awarded attorney's fees incurred by her on this appeal." We address this issue separately.

Husband's first issue involves the weight and credibility given to the testimony of an expert by the fact finder. Husband contends that the chancery court erred when it rejected Dr. Williams' uncontradicted medical opinion that Husband could not perform any type of work. It is the opinion of this court, however, that the Husband's own testimony contradicted the doctor's opinion and that the chancery court did not completely reject the doctor's opinion.

"The weight, faith and credit to be given to any witness' testimony lies in the first instance with the trier of fact and the credibility accorded will be given great weight by the appellate court." **Leek v. Powell**, 884 S.W.2d 118, 120 (Tenn. App. 1994). While it is true that the trier of fact should not ignore the testimony of an expert witness¹, the fact finder may weigh the testimony and even reject it. The Tennessee Supreme Court has stated as follows:

Expert opinions, at least when dealing with highly complicated and scientific matters, are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are purely

¹ **Hudson v. Capps**, 651 S.W.2d 243, 247 (Tenn. App. 1983); **Reserve Life Ins. Co. v. Whittemore**, 59 Tenn. App. 495, 516, 442 S.W.2d 266, 275 (1969).

advisory in character and the trier of facts may place whatever weight it chooses upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the case or otherwise unreasonable.

Gibson v. Ferguson, 562 S.W.2d 188, 189-90 (Tenn. 1976); **England v. Burns Stone Co.**, 874 S.W.2d 32, 38 (Tenn. App. 1993) (referring to all expert testimony). In other words, "[t]he opinion of an expert may be reduced to mere conjecture by proof of physical facts completely inconsistent therewith." **Nashville, C. & St. L. Ry. v. Jackson**, 187 Tenn. 202, 217, 213 S.W.2d 116, 122 (1948)(on petition to rehear)(citing **Standard Oil Co. of Louisiana v. Roach**, 19 Tenn. App. 661, 675, 94 S.W.2d 63, 69 (1935)).

As mentioned earlier, the testimony in this case contradicts, at least to some degree, the opinion of Dr. Williams. The evidence reveals that Husband has experienced depression since 1988. Nevertheless, he continued to work until 1994 and, as he phrased it, "never missed a paycheck." In response to questions at trial regarding Husband's current activities, he made the following responses: "I just was in a situation that was very, very good for me. And time slipped by. I just -- I've enjoyed being with my sister's children . . . I was taking care of the kids, back and forth to school, and errands. . ." and "I've got some beautiful children that I'm taking care of. Their mother's working. I'm responsible for them, and I'm enjoying -- I'm a homemaker, really, is what I'm doing. I'm cooking for them. I'm cleaning house, and I'm running errands." Finally, the following testimony occurred:

Q Taking care of whose family?

A My sister's family. I'm at work; I'm in a situation -- yes, I have a full-time job.

Q You have a full-time job that just doesn't pay you anything, right?

A Yep. There's a lot of people that have those nowadays.

Moreover, Husband testified that he was caring for his mother who

had recently had a stroke.

Despite Husband's own testimony, Dr. Williams opined that Husband could not even perform ministerial tasks such as sacking groceries. Clearly, the evidence is contradictory. Thus, the trial court was justified in not accepting Dr. Williams' opinion as conclusive. Further, although Husband contends that the court rejected in full Dr. Williams' opinion, the record reveals otherwise. In its order, the court cut Husband's obligation by more than fifty percent. Had the court rejected the expert's opinion in toto there would have been no need for a reduction at all. Moreover, although the court ordered Husband to "immediately attempt to secure appropriate gainful employment. . . ." the record reveals that the court did not intend for the term "appropriate" to refer to the types of employment Mr. Williams performed at Behr and Nissan. Instead, the trial court recognized that manual employment was sufficient. While issuing its ruling at the hearing, the court stated as follows: "I want \$350 per month out of that account to go to Mrs. Williams, for your alimony payment, and that will continue until you come in, Mr. Williams, and tell me that you've found a job, even if it's a manual job. . . ." Husband's first issue is without merit.

Husband's second issue involves the construction of the language in a court's decree. The final decree of divorce entered between the parties stated as follows: "Mr. Williams is ordered to pay spousal support in futuro in the amount of \$750.00 per month until the date of his retirement or the date of Mrs. Williams' remarriage." Husband claims that he retired from Behr and thereby eliminated his alimony obligation. Wife, on the other hand, contends that Husband did not actually retire and that he is attempting to avoid the alimony obligation.

Husband argues that the final decree gave him complete discretion to determine his retirement date, instead of assigning a specific age or other limitation. Husband claims that the court granted him such control because of the sizable estate it granted to Wife and because Husband never earned a substantial income until he began his job with Nissan. Despite Husband's assertion in this court that Wife received a greater share of the marital estate, his response to Wife's petition recognized that the original division of the marital property was nearly equal. As to the other claims, we find no evidence in the record to support them nor does Husband point to any particular references.

"Judgments are to be construed like other written instruments, the determinative factor being the intention of the court as gathered from all parts of the judgment." **Branch v. Branch**, 35 Tenn. App. 552, 555-56, 249 S.W.2d 581, 582-83 (1952)(citations omitted). To determine the intent of the trial court, courts must focus on the language in the decree and should construe the language in light of its plain, ordinary and popular meaning. **See Duvier v. Duvier**, No. 01-A-01-9311-CH-0050, 1995 WL 422465, at *3 (Tenn. App. 19 July 1995). If there is still no resolution, courts may then consider the circumstances existing at the time of the decree. **Id.** It is difficult to set out the plain or ordinary meaning of retirement as used by the trial court because it used the term in its most general sense providing no restrictions. This was also the case in **Duvier v. Duvier**. In that case, this court looked to the surrounding circumstances to determine the court's intent. **Id.** Applying this same logic to the present case, it is the opinion of this court that the evidence preponderates in favor of the trial court's finding that Husband had not retired.

The court entering the final decree of divorce did not intend for Husband to retire at will. To the contrary, the evidence establishes that the court intended the alimony to continue into the future, perhaps until Husband reached the traditional age of retirement or was forced to retire. Indeed, Husband was only 51 at the time of the divorce. Further, he had worked at Nissan for twelve and a half years and there was no evidence that he planned to leave. Finally, the parties had been married for 28 years and there was a significant disparity between their earning capacities.

At the very least, the chancery court could have intended, as did the court in *Duvier*, that the alimony continue until Husband retired from Nissan. If this were true, the decree would still obligate Husband to continue making the payments because it is clear that he did not retire from Nissan. Rather, he quit in order to accept what he expected to be a more lucrative opportunity. For the foregoing reason, Husband's second issue is without merit. To avoid future disputes, we remand to the chancery court to define retirement as used in the final decree of divorce.

Husband's third issue asks whether there is any evidence to support the trial court's finding of contempt. Specifically, Husband argues that he lacked the ability to comply with the court's order. In addition, Husband contends that the sentence issued by the judge was improper. The determination of whether a party is in contempt of a court's order is within the discretion of the trial court. As such, we may not reverse the trial court's decision absent an abuse of that discretion. *Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. 30, 37, 377 S.W.2d 908, 912 (1964).

There are two types of contempt, civil and criminal. "Criminal contempt actions are those to preserve the power and vindicate the dignity of the court while civil contempt actions are those brought to enforce private rights." *Id.* It is a general rule that a court can not find a person guilty of contempt if that person lacked the ability to comply with the court's order. *Bradshaw v. Bradshaw*, 23 Tenn. App. 359, 363, 133 S.W.2d 617, 619 (1939); *Gossett v. Gossett*, 34 Tenn. App. 654, 658, 241 S.W.2d 934, 936 (1951). "Where an alleged contemner, however, has voluntarily and contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt.'" *Bradshaw*, 133 S.W.2d at 619 (citations omitted).

The evidence in this case demonstrates that not only did Husband have the ability to pay the alimony for a certain period of time, but that he voluntarily put himself in a position in which he was unable to make the payments. First, Husband testified that, at the time he terminated his employment with Behr, he had been able to "save quite a bit of money" because Behr had paid for all of his expenses and meals while he traveled. Nevertheless, Husband did not use this money to pay any part of his alimony obligation. Second, he did not petition the court to reduce the alimony award until after Wife filed her petition for contempt. Also, Husband voluntarily quit his job at Nissan even though he was doing well and had received a promotion. Finally, he voluntarily quit taking Prozac and did not contact his doctor for more than six months.

It is the opinion of this court that, although Husband lacked, to some degree, the ability to pay the original alimony award at the time of the hearing, he did not lack such ability

during the entire period from October 1994 to May 1995. Further, the evidence preponderates against a finding that he completely lacked the ability to pay the alimony at any point in time. Thus, the court did not err in finding Husband guilty of criminal contempt. Nevertheless, the court did err when it sentenced Husband to a thirty day suspended jail term. Tennessee Code Annotated section 29-9-103(b) limits the courts to a \$50.00 fine and ten days of imprisonment. **Sherrod v. Wix**, 849 S.W.2d 780, 786 (Tenn. App. 1992); Tenn. Code Ann. § 29-9-103(b) (1980). For this reason, we modify the court's sentence from thirty days to ten days.

In his final issue, Husband argues that the court should terminate his alimony obligation because Wife's needs are less and because he lacks the ability to pay. Specifically, Husband contends that, at present, Wife's income and assets are greater than his. Husband's contentions are without merit. Wife's income has only increased by \$2,000.00 since 1994. Further, there is no evidence that her accumulation of assets has changed since the court entered the divorce decree. Finally, while it is true that Husband's ability has diminished, it is the opinion of the court that the preponderance of the evidence establishes that he is capable of performing some form of income producing activity. Thus, Husband has failed to establish that the chancery court abused its discretion when it decided against terminating the Husband's alimony obligation.

As to wife's request for attorney's fees, it is the opinion of this court that the issue be remanded to the trial court. "[T]he trial court is the proper forum for the determination of whether attorney[']s fees should be awarded and their amount." **Chaille v. Warren**, 689 S.W.2d 173, 180 (Tenn. App. 1985)(citing

Folk v. Folk, 210 Tenn. 367, 379, 357 S.W.2d 828, 828-29 (1962)).

The decision of whether to allow attorney's fees for an appeal includes a review of the ability to pay, the success of the appeal, the good-faith of the appellant in bringing the appeal, the need for the payment, and any other particular facts of the individual case. **Folk**, 357 S.W.2d at 829.

For the forgoing reasons, we modify that portion of the chancery court's order sentencing Husband to thirty days for criminal contempt to ten days. The remaining portions of the order are affirmed in all respects. The case is remanded to the chancery court to define retirement as used in the final decree of divorce and to determine whether Wife is entitled to attorney's fees and, if so, the amount. Costs are taxed to respondent/appellant, Victor Legrand Williams, Sr.

SAMUEL L. LEWIS, JUDGE

CONCUR:

BEN H. CANTRELL, JUDGE

WILLIAM C. KOCH, JR., JUDGE