

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
AUGUST 4, 2009 Session

KARMEN DOLOROUS LANE v. RICHARD ROLAND LANE

**Direct Appeal from the Circuit Court for Davidson County
No. 98D-1571 Muriel Robinson, Judge**

No. M2008-02802-COA-R3-CV - Filed November 17, 2009

Upon the parties' divorce, Husband was ordered to pay \$1,500.00 monthly alimony *in futuro* to Wife. Based on his decreased income since the divorce, Husband filed a petition to reduce or terminate his alimony obligation. The trial court denied Husband's petition, and we affirm. We also affirm the trial court's award of attorney fees to Wife.

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

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

Jeffrey L. Levy, Nashville, TN, for Appellant

D. Scott Parsley, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

Richard Roland Lane (“Husband”) and Karmen Dolorous Lane (“Wife”) were married for twenty-eight years before their divorce in April 2000. Pursuant to the divorce decree, Wife was awarded the parties’ marital residence valued at \$280,000.00, an automobile for which no debt was owed, her Dillard’s retirement account valued at \$4,900.00, and \$16,399.50 paid by Husband to equalize the division. Husband was awarded two automobiles, an ATV, his 401-k valued at \$148,762.00 and a money market account valued at \$169,000.00. Each party was awarded a total of \$301,362.50 in marital property.

At the time of the divorce, Husband earned \$10,000.00 per month. Because the trial court found “great disparity in the ability of each of the parties to earn income[,]” it ordered Husband to pay alimony *in futuro* to Wife in the amount of \$1,500.00 per month until either party’s death, or Wife’s remarriage.¹

On September 20, 2007, Wife filed a “Petition for Criminal Contempt” alleging that Husband had failed to make his alimony payments for the months of June, July, August and September of 2007. On January 15, 2008, Husband filed a “Petition to Modify Alimony” urging a reduction or termination of his alimony obligation due to his losing “his employment through no[] fault of his own[,]” and his inability to obtain employment “making approximately the same amount of money [] due to his age [sixty] and other reasons[.]”² Wife answered Husband’s petition, denying the existence of a material and substantial change in circumstance. She also filed a second “Petition for Criminal Contempt” on January 15, 2008, claiming that Husband failed to make his alimony payment for that month. The following day, an “Agreed Order” was entered acknowledging that Husband was guilty of contempt for non-payment from June to December 2007; however it further stated that Husband had purged the contempt by tendering \$10,500.00, representing the alimony owed. Wife filed subsequent petitions in February, April, and September of 2008, alleging that Husband failed to fulfill his alimony obligation from February through September of 2008.³

After a trial on Husband’s and Wife’s petitions, the trial court entered an “Order” denying Husband’s request for modification, stating that he was an “able bodied man who has elected to

¹ This case, dubbed by this Court as “a story of the wreck of a family[,]” was previously appealed to this Court regarding child support, division of property, contempt, and whether rehabilitative, rather than *in futuro* alimony should have been awarded. *Lane v. Lane*, No. M2000-01135-COA-R3-CV, 2001 WL 1523365 (Tenn. Ct. App. Nov. 30, 2001) *perm. appeal denied* (Tenn. Apr. 29, 2002). The award of alimony *in futuro* was affirmed. *Id.* at *3.

² Husband had previously filed a “Petition to Modify Alimony” which was voluntarily non-suited on September 10, 2001.

³ Wife claimed that Husband made partial payments as follows: March \$250.00; May \$200.00; June \$200.00; July \$200.00; August \$150.00; September \$650.00.

retire from his usual occupation and has started a new business[.]” In its “Order,” the trial court also found Husband in criminal contempt, noting that Husband “has never fully complied with any order of this Court regarding [Wife’s] alimony until he is faced with litigation.” It did not, however, assess punishment against Husband as he settled his obligation prior to the order’s entry. Finally, the trial court ordered Husband to pay Wife’s attorney fees in the amount of \$11,690.90. Husband appeals.

II. ISSUES PRESENTED

Appellant has timely filed his notice of appeal and presents the following issues, as restated, for our review:

1. Whether the trial court failed to consider the statutory factors for modification in order to punish Husband for failing to satisfy his alimony obligation;
2. If the statutory factors are considered, should Husband’s alimony obligation be terminated or reduced as of the date of his Petition, January 15, 2008; and
3. Whether the award of attorney fees to Wife was improper.

III. STANDARD OF REVIEW

Modification of a spousal support award is factually driven. *Perry v. Perry*, 114 S.W.3d 465, 466 (Tenn. 2003) (citing *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). Thus, a trial court’s decision concerning modification is “given wide latitude within the trial court’s range of discretion.” *Id.* at 466-67. (citing *Watters*, 22 S.W.3d at 821). “The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives.” *Bronson v. Umphries*, 138 S.W.3d 844, 851 (Tenn. Ct. App. 2003) (citing *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000)). “[W]e will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or if it is contrary to the governing law[.]” *Id.* However, “we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative.” *Id.* We accord great deference to a trial court’s determinations on matters of witness credibility and will not re-evaluate such determinations absent clear and convincing evidence to the contrary. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted). We review a trial court’s conclusions of law under a *de novo* standard upon the record with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. Consideration of Statutory Factors

Tennessee Code Annotated section 36-5-121 provides that the court may, upon the application of either party, modify a spousal support award upon a showing of a substantial and material change of circumstances. “It is not sufficient to simply show a change of circumstances.” *Bowman v. Bowman*, 836 S.W.2d 563, 568 (Tenn. Ct. App. 1991). To be “substantial and material,” the change “must affect the obligor spouse’s ability to pay or the obligee spouse’s need for the alimony awarded.” *Id.* (citing *Threadgill v. Threadgill*, 740 S.W.2d 419, 422-23 (Tenn. Ct. App. 1987)).

As the party seeking relief on the grounds of a substantial and material change of circumstances, Husband bears the burden of proving such changed circumstances warranting termination or a reduction in the amount of his alimony obligation. *Watters*, 22 S.W.3d at 821 (citing *Seal v. Seal*, 802 S.W.2d 617, 620 (Tenn. Ct. App. 1990)). Once he proves such grounds, the court should then “weigh the same criteria that were considered in making the initial alimony award.” *McCullough v. McCullough*, No. 01A01-9701-COA-CV-00039, 1997 WL 749459, at *4 (Tenn. Ct. App. W.S. Dec. 5, 1997) (citations omitted). These factors, enumerated in Tennessee Code Annotated section 36-5-121(I), are as follows:

- (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.

Tenn. Code Ann. § 36-5-121(I).

On appeal, Husband argues that the trial court erred in failing to consider the statutory factors for a modification. Such failure, Husband contends, evidences the trial court's "determination to make [Husband] 'pay' for his missed and partial payments at the end of 2007 and into 2008." Husband maintains that "the trial court explicitly admitted that it did not even reach a serious consideration of all of the relevant factors because past support had been late or partially paid." Husband points to the following language from the trial court's order denying his petition to modify:

If [Husband] had not totally refused to honor his alimony obligation in the past, he would be current and [Wife] would actually have increased her income which might have had the effect of promoting a reduction based on her need. This Court finds the reduction could have been minimum or slight or may[be] insignificant, however, we cannot get to this point under the present circumstances because he has never fully complied with any order of this Court regarding [Wife's] alimony until he is faced with litigation.

We reject Husband's contention that such language evidences a failure by the trial court to consider the statutory factors. In fact, the preceding sentence states "This Court has considered the factors under T.C.A. § 36-5-101(a),⁴ applicable to alleged changes of circumstances to warrant a modification of alimony." Furthermore, we find that the trial court's statement demonstrates only that if Husband had paid alimony as required, Wife's need for alimony may have diminished, warranting a modification. It reveals no punitive intention. This issue is without merit.

⁴ The statutory factors are now found in section 36-5-121.

B. Modification/Termination of Alimony

Next, Husband asks this Court to consider whether a reduction or termination of his alimony obligation is warranted. As we stated above, Husband carries the burden of proving first that a material change of circumstances has occurred, and second, that such change warrants modification. *Evans v. Young*, 280 S.W.3d 815, 825 (Tenn. Ct. App. 2008) (citing *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); see also *Byrd v. Byrd*, 183 S.W.3d 686, 691 (Tenn. Ct. App. 2005) (citing *Freeman v. Freeman*, 147 S.W.3d 234 (Tenn. Ct. App. 2003)).

To determine whether a material change of circumstances has occurred, we must compare the circumstances as they existed at the time of the divorce with the circumstances at the time Husband filed his petition for modification. *Allen v. Allen*, No. W2007-02224-COA-R3-CV, 2008 WL 5169570, at *6 (Tenn. Ct. App. Dec. 10, 2008). At the time of the parties' divorce in April 2000, Husband was earning \$10,000.00 per month. (V1, 4). In July 2000, Husband moved to South Carolina where he worked as a senior claims representative for Willis North America, earning \$120,000.00 annually. Husband claims that his employment with Willis ended in May 2001 due to "[c]orporate downsizing." In September of that year, Husband began working for Hewitt and Coleman, but left after only two weeks for a "better position" with Marsh and McLennan, earning \$100,000.00 per year. Husband left Marsh in July of 2004. He claims he "was terminated because [he] reported illegal activity" and "[b]ecause [he] refused to participate in criminal behavior."

Husband claims that after his termination from Marsh in July of 2004, he was unable to secure employment until October of 2005, when he began working for Cogdell Spencer Advisors in real estate property management, earning \$55,000.00 annually. He was, again, terminated in March of 2006. According to Husband, Cogdell's stated rationale for his termination was that he "was not a good fit[;]" however, he maintains that the termination was motivated by his reports of wrongdoing by the company to the Securities and Exchange Commission.

Husband states that he unsuccessfully searched for employment from March 2006 until April 2007, when he "made a personal commitment to open [an antique store.]" Meanwhile, Husband remarried in December 2005, and he and his new wife returned to Tennessee in October 2006. Husband used the net proceeds from the sale of his South Carolina home to purchase a home in White House, Tennessee, jointly titled in the names of both Husband and his new wife. Husband paid cash for this new home, as he was unable to obtain a mortgage, because neither he, nor his new wife, was employed.⁵

Husband opened an antique store in December 2007, which, according to Husband's handwritten report, experienced increased gross sales during each quarter. Despite these increases, Husband testified that the store operated at a loss during its first year. He further testified that he is not currently seeking employment because he believes that "in time" the antique store can earn

⁵ After paying off his mortgage, taxes, deposits, and settlement charges, Husband received \$288,788.80 cash from the sale of his South Carolina home. His White House, Tennessee, home was purchased for \$269,150.00.

“sufficient money[.]” Husband’s October 23, 2008 “Income and Expense Statement” lists his net monthly income as zero. However, Husband testified at trial to future sources of income. He stated that when he turned sixty-two, on April 30, 2009, he would become eligible to receive \$1,630.00 in monthly social security benefits. Additionally, the record reveals that Husband’s 401k valued at \$148,762.00 at the time of the divorce in 2000, had an increased value of \$212,500.82.⁶ Husband testified that at 62, he could access his 401k by incurring a twenty percent penalty, and taking a lump sum which could be converted into an annuity.⁷ He stated that he could draw \$4,000.00 per month from the annuity.⁸ Thus, upon turning sixty-two, Husband could, at a minimum, draw \$2,913.00 each month. Husband also possesses the following assets: a \$271,202.94 home, a \$14,000 motorcycle,⁹ an \$8,875 automobile, a \$17,370 automobile, \$3,522 in stock, a \$9,000 inheritance,¹⁰ and \$7,967.69 in store inventory.

At trial, Husband was asked, “Would you agree or disagree that the contribution to the payment of your . . . personal expenses, [is] about \$1,500 *a year* and your [new] wife pays the rest?” (emphasis added). Husband answered “Approximately.” However, included in the record before us are two expense statements, both filed by Husband in December 2008, in which Husband claims additional contributions. The statements, reconciled with one another, set Husband’s monthly personal expenditures claim at \$2151.50, including alimony.¹¹ We note that Husband’s \$1,454.00 monthly child support obligation terminated May 31, 2001.

⁶ In its “Order,” the trial court utilized a June 30, 2008 statement to value Husband’s 401k at \$247,238.33. We find it appropriate to value his 401k at \$212,500.82, based on an October 20, 2008 statement.

⁷ Husband testified on November 13, 2008, that his 401k’s current value was \$203,028.86. However, the record contains no statement beyond October 20, 2008, when the account was valued at \$212,500.82.

⁸ Husband’s attorney explained that Husband “misunderst[ood] [] the question” and he stated that upon Husband’s sixty-second birthday, he would be able to draw between \$1,283.00 and \$1,424.00 per month.

⁹ Husband claims this motorcycle was obtained through a trade; however, it is nonetheless an asset.

¹⁰ According to Husband, he applied \$13,000 of his \$22,000 inheritance from his mother’s estate towards his alimony arrearage.

¹¹ We have calculated Husband’s claimed personal monthly expenditures as follows: \$68.00 homeowner’s insurance; \$124.00 automobile insurance; \$50.00 gasoline; \$5.00 clothing; \$7.50 barber shop; \$262.00 life insurance; \$110.00 storage; \$25.00 automobile maintenance; \$1,500.00 alimony.

In his “Residential Monthly Expense Statement,” Husband claims “Total Expenses” of \$3,833.66. However, of those expenses, \$1707.66 are denoted as being paid by Husband’s new wife. Likewise, Husband’s “Income and Expense Statement” claims monthly expenditures of \$2723.50, but such total includes telephone and medical bills, which Husband acknowledged were paid by his new wife. Additionally, the total includes \$350.00 towards groceries despite Husband’s testimony that his new wife “buys all the groceries[.]” and his new wife’s testimony that he contributes “[m]aybe \$50” towards “the food bill[.]” Finally, the total includes a \$254.00 monthly payment towards Husband’s \$15,000 credit card debt. Because Husband testified that he charged \$13,200 the day before trial to cover his alimony arrearage, this amount is not properly included within Husband’s expenditures.

At the time of the divorce in 2000, Wife was earning approximately \$21,000.00 per year; however, by November 2008, her yearly income had increased to \$41,348.40. Wife's "Income and Expense Statement" claims a "Net Take-Home Monthly Total" of \$4,296.04, broken down as follows: \$2,477.88 post-tax wages; \$1,500.00 alimony; and \$317.56 from a pension, which she was not receiving at the time of the divorce.

Wife also acknowledges possessing the following assets: a \$10,000 401k with her previous employer; a \$3,000.00 401k with her current employer; "stock options" with her current employer; and a home purchased for \$295,000.00.¹² She claims monthly expenses of \$3673.27, including \$208.78 for her adult daughter's educational expenses. Wife acknowledged at trial that she financed five years of college for her adult daughter, who obtained no degree, and who now lives with Wife rent free. She also testified to expending \$30,000.00 towards her eldest daughter's wedding. At trial, Wife maintained that she had a continuing need for the alimony ordered, and she claimed that Husband's failure to make timely payments had required her to borrow money.

The trial court, in its order denying Husband's petition for modification, found as follows:

The Court finds from the proof that Mr. Lane is a healthy, able bodied man who has elected to retire from his usual occupation and has started a new business known as "The Stone Cottage[.]" being an antique and gift shop in White House, Tennessee. Mr. Lane has retained assets awarded to him at the time of the divorce in 2000 and he has now virtually given and commingled all assets with his present wife.

....

Mrs. Karmen Dolorous Lane has managed her assets very well since the divorce and has gone to work and increased her income somewhat to meet her expenses. She has a need for the alimony awarded to her by virtue of her expenses presented to the Court. She has been hampered by the undisciplined fact that Mr. Lane will not pay on time and she has expended much of her funds on attorney fees seeking to enforce her order of alimony payments.

Mrs. Karmen Dolorous Lane exhibited to the Court her current expense list. She shows income which includes her alimony payment, when it is paid, of \$4,296.04. She can manage quite well when Mr. Lane complies with the court

¹² As we stated above, Wife was awarded the parties' marital home, valued at \$280,000, in the divorce. She sold the marital home for \$500,000, and with the proceeds she purchased her new home for \$295,000.00. We reject Husband's suggestion that the proceeds from the sale of her home decreased Wife's need for alimony. This Court has stated that "[a]ny income produced [from assets] awarded to a spouse in the division of marital property should not be a factor in determining whether or not a change of circumstances existed to warrant a modification of periodic alimony payments." *Richards v. Richards*, No. M2003-02449-COA-R3-CV, 2005 WL 396373, at *11 (Tenn. Ct. App. Feb. 17, 2005) (quoting *Norvell v. Norvell*, 805 S.W.2d 772, 775 (Tenn. Ct. App. 1990)).

ordered alimony order. She has approximately \$622.77 left if there are no unforeseen circumstances, which would cause a necessity for unexplained expenses. However, this has not been the case because of Mr. Lane's failure to honor his commitment without the necessity of a contempt petition hanging over his head. Therefore, for many months, she was lacking \$1,500.00 and her income was \$2,796.04.

In this case, the trial court made no finding regarding whether a material change of circumstance had occurred. It merely denied Husband's modification petition, without specifying whether such denial was based on his failure to prove a material change of circumstance, or his failure to prove that such change warranted a modification. Therefore, our review is de novo without a presumption of correctness.

We find ambiguous the trial court's statement that Husband "elected to *retire* from his usual occupation[.]" (emphasis added). Based on the circumstances of this case,¹³ we find that the trial court was not referring to a full retirement from the workforce as contemplated by *Bogan*,¹⁴ but instead was stating only that Husband had chosen to leave the insurance industry in order to open his own business. Thus, we need not determine whether Husband's "retirement" was objectively reasonable. *See Bogan*, 60 S.W.3d at 729.

This Court has addressed the effect of unemployment or underemployment on an obligor's spousal support duty:

It is clear that wilful and voluntary unemployment or underemployment will not provide a basis for modifying spousal support. *Watters*, 22 S.W.3d at 823. When called upon to determine whether a person is wilfully and voluntarily unemployed or underemployed, the courts must consider the person's past and present employment, as well as the reasons for the unemployment or the taking of a lower paying job. *Watters*, 22 S.W.3d at 823. If the decision for unemployment or for taking a lower paying job is reasonable, the court will not find the person to be wilfully and voluntarily underemployed. *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001)). Courts have confronted situations in which a divorced spouse seeks to avoid an alimony obligation by quitting work or taking a lower paying job. *Walker v.*

¹³ Neither Husband nor Wife argued that Husband was "retired." In fact, Husband stated that he was "hoping to retire" and that the trial court may have been more sympathetic to his circumstances "if he had actually decided to retire in 2006" rather than opening his own business. On appeal, Wife argues that Husband is "underemploy[ed]" rather than retired.

¹⁴ In *Bogan*, our Supreme Court held that "when an obligor's retirement is objectively reasonable, it does constitute a substantial and material change in circumstances—irrespective of whether the retirement was foreseeable or voluntary—so as to permit modification of the support obligation." 60 S.W.3d at 729. (footnote omitted). However, a showing that the obligor's retirement was objectively reasonable does not necessarily entitle him to a reduction or termination of his spousal support obligation. *Id.* at 730. Instead, the trial court must then consider the statutory factors contained in Tennessee Code Annotated section 36-5-121, specifically the obligor's financial ability and the recipient's need, to determine whether a modification is warranted. *Id.* (citations omitted).

Walker, M2002-02786-COA-R3-CV, 2005 WL 229847 (Tenn. Ct. App. Jan. 28, 2005). To remedy this strategy, a spouse's support obligation should not be measured by his actual income, but rather by his earning capacity. (citation omitted).

Byrd v. Byrd, 184 S.W.3d 686, 691-92 (Tenn. Ct. App. 2005).

“Determining whether a person is wilfully and voluntarily underemployed is a fact-driven inquiry requiring a careful consideration of all the attendant circumstances.” *Walker*, 2005 WL 229847, at *3 (citing *Ralston v. Ralston*, No. 01A01-9804-CV-00222, 1999 WL 562719, at *3 (Tenn. Ct. App. M.S. Aug. 3, 1999)).

In his “Petition to Modify Alimony,” Husband stated that a material change of circumstances had occurred since entry of the divorce decree in that “he previously lost his employment through no[] fault of his own[,] . . . [and that he had] diligently tried to obtain employment making approximately the same amount of money but due to his age and other reasons he ha[d] been unsuccessful.” The record before us includes documentation regarding Husband’s search for employment, which, Husband claims, spans “some 182 pages” and “show[s] the seriousness of his job search.” The breadth of the documentation, at first glance, appears to support Husband’s diligence claim. However, upon closer examination, we find that the record does not support a finding that Husband’s underemployment was reasonable.

During a sixteen-month period of unemployment from July 2004 to October 2005, Husband applied for approximately seventy-five jobs before he secured employment with Cogdell Spencer Advisors in October 2005. Husband claims that after he was terminated from Cogdell in March 2006, he “looked for employment through-out the remainder of 2006 and up until April 1, 2007, without success.” However, the record shows that in the nineteen-month period of October 2005 to April 2007, Husband applied for only thirteen jobs—none after August of 2006.

We are careful to avoid setting a numerical requirement for the number of jobs to which an obligor spouse must apply to avoid a finding of willful and voluntary underemployment. However, after carefully considering the attendant circumstances of this case, we find that Husband’s minimal applications and early cessation of his employment search, coupled with his *negative* income due to his voluntary undertaking of a struggling business, demonstrate voluntary and wilful underemployment.

In affirming the trial court’s denial of Husband’s petition to modify alimony, we note that Wife has demonstrated her continuing need for alimony, and Husband’s ability to pay such. Including alimony, Wife’s monthly income totals \$4,296.04. After deducting her expenses—excluding her daughter’s educational expenses—Wife is left with an \$831.55 monthly surplus. Upon reaching sixty-two Husband is able to earn, at a minimum, \$2913.00 per month from social security benefits and his 401k. After deducting his personal expenses, including alimony, but

not his business expenses,¹⁵ Husband is left with a \$761.50 monthly surplus. We reject Husband's contention that he should not be required to liquidate a fixed asset—his 401k—in order to meet his alimony obligation. This Court has stated that “[a] significant decrease in income may not constitute a substantial and material change in circumstances if the obligor owns assets that can be liquidated and the obligee's need for the payments has not diminished.” *Siefker v. Siefker*, No. M2001-01458-COA-R3-CV, 2002 WL 31443213, at *3 (Tenn. Ct. App. Nov. 1, 2002) (citing *Bowman*, 836 S.W.2d at 569); *see also Richards*, 2005 WL 396373, at *10 (requiring husband to withdraw funds from his retirement account to meet his alimony obligation)).

Based on our finding of willful and voluntary underemployment, we affirm the trial court's denial of Husband's petition to modify his alimony obligation.

C. Attorney Fees

Finally, Husband argues that if this Court modifies Husband's alimony obligation, Wife's counsel should be required “to separate his fees with regard to the contempt allegations from those that related to the petition to reduce or terminate alimony.” Because we affirm the trial court in all respects, this issue is moot.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the circuit court. Costs of this appeal are taxed to Appellant, Richard Roland Lane, and his surety, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.

¹⁵“The settled rule in Tennessee is that ‘obligations voluntarily assumed are not proper to be considered as changed circumstance[s] to reduce support payments otherwise owed.’” *Richards*, 2005 WL 396373, at *9 (citing *Dillow v. Dillow*, 575 S.W.2d 289, 291 (Tenn. Ct. App. 1978); *see also Jones v. Jones*, 784 S.W.2d 349, 353 (Tenn. Ct. App. 1989)).