

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 17, 2008 Session

**MARYANN MILES DOUGLAS v. MICHAEL DAVID DOUGLAS**

**Appeal from the Circuit Court for Sumner County**  
**No. 29707-C C. L. Rogers, Judge**

---

**No. M2008-00219-COA-R3-CV - Filed January 2, 2009**

---

Wife appeals the trial court's division of marital property, the amount and duration of transitional alimony, and the award of attorney's fees in this divorce action. The parties had substantial marital debts and little marital property of value with the exception of the marital residence, which had a modest amount of equity. The trial court ordered the residence be sold and the proceeds from the sale divided equally. Wife was allowed to reside exclusively within the residence pending its sale, during which time Husband was responsible for the monthly mortgage payments. Wife was awarded transitional alimony of \$1,540 per month for twenty-four months, which was to begin when the residence was sold. Wife was also awarded \$2,500 of alimony *in solido* for her attorney's fees. We affirm the division of marital property and the award of transitional alimony. We, however, modify the award of Wife's attorney's fees, increasing the award to \$6,755.75, one-half of the amount requested.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed in Part, Modified in Part**

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

Bruce N. Oldham and Sue Hynds Dunning, Gallatin, Tennessee, for the appellant, Maryann Miles Douglas.

Charles Blackard and Robert Todd Jackson, Brentwood, Tennessee, for the appellee, Michael David Douglas.

**OPINION**

This appeal arises from a divorce action. The parties married on November 6, 1999. They have three children, a daughter, age 7, and twin sons, age 5. At the time of the marriage, Wife had a high school education and a license as a practical nurse. She began working prior to the marriage and continued working until the birth of the parties' first child in 2000. Wife went back to work

part-time in October 2006 and returned to work full-time in September 2007. Husband is employed by a commercial equipment leasing company, where he has worked for fourteen years.

Wife filed for divorce on March 5, 2006 on the grounds of irreconcilable differences and inappropriate marital conduct. On September 17, 2007, an Agreed Order was entered stipulating that each party was entitled to a divorce pursuant to Tennessee Code Annotated section 36-4-129. A trial was held on September 20, 2007, in the Circuit Court for Sumner County. Following the trial, the court issued a Memorandum Opinion on September 26, 2007, and a Final Decree of Divorce on October 10, 2007.

The trial court determined that Wife's annual income as a Licensed Practical Nurse ("LPN") at a children's clinic was \$20,000, with a net monthly income of \$1,448. Husband's annual income was found to be approximately \$122,000, with a \$7,000 net monthly income. Wife was designated as the primary residential parent and was awarded child support of \$1,794 per month. After finding that both spouses had overstated their reasonable monthly expenses,<sup>1</sup> the court determined that Wife was economically disadvantaged, and that while she did not need rehabilitation, she needed transitional alimony for twenty-four months, which would begin the month following the sale of the marital home.<sup>2</sup> The trial court set Wife's alimony at what it deemed Husband had "the reasonable ability to pay" and Wife's reasonable need, which the trial court determined to be \$1,540 per month.<sup>3</sup>

When dividing the marital estate, the trial court stated that there was simply not "enough to go around," in terms of marital assets. In dividing the marital property, the court accepted the parties' stipulations as to their separate property, and adopted the values of the marital assets submitted by the parties. Wife had no cash assets or savings, while Husband had an E-trade account valued at \$11,000. Wife and Husband were each awarded their own vehicle. The only marital asset of any value was the marital residence, which was valued at approximately \$250,000, but which had significant debts encumbering the property totaling in excess of \$215,000.<sup>4</sup> The court ruled that the residence was to be sold at a commercially reasonable price, with the net proceeds from the sale divided equally between the parties. The trial court also ordered that Husband was to make reasonable repairs on the residence up to the sum of \$2,500, and that he was to be reimbursed for the repairs from the net proceeds of the sale of the home.

---

<sup>1</sup>Some of Husband's expenses the court found to be unreasonable were his dues and expenses at two country clubs, Fairvue Plantation and Gallatin Country Club.

<sup>2</sup>The trial court did not award her transitional alimony for the period of time she had exclusive use of the marital residence because Husband was paying the mortgage during that period of time.

<sup>3</sup>This figure was originally set at \$1,360 but was amended in a subsequent order to correct a mathematical error.

<sup>4</sup>The parties stipulated that at the time of trial the balance owed on the first mortgage was \$175,326.46, and the balance owed on the second mortgage was \$39,802.58.

Wife was allowed to reside exclusively within the residence until it was sold, during which time Husband would be solely responsible for the monthly mortgage payments. If the residence did not sell within nine months, the court provided that either party could file a motion asking the court to order the residence sold at auction. The parties were to mutually agree upon the listing agent and the sales price for the home.

The marital debts were allocated as follows. Husband was ordered to pay the home equity line of credit to Regions Bank, the Bank of America line of credit, the Bank of America Visa, the Nissan Motor Credit on his vehicle, the Sears card, and any obligation to the IRS through 2006. Wife was ordered to pay the AmSouth Visa credit card, the Lowe's credit card, the two Capital One accounts, the ADT and DirectTV accounts, and all utilities on the marital residence while she resided there. The court also ordered Husband to pay \$2,500 of Wife's attorney's fees as alimony *in solido*.

Thereafter, both parties filed motions to alter or amend the court's order. In her motion, Wife requested that the marital residence not be sold until the youngest children reached eighteen years of age, that the court increase her alimony, and that the court expressly provide that the alimony was modifiable. She also requested the award of her attorney's fees be increased substantially. In his motion, Husband requested that the marital residence be sold immediately, that the transitional alimony be made modifiable upon the death or remarriage of Wife, that the court specify which debts were to be paid from the proceeds of the sale of the residence, and that attorney's fees be awarded to him for the cost of filing his motion.

On January 9, 2008, the trial court ruled on the parties' motions to alter or amend, in which the court denied most of the relief sought by the parties. The court, however, issued an order which corrected a mathematical error, thereby increasing Wife's alimony to \$1,540 per month, expressly provided that the transitional alimony was modifiable in the future, and granted Husband's request to appoint a listing agent to immediately list the residence for sale. As Husband requested, the court authorized the agent to determine the listing price for the property. The court also afforded both parties an opportunity to submit affidavits to support their competing requests for attorney's fees. On March 26, 2008, following review of the parties' affidavits in support of their requests for attorney's fees, the trial court issued an order stating it would not modify the award of attorney's fees as stated in the Final Decree of Divorce, wherein Wife was awarded \$2,500. Wife appeals.

#### ANALYSIS

On appeal, Wife raises four issues. The first is whether the trial court erred in its distribution of the marital assets and debts, specifically, whether the trial court should have allotted her a larger portion of the value of the marital residence. Secondly, Wife argues that the trial court erred in its award of transitional alimony of \$1,540 for only twenty-four months. She advocates both a larger award and a longer duration for her to receive alimony. Lastly, Wife seeks an increase of her award of alimony *in solido* for her attorney's fees below. Both parties seek to recover the attorney's fees they incurred on appeal. We shall address each issue in turn.

## DIVISION OF MARITAL PROPERTY

The division of the parties' marital estate begins with the classification of the property as separate or marital property. *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). Tennessee is a "dual property" state, *Smith v. Smith*, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002), thus, property cannot be included in the marital estate unless it is "marital property." The definition of that term is found in Tenn. Code Ann. § 36-4-121(b)(1)(A). "Separate property," as that term is defined in Tenn. Code Ann. § 36-4-121(b)(2), is not marital property. Therefore, separate property should not be included in the marital estate. *Woods v. Woods*, No. M2002-01736-COA-R3-CV, 2005 WL 1651787, at \*3 (Tenn. Ct. App. July 12, 2005). Property classification is a question of fact. *Mitts v. Mitts*, 39 S.W.3d 142, 144-45 (Tenn. Ct. App. 2000). Thus, we review the trial court's classification using the familiar standard of review in Tenn. R. App. P. 13(d).

Once property has been classified as marital property, the court should place a reasonable value on property that is subject to division. *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at \*11 (Tenn. Ct. App. May 13, 2003). The parties have the burden to provide competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values presented. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997). Decisions regarding the value of marital property are questions of fact, *Kinard*, 986 S.W.2d at 231; thus, they are not second-guessed on appeal unless they are not supported by a preponderance of the evidence. *Smith*, 93 S.W.3d at 875.

Once the marital property has been valued, the trial court is to divide the marital property in an equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Miller*, 81 S.W.3d at 775. A division of marital property in an equitable manner does not require that the property be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c). *Kinard*, 986 S.W.2d at 230. Trial courts have wide latitude in fashioning an equitable division of marital property, *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983) and this court accords great weight to the trial court's division of marital property. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). Thus, we defer to the trial court's division of the marital estate unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence. *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

Wife contends that she should be awarded the marital residence subject to a \$20,000 lien in favor of Husband, which would be paid off upon the sale of the property or when the parties' youngest children turn eighteen, whichever occurred first. Admitting her proposed distribution would afford her a greater distribution than Husband, Wife insists that she should receive more because she received no cash assets and has the primary responsibility of raising the parties' three small children. Husband, however, argues that the trial court did not abuse its discretion in its division of the marital property, including the proceeds from the sale of the marital residence.

As the trial court noted, the problem is the parties have essentially no assets of any value except for the modest equity in the marital residence. The trial court was well aware of the financial circumstances of the parties and the modest estate to be divided. Based upon our review of the record, it appears the trial court's division of the marital estate was consistent with the factors in Tenn. Code Ann. § 36-4-121(c) and that its decision is supported by a preponderance of the evidence. *See Brown*, 913 S.W.2d at 168. We, therefore, affirm the division of the marital estate.

Having affirmed the trial court's decision to sell the residence and to divide the net proceeds equally, we must address Wife's contention the trial court erred in allowing the realtor to set the sale price. First we note the court stated that it was to be sold for a commercially reasonable price; therefore, the real estate agent would be obliged to set the sale price consistent with that mandate. We also believe the issue is now moot due to the fact more than nine months have passed and the trial court expressly authorized either party to request the residence be sold at auction.

Based upon the foregoing analysis, we affirm the trial court's division of the marital estate and the mandate that the residence be sold in the manner provided in the Final Decree of Divorce.

#### ALIMONY

There are no hard and fast rules for spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682-683 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996). Alimony decisions require a careful balancing of the factors in Tenn. Code Ann. § 36-5-101(d)(1) and typically hinge on the unique facts and circumstances of the case. *See Anderton*, 988 S.W.2d at 683; *see also Hawkins v. Hawkins*, 883 S.W.2d 622, 625 (Tenn. Ct. App. 1994). The two most important factors are the need of the disadvantaged spouse and the obligor's ability to pay. *Varley v. Varley*, 934 S.W.2d 659, 668 (Tenn. Ct. App. 1996).

Determinations of alimony are factually driven and require the trial court to balance the various factors contained in Tennessee Code Annotated section 36-5-101(d)(1)(A)-(L) (2001). *Robertson v. Robertson*, 76 S.W.3d 337, 338 (Tenn. 2002). An alimony award may be reversed only if the trial court abused its discretion. *See Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). "It is not the role of the appellate court to fine tune a trial court's spousal support award." *Atkins v. Motycka*, No. M2007-02260-COA-R3-CV, 2008 WL 4831314, at \* 3 (Tenn. Ct. App. Nov. 6, 2008) (citing *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at \*9 (Tenn. Ct. App. Sept. 1, 2006) (no Tenn. R. App. P. 11 application filed); *Hartman v. Hartman*, No. E2000-1927-COA-R3-CV, 2001 WL 823188, at \*7 (Tenn. Ct. App. July 20, 2001)). To the contrary, the role of the appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable. *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001).

In this case, the trial court found that Wife was not in need of rehabilitation and that she only required transitional alimony for a period of twenty-four months following the sale of the residence. Transitional alimony may be awarded when rehabilitation of the disadvantaged spouse is not

necessary, but the court finds “the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce. . . .”<sup>5</sup> *Wynns v. Wynns*, No. M2007-00740-COA-R3-CV, 2008 WL 4415786, at \*3 (Tenn. Ct. App. Sept. 26, 2008) (quoting Tenn. Code Ann. § 36-5-121(d)(4)).

On appeal, Wife contends the trial court erred in finding that she overstated her expenses, that she should be granted more alimony per month, and that the duration of her alimony should be extended. She also contends that Husband’s greater earning capacity and the modest assets she received in the divorce, as well as her designation as the primary residential parent, entitle her to a larger award of alimony.<sup>6</sup> Although Wife is in a most unfortunate financial position, we find as the trial court did that both parties are in a difficult financial position due principally to the parties’ substantial debts and modest assets. As we stated above, determinations of alimony are factually driven and the trial court is to balance the various statutory factors contained in Tennessee Code Annotated section 36-5-101(d)(1)(A)-(L). *Robertson*, 76 S.W.3d at 338. On appeal, our role in reviewing an award of alimony is to determine whether the trial court applied the correct legal standard and whether the trial court reached a decision that is not clearly unreasonable. *Bogan*, 60 S.W.3d at 733. The record reveals that the trial court applied the correct legal standard and the decision reached by the trial court clearly is not unreasonable. Thus, we affirm the decision to award transitional alimony in the amount of \$1,540 for a period of twenty-four months following the sale of the residence.

#### WIFE’S ATTORNEY’S FEES

The trial court awarded Wife \$2,500 for her attorney’s fees and costs. She had requested \$13,511.50.<sup>7</sup> An award of attorney’s fees in a divorce case constitutes alimony *in solido*. *Anzalone v. Anzalone*, No. E2006-01885-COA-R3-CV, 2007 WL 3171132 (Tenn. Ct. App. Oct. 30, 2007) (no Tenn. R. App. P. 11 application filed) (citing *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996)). When determining whether to award attorney’s fees, the trial court must consider the relevant factors regarding alimony set forth in Tenn. Code Ann. § 36-5-121(i). *Failey v. Failey*, No. M2006-02510-COA-R3-CV, 2008 WL 933202, at \*5 (Tenn. Ct. App. Apr. 7, 2008) (citing *Echols v. Echols*, No. E2006-02319-COA-R3-CV, 2007 WL 1756711 at \*7 (Tenn. Ct. App. June 19, 2007) (no Tenn. R. App. P. 11 application filed)).

---

<sup>5</sup>Transitional alimony is nonmodifiable except in certain circumstances as provided in Tennessee Code Annotated section 36-5-121(g)(2). One such exception is when the court expressly states in the decree of divorce that it is modifiable in the future. Tenn. Code Ann. § 36-5-121(g)(2)(B). Here, the court expressly provided in the amended Final Decree of Divorce that Wife’s transitional alimony would be modifiable in the future.

<sup>6</sup>Wife’s contention that the award of alimony is insufficient centers on her estimate of the cost of caring for their three children; however, Husband was ordered to pay \$1,794 in child support per month, which constitutes an amount in accordance with the Guidelines, and the amount of child support was not raised as an issue on appeal.

<sup>7</sup>The attorney’s fees total \$12,600, and costs are an additional \$911.50.

Wife included in her Complaint a request for attorney's fees, however, she was not afforded the opportunity to submit a detailed request or an affidavit in support of her request until her motion to alter or amend the final decree was entertained by the trial court, which was after the trial court had already set her attorney's fee award at \$2,500. We find it significant that the trial court announced its decision to award \$2,500 prior to receiving the formal application with the detailed affidavit of counsel requesting an award of \$13,511.50, and the trial court made no findings and gave no reason for its determination that Wife should recover only \$2,500 of the amount requested.

There is nothing improper about a trial court making an award of attorney's fees without receiving a formal or detailed application for fees. In this case, however, the trial court announced its decision to award Wife \$2,500 of her attorney's fees prior to receiving and without considering the detailed fee application, in spite of granting Wife permission to make a formal application for fees. We find this constitutes error and, therefore, we will examine the fee application in order to determine the amount to award.

The fee request is very detailed, and nothing in the fee request appears to be unnecessary or unreasonable. To the contrary, the services rendered and expenses incurred appear to be necessary and reasonable. The attorney expended 72 hours representing Wife in this matter, which at \$175 per hour, totals \$12,600. The out of pocket expenses total \$911.50. As discussed above, the two most important factors for us to consider are the need of the disadvantaged spouse and the obligor's ability to pay. *See Varley*, 934 S.W.2d at 668. Wife is significantly disadvantaged economically compared to the Husband's income; however, Husband has numerous obligations to pay, which somewhat impairs his ability to pay additional alimony in the form of Wife's attorney's fees. For this reason, we find he does not have the ability to pay the entirety of Wife's attorney's fees and costs, however, he is able to pay half of her attorney's fees and costs, which amounts to an award of \$6,755.75.

#### ATTORNEY'S FEES ON APPEAL

Wife also seeks her attorney's fees on appeal. "Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court." *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at \*6 (Tenn. Ct. App. Dec. 17, 2007) (citing *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995)). In determining whether an award is appropriate, we take into consideration the "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered." *Id.* at \*6 (citing *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at \*10 (Tenn. Ct. App. Sept. 3, 2003)).

For the same reasons we determined Wife is entitled to recover one-half of her attorney's fees and costs incurred in the trial court, we find she is entitled to recover reasonable and necessary attorney's fees incurred on appeal. Therefore, we remand this issue to the trial court for a determination of the amount of attorney's fees incurred on appeal that Wife is entitled to recover.

### IN CONCLUSION

The judgment of the trial court is affirmed in part and modified in part, and this matter is remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed against Michael Douglas and his surety.

---

FRANK G. CLEMENT, JR., JUDGE