

**IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE**

**FILED**  
January 26, 2000  
Cecil Crowson, Jr.  
Appellate Court Clerk

ESTHER JANE KERR,	)	03A01-9903-GS-00083
	)	E1999-00214-COA-R3-CV
Plaintiff/Appellee	)	
	)	Appeal As Of Right From The
v.	)	BLOUNT COUNTY
	)	GENERAL SESSIONS COURT
HOWARD TRUITT KERR,	)	
	)	HON. HOWARD L. UPCHURCH
Defendant/Appellant	)	JUDGE

**For the Appellant:**

Keith McCord  
McCORD, TROUTMAN  
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**For the Appellee:**

Charles M. Clifford  
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AFFIRMED as MODIFIED  
and REMANDED

Swiney, J.

**OPINION**

\_\_\_\_\_This is an appeal by Howard Truitt Kerr (“Husband”) of the division of marital property and the award of alimony in solido and periodic alimony to Esther Jane Kerr (“Wife”) in the divorce granted to Wife based on the statutory grounds of inappropriate marital conduct after a 35-year marriage. From a marital estate of \$613,000, the Trial Court awarded Husband marital assets of approximately \$334,707 plus household goods. Wife was awarded marital assets of approximately \$277,607 plus household goods and an additional \$80,000 as alimony in solido. The Trial Court also awarded Wife \$1,400 per month as alimony in futuro, and ordered Husband to pay Wife's monthly health insurance premiums. We affirm the judgment of the Trial Court as to the

division of marital assets and the award of periodic alimony and modify the judgment as to the award of alimony in solido.

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**Background**

These parties married in 1961 when Husband was a full-time student at the University of Tennessee and Wife was a nurse's aide. They have two grown children. In 1964, before their second child was born, Wife quit working outside the home and has worked outside the home on two occasions since 1964. She was employed for four months in a greenhouse and for one year at an auto parts plant. Except for her job at the auto plant, all her employment was at minimum wage.

Husband is employed as a nuclear engineer for Martin-Marietta. He also receives an annual salary of \$16,500 as a member of the Tennessee legislature. His IRS 1040 Individual Income Tax returns reported income from wages/salaries in 1996 of \$92,519; in 1995 of \$88,889; in 1994 of \$72,309; and in 1993 of \$68,340. Some of that income was derived from selling back unused leave time. During that four-year period, Husband reported farming losses averaging \$16,000 per year.

In 1996, Wife was diagnosed as having thyroid cancer which required surgery, radiation and subsequent treatment. At the time of trial, her doctor thought she was cancer-free, but opined that a five-year waiting period is recommended to determine if the condition has been cured. She has other medical conditions, including hypertension and depression. Wife's treating physician testified by deposition that she was totally unable to work at the time of trial.

The Trial Court correctly found that the marital estate consists of the following: the marital home, valued at \$145,000; a second dwelling, valued at \$34,000; approximately \$122,000 in cash; Husband's retirement benefits at Martin-Marietta; each party's automobile; Husband's beekeeping/honey business, valued at \$14,000; notes receivable from various friends and relatives aggregating \$21,000; and the customary household goods and personalty.

After hearing testimony about Husband's 1985 extramarital affair and 1997 post-

separation conduct, the Trial Court found that Wife was entitled to a divorce based upon Husband's inappropriate marital conduct. Husband does not appeal the Trial Court's decision that Wife was entitled to the divorce.

The Trial Court awarded to Husband the marital home, one-half of the cash, one-half of the Martin-Marietta retirement fund, his personal auto, the beekeeping business, several small notes receivable and the agreed upon household goods and personalty. The Trial Court awarded to Wife the smaller dwelling, one-half of the cash, one-half of the Martin-Marietta retirement fund, her personal auto, a note receivable from the parties' daughter and the remaining household goods and personalty. The result of this division of marital assets was that Husband received assets worth \$334,707, and Wife received assets worth \$277,607.

The Trial Court's Final Judgment also awarded alimony in solido of \$80,000 to Wife “to equalize the distribution of the parties' marital property interests.” The Judgment reflects that Husband was ordered to pay the alimony in solido in four lump sums over a period of four years.

Finally, the Trial Court ordered Husband to pay Wife \$1,400 per month as periodic alimony. The Trial Court also ordered Husband to pay the cost of Wife's monthly health insurance premiums, not to exceed \$250 monthly, until she reaches the appropriate age to receive Medicare health benefits.

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### **Discussion**

Our review is de novo upon the record, accompanied by a presumption of the correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Rule 13(d), T.R.A.P.; *Lindsey v. Lindsey*, 976 S.W.2d 175, 178 (Tenn. App. 1997).

In this appeal, Husband states the issues as follows:

1. Whether the Trial Court's award to the Plaintiff Wife of \$358,577.00 out of a marital estate of approximately \$613,000.00 is a fair and equitable division of the marital property under T.C.A § 36-4-121 when all of the marital property was accumulated through the efforts of the Defendant Husband?
2. Whether the Trial Court erred in awarding the Plaintiff Wife alimony in futuro in the amount of \$19,800.00 annually in addition to an excessive and

inequitable award of the marital property?

3. Whether the Trial Court failed to consider or comply with applicable statutory factors, ignored legislative policy, and abused its discretion in awarding an excessive and inequitable amount of marital property to plaintiff wife, coupled with an award of alimony in futuro, punitive in nature, and in excess of her needs?

Although Husband stated these as three separate issues, he addressed them together in one argument. For the sake of clarity, we restate the issues before us on appeal as:

1. Whether the Trial Court erred in its award of periodic alimony?
2. Whether the Trial Court erred in its division of the marital assets and award of alimony in solido?

**Award of Periodic Alimony**

\_\_\_\_\_ T.C.A § 36-5-101(d)(1) provides, as pertinent:

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 (a)(3) . . . .[I]n determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:

- (A) 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;
- (B) 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 earning capacity to a reasonable level;
- (C) The duration of the marriage;
- (D) The age and mental condition of each party;
- (E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (F) 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;
- (G) The separate assets of each party, both real and personal, tangible and intangible;
- (H) The provisions made with regard to the marital property as

defined in § 36-4-121;

(I) The standard of living the parties established during the marriage;

(J) 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;

(K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

(L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

T.C.A. § 36-5-101(d)(1) (1994).

While all relevant factors must be considered, need and the ability to pay are the critical factors in setting the amount of an alimony award. *Smith v. Smith*, 912 S.W.2d 155, 159 (Tenn. Ct. App. 1995). In this case, Wife worked outside the home for less than two years during this 35-year marriage. She is 57-years old and in poor physical and mental health. Her doctor testified that she is unable to work. Husband is a nuclear engineer with a substantial income. Husband complains that the investment of Wife's share of the marital assets, together with the award of periodic alimony, will result in Wife having an annual income of "at least \$46,000 without invading assets," which he thinks is excessive. However, Wife is presently living in a \$34,000 dwelling while Husband owns the marital home, valued at \$145,000. Wife is driving a six-year-old automobile while Husband's auto is two years old. Wife reasonably argues that she may need to convert cash into other forms of property, such as a house more in keeping with her previous lifestyle or a newer car. If she purchases a home with the same approximate value as the marital home, her income-producing assets will decrease substantially.

The amount of alimony to be awarded is a matter for the trial court's discretion in view of the particular circumstances of the case. Appellate courts are not inclined to alter an alimony award except where the record reflects that the Trial Court's discretion has been abused. *Gilliam v. Gilliam*, 776 S.W.2d 81, 86 (Tenn. Ct. App. 1988). The preponderance of the evidence in the record before us is not contrary to the Trial Court's findings of fact. We hold that the Trial Court did not err in awarding \$1,400 in monthly periodic alimony plus monthly health insurance premiums to

Wife. We affirm the Trial Court's award of periodic alimony.

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**Award of Marital Assets**

From a marital estate of \$613,000, the Trial Court awarded \$334,707 in assets to Husband and \$277,607 in assets to Wife. The Trial Court, from the bench, stated:

Now, if you gentlemen at some point later this evening go through and make your – add your figures up and what have you, you will see that there is about a fifty-seven thousand dollar difference in the value of assets apportioned between Mr. Kerr and Ms. Kerr. And that fifty-seven thousand dollars is in favor of Ms. Kerr [sic-Mr. Kerr] at this point. I am going to direct Mr. Kerr to make this an equal division. And the Court basically finds that after thirty-five years of marriage that the division of these assets should be – an equitable division – would be approximately a fifty-fifty division. The Court finds that Mr. Kerr should pay the following amounts to Ms. Kerr on the following dates to equalize the division of assets made by the Court.

According to the trial transcript, the Trial Court then ordered, from the bench, that Husband was to Pay Wife \$10,000 on June 1, 1998; \$20,000 on June 1, 1999 and \$25,000 on June 1, 2000. The Court then stated, “So, he will be paying her an additional eighty thousand dollars over a four year period.” We note that the three payments recited total \$55,000, not \$80,000. The Final Judgment entered in the case recites that four payments, not three, are to be made, including a payment of \$25,000 on June 1, 2001.

Since alimony in solido, which is not modifiable, is not generally awarded out of future income, the Trial Court's Final Judgment results in Husband's share of the marital estate being reduced by \$80,000 in order to provide \$80,000 alimony in solido to Wife. *See Aleshire v. Aleshire*, 642 S.W.2d 729, 733 (Tenn. Ct. App. 1981). That results in an award to Husband of \$254,707 of the marital estate and an award to Wife of \$357,607 of the estate. We are unable to ascertain the Trial Court's rationale for the award of \$80,000 alimony in solido if, in fact, the Court sought to effect “approximately a fifty-fifty division.” The Trial Court held that an equitable division of the marital assets “. . . would be approximately a fifty-fifty division.” The award of \$80,000 alimony in solido as contained in the Final Judgment results not in approximately a 50% - 50% division, but rather a 58% - 42% division in favor of Wife. We are aware that the \$80,000 is to be paid over four years. Wife argues this four-year payout makes the present value “considerably less than \$80,000.”

There is nothing in the record before us concerning the “present value” of the \$80,000.

An award of \$55,000 of alimony in solido paid in three installments, as ordered by the Trial Court from the bench, rather than \$80,000, is closer to the fifty-fifty division found by the Trial Court to be equitable. An award of \$55,000 of alimony in solido results in a 54% - 46% division in favor of the Wife. We hold this to be an equitable division.

### **Conclusion**

We hold that the Trial Court did not err in determining that an equal, or “approximately a fifty-fifty” division of the marital estate is equitable. Therefore, we modify the judgment of the Trial Court to reflect that Wife is awarded \$55,000 in alimony in solido, to be paid in three payments as stated by the Trial Court from the bench. As modified, the judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for such further proceedings, if any, as may be required consistent with this Opinion, and for collection of the costs below. Costs of this appeal are assessed one-half to each party.

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D. MICHAEL SWINEY, J.

**CONCUR:**

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HOUSTON M. GODDARD, P.J.

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JOSEPH M. TIPTON, SpJ.