

MARY POOR AYERS,	)	
	)	
Plaintiff/Appellee,	)	
	)	Montgomery Chancery
	)	No. 90-65-518
VS.	)	
	)	Appeal No.
	)	01-A-01-9508-CH-00355
JAMES OLIVER AYERS,	)	
	)	
Defendant/Appellant.	)	

<p><b>FILED</b></p> <p><b>March 22, 1996</b></p> <p><b>Cecil W. Crowson</b>  <b>Appellate Court Clerk</b></p>
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IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF MONTGOMERY COUNTY  
AT CLARKSVILLE, TENNESSEE

HONORABLE ALEX W. DARNELL, CHANCELLOR

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MODIFIED, AFFIRMED AND REMANDED

HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:  
SAMUEL L. LEWIS, JUDGE  
BEN H. CANTRELL, JUDGE

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OPINION

This is a divorce case in which the principal bone of contention is the division of marital property, but the unusual procedure in the Trial Court must also be reviewed.

The parties were married on July 12, 1975. The husband was 51 and retired, and the wife was 28 and employed. No children were born to this marriage, but the defendant-husband has adult children of a former marriage. The parties separated on July 24, 1990, and this suit was filed on August 23, 1990. At the marriage, the husband owned two businesses- a realty corporation and an incorporated auto dealership. At the same time, he owned the land occupied by the dealership and adjoining vacant land later leased for construction of a restaurant. The realty was encumbered with a \$200,000 mortgage.

The separate property of the wife at marriage consisted of an automobile in which she held an equity of \$2,000 and unvalued household effects. The wife worked at the dealership for pay until it closed in 1977. In 1976, the wife joined in a deed of trust securing the renewal of the \$200,000 debt on the realty. She did not sign the renewal note. In 1978, the parties executed a trust deed, assigned the lease on the commercial property and signed a note for \$235,000 to renew the \$200,000 debt, and finance improvements of the commercial property and their home and the purchase of a “motor home.”

At the time of trial, the husband was 68 years old and unemployed except for serving as an officer and tournament director of a golf association. The wife was 45 years old with a

high school education and some college credit. Her net earnings were \$943.00 per month and her claimed monthly expenses were \$2,275, leaving a shortage of \$1,332 per month.

*-Proceedings in Trial Court-*

In August, 1990, the wife filed this suit for divorce. In September, 1990, the husband filed his answer.

In November, 1991, the wife admitted in a deposition that she had committed adultery, but refused to name her paramour. In January, 1992, the husband counterclaimed for divorce and the wife amended to assert two years of separation as grounds of divorce.

In July, 1992, the first Trial Judge, on motion of the husband, required the wife to write the name of her paramour and file it in a sealed envelope. This was done.

In August and September, 1992, the parties filed proposals for division of property. On November 20, 1992, the first Trial Judge ordered a trial to be held on January 4, 1993, on the sole issue of division of property. On February 12, 1993, the first Trial Judge filed a memorandum of his division of property and, on May 4, 1993, an order was entered. On July 1, 1993, on motion to alter or amend, an amended order was entered by the first Trial Judge dividing the real estate, but not the personalty, of the parties, reserving issues as to grounds of divorce and division of furnishings and household goods, and recusing himself from participation in further proceedings in the case.

On February 17, 1994, the second Trial Judge conducted a further hearing and entered a "Final Decree" in which the husband was granted a divorce on grounds of inappropriate marital conduct; the prior order of July 1, 1993, was approved and incorporated by reference;

and the wife was awarded judgment against the husband for \$807.68. The decree further provided:

4. The plaintiff is awarded all furnishings and personal property on the attached list designated by an 'x' and that the defendant is awarded all remaining property on such list. Each party is awarded any additional property in their possession but not on the list. Any issues as to whether the listed property is still in the defendant's possession is reserved. The plaintiff will deliver the table in her possession to his home as soon as possible.

5. At 4:30 P.M., February 17, 1994, the plaintiff shall come to the defendant's residence at Peterson Lane, Clarksville, and a Deputy Sheriff of Montgomery County is directed to accompany her. She shall take into her possession the items awarded in this decree, and the Deputy shall prepare a list of all items taken, to be signed by the Deputy and filed with the court. Any charges for the Deputy's services shall be assigned as court costs and these and all other court costs shall be equally divided by the parties.

6. The defendant is awarded all the plaintiff's interest in a Volkswagen bug and bus and shall pay to the plaintiff the sum of \$700.00, payable at \$100.00, per month starting March 15, 1994. The plaintiff shall pay all storage and towing charges due.

On appeal, the husband presents four issues, of which the fourth is:

4. Whether the trial court erred by recusing himself after dividing the parties' property when the information prompting such recusal was available to the trial court prior to its division of the parties' property?

T.C.A. Section 17-2-100 lists five grounds of incompetency which disqualify a judge from sitting on a particular case. Canon 3(C)(1) of Rule 10 of the Supreme Court lists eight grounds of disqualification. None of these grounds are shown in the present case. Indeed, neither party questioned the competency of the first Trial Judge, and the record contains no other information as to his reasons for recusal.

Canon 10D of Rule 10 of the Supreme Court permits a judge to disclose on the record the basis of his disqualification, after which the parties may waive the disqualification. This record contains no such disclosure or waiver.

It is well settled that recusal rests within the sound discretion of the judge involved. *Memphis Board of Realtors v. Cohen*, Tenn. App. 1989, 786 S.W.2d 951; *Wiseman v. Spaulding*, Tenn. App. 1979, 573 S.W.2d 490.

The present case presents the situation where a Trial Judge rules upon part of a controversy, but refuses to rule upon the remainder of the controversy without stating a reason or vacating his partial ruling to allow his successor to rule upon all issues.

In *Coastal Petroleum Co. v. Mobil Oil Corp.*, Fla. App. 1980, 378 So.2d 336, it was held that a Trial Court, which had recused itself as to issues that had been severed for separate trial and specifically reserved jurisdiction to rule on matters previously tried, retained authority to enter final judgment later on the issues already tried. In the present case, the first Trial Judge entered judgment on previously tried matters before recusing himself.

No other published authority is cited or found which would reflect on the fourth issue.

Prior to entering partial judgment, the first Trial Judge bifurcated the issues, separating the distribution of the marital estate from other issues. He then considered evidence on distribution of marital estate and decided that issue. In divorce cases, the courts are required to equitably divide the marital estate without regard to marital fault. T.C.A. §36-4-121, *Fisher v. Fisher*, Tenn. 1983, 648 S.W.2d 244; *Wilder v. Wilder*, Tenn. App. 1992, 863 S.W.2d 707.

Property divisions are not ordinarily made before a determination of the issue of whether and to whom the divorce should be granted. However, in the absence of objection of a party or demonstrated prejudice, it is difficult to conceive how such action could be reversible error. This is especially true so long as the partial judgment as to property and

remained subject to revision until final judgment was rendered as to all issues. *See* T.R.C.P. Rule 54.02.

No prejudice having resulted from the unusual order of procedure, it is deemed harmless. T.R.A.P. Rule 36(b).

Appellant's first issue is:

1. Whether the trial court erred by classifying real property owned by James Ayers before the marriage as marital property and by distributing an interest in that property to Mary Ayers?

The briefs do not cite and this Court has been unable to find a part of the record which reflects that the first Trial Court classified real property owned by the husband before the marriage as marital property. It appears to be undisputed that all of the real property was owned by the husband before the marriage. Its value at the time of the marriage was therefore the separate estate of the husband. T.C.A. §36-4-121,(b)(2)(A).

However, T.C.A. §36-4-121(b)(1)(B) and (C) provide:

(B) "Marital Property" includes income from, and any increase in value during the marriage, of property determined to be separate property... if each party substantially contributed to its preservation and appreciation and the value of vested pension, retirement or other fringe benefit rights accrued during the period of the marriage.

(C) As used in this subsection, "substantial contribution" may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

Prior to the marriage the commercial real estate of the husband was worth approximately \$150,000.00. At the time of the divorce, it was worth approximately \$1,050,000.00 due to an increase in value during the marriage of approximately \$900,000.00. This increase could be treated as marital property if the statutory conditions were shown. There is evidence that, during the marriage, the wife was the "financial manager" of the

automobile dealership, property management and personal finances; that she was involved in the leasing of the property to commercial enterprises; and that she managed the home where the parties lived and entertained. Moreover, as stated initially, she joined in signing some of the documents involving the real estate. All cash income of either party from any source was deposited in the joint bank account of the parties which was administered by the wife. The evidence just summarized was contradicted. However, on appeal from a cause tried without a jury, the decision of the Trial Judge based upon credibility of witnesses will not be reversed unless the record contains concrete and convincing evidence other than testimony which contradicts the findings of the Trial Court. *Bowman v. Bowman*, Tenn. App. 1991, 836 S.W.2d 563.

No reversible error is shown in support of the husband's first issue.

The husband's second issue is:

2. Whether the trial court erred by tying the parties' property together in its order distributing the parties' real property?

The amended judgment entered by the first Trial Judge provided:

1. Mary Poor Ayers and James Oliver Ayers are awarded the following realty as equal tenants in common, referred to as the Mrs. Winner's property: . . . .
2. That profits from the leased property above referenced, and all other Riverside Drive property owned by the defendant James Ayers, including Lots H5-6, referred to as the Nissan Automobile Dealership property, owned by the defendant, not described in the Winner's lease, shall be divided for a period of ten (10) years from the entry of this Order, 70% to James Ayers, and 30% to Mary Ayers, after deducting out-of-pocket expenses. Out-of-pocket expenses shall include:
  - A. Mortgage payments.
  - B. Payment of note for roof repair.
  - C. 2% of the gross rental, to defer future costs of repair - professional fees for accounting and lease drafting. This money need not be escrowed, but expenditures from this fund shall be shown in an annual accounting provided to Mary Ayers by James Ayers.

3. The defendant, James Ayers, may convey or encumber any portion of Lots H5-6, commonly referred to as the Nissan Automobile Dealership, or other property situated on Riverside Drive, Clarksville, Tennessee, not subject to ownership interest by Mary Ayers, but after the sale or mortgage of any portion of Lots H5-6, the plaintiff, Mary Ayers, may at her option, receive the full payment of the Mrs. Winner's lease for the remainder of its terms, with the defendant, James Ayers having payments from the remaining property, she may continue to receive the 30% of all leases if she chooses. Any mortgage must be for a reasonable commercial purpose and not to defeat the interest of Mary Ayers.

4. If the lease on the Mrs. Winner's property, is not renewed, then the parties may agree to lease or sell to other persons, with any rental profit from a new lease within ten (10) years from the date of the entry of this order, to be divided 70/30, in accordance with this order, and any rental profits or sale profits received after ten (10) years from the date of the entry of this order, to be divided equally.

T.C.A. Section 36-4-121 confers broad powers in respect to adjusting property interests whether legal or equitable. The legal title to the property under discussion was in the husband, but there is evidence that the wife made some contributions to the preservation and enhancement of the buildings on the property and the production of an income producing lease on the property. Her interest in the realty was equitable, measurable by the extent of her contribution to the preservation and enhancement of the value of the property and income therefrom. The increase in the value of the property due to the general rise in the price of property in the neighborhood was not traceable to any activity of the wife, and she is not entitled to participate in or profit from such rise in general market values.

Without questioning the authority of the Trial Judge to devise and decree the unusual plan of compensating the wife for her equitable interest in the commercial realty, this Court must respectfully disagree with the complex conclusion reached.

After reviewing the evidence *de novo* with due regard with the findings of the Trial Judge as to credibility, this Court concludes that the equitable interest of the wife in the commercial realty would be equitably satisfied by payment to her of \$150,000 in ten equal



annual installments without interest secured by lien upon the interest the husband has in the restaurant property and the income therefrom. By this means, the complex plan set out in the order of July 1, 1993, may be vacated and deleted.

The husband's third issue is:

3. Whether the trial court's division of marital property was inequitable under the circumstances?

Both parties have included in their briefs a "Rule 15 Statement" regarding the disposition of marital property by the Trial Court. Neither is particularly helpful because neither contains the information required by Rule 15 of the Rules of this Court. Particularly absent is the finding of the Trial Court as to the value of various properties. It does not appear that the Trial Court made such a finding. Of special interest is the value of the equitable interest in the commercial property and income therefrom. Also, the monetary value of the interest in income allocated to the wife is not discussed in the order of the Trial Court or the briefs of the parties.

No complaint is made as to the allocation of property other than the commercial property. Therefore, the disposition of such other property need not be discussed or disturbed.

This Court has heretofore disposed of the issue of distribution of the commercial property.

In addition to the issues presented by the husband, the wife complains that the Trial Court failed to award her alimony and attorneys' fees.

In divorce actions, attorneys' fees awarded to a party are treated as alimony. *Gilliam v. Gilliam*, Tenn. App. 1988, 776 S.W.2d 81.

The allowance of alimony is a discretionary question for the Trial Court, and the appellate courts are disinclined to review the exercise of that discretion unless its exercise was clearly erroneous. *Hall v. Hall*, Tenn. App. 1989, 772 S.W.2d 432.

T.C.A. Sections 36-5-101(a)(1) and (d) provide authority and criteria for awards of support and maintenance (alimony). Among the relevant criteria are the following:

- A. Earning capacities, resources and needs of the parties.
- B. Relative education and need for same.
- C. Duration of marriage.
- D. Age and mental condition.
- E. Physical condition.
- G. Separate assets.
- H. Share of marital assets.
- I. Standard of living.
- K. Relative fault.

Considering all of the foregoing, this Court concludes that the share of the marital assets allocated to the wife above, is equitable and fair and does not require an additional award of alimony. *See Barnhill v. Barnhill*, Tenn. App. 1991, 826 S.W.2d 443; *Seal v. Seal*, Tenn. App. 1990, 802 S.W.2d 617.

In summary, the judgment of the Trial Court is modified by deleting therefrom the above quoted verbiage relating to disposition of interests in commercial property and substituting therefore the following:

In satisfaction of the equitable interest of Mary Poor Ayers in the appreciation of value and income from commercial real estate of the defendant, James Oliver Ayers, she is awarded the sum of \$150,000.00 to be paid by James Oliver Ayers in annual installments of \$15,000.00 without interest, beginning 30 days after entry of this modified judgment. A lien is hereby declared and imposed upon the commercial property of defendant and income therefrom to secure payment of said installments. Each of said installments shall represent a judgment against said James Oliver Ayers enforceable by execution 30 days after the due date of each installment.

In all other respects, the judgment of the Trial Court is affirmed. Costs of this appeal are taxed equally; that is, each party is required to pay one-half of same. The cause is

remanded to the Trial Court for entry of judgment in conformity with this opinion and for such other proceedings as may be necessary and proper.

Modified, Affirmed and Remanded.

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HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

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SAMUEL L. LEWIS, JUDGE

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BEN H. CANTRELL, JUDGE