IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

CAROL JEAN MOSE,	**)**	
	)	
Plaintiff/Appellant/Counter-Appellee,	**)**	Maury Chancery No. 94-011
	)	
v.	**)**	C.A. No. 01A01-9508-CH-00337
	)	
JEFFREY NORMAN MOSE,	**)**	
	)	
Defendant/Appellee/Counter-Appellant.	**)**	

APPEAL FROM THE CHANCERY COURT OF MAURY COUNTY
AT COLUMBIA, TENNESSEE
THE HONORABLE JIM T. HAMILTON, CHANCELLOR

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AFFIRMED AS MODIFIED

WILLIAM H. WILLIAMS, SENIOR JUDGE

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

This is an appeal from a non-jury divorce action heard in Chancery form in Maury County, Tennessee. The Complaint alleging irreconcilable differences or, in alternative, inappropriate marital conduct was filed by the appellant, Carol Jean Mose, on January 7, 1994. The hearing of all issues

was tried October 14, 1994 and by final order entered November 4, 1994, Mrs. Mose was awarded an absolute divorce from the appellee, Jeffrey Norman Mose, on the grounds of inappropriate marital conduct. The trial court ordered distribution of marital assets, payment of medical insurance, attorneys' fees, and alimony. Mrs. Mose filed two motions to alter or amend the final order pursuant to Rule 59.04, T.R.C.P., on November 23, 1994 and November 29, 1994. The defendant filed a motion to alter or amend judgment or in the alternative for a new trial and a request for findings of fact and conclusions of law. All motions were heard by the trial court on January 13, 1995. By order styled "Order on Motion to Reconsider" filed February 21, 1995, the trial court reduced the monthly alimony payments to be paid by Mr. Mose from $2,000 to $1,500. Both parties filed a Rule 3, T.R.A.P., appeal and by agreement between the parties, Mrs. Mose, the plaintiff below is the appellant here, and Mr. Mose, the defendant below, is the appellee here. Both appeals have been perfected and are properly before this Court. The appellant, Mrs. Mose, will be addressed in this Court as Wife, and Mr. Mose, the appellee, will be addressed as Husband.

ISSUES

The Wife's issues are as follows:

1. Whether the trial court failed to provide for equitable division of the marital assets by omitting to award Mrs. Mose an equitable share in the Husband's retirement account.

2. Whether the trial court properly awarded Mrs. Mose alimony in futuro and erred by reducing Mr. Mose's alimony obligation in the absence of additional record evidence demonstrating a substantial and material change in circumstances.

3. Whether Mr. Mose should be obligated to pay all post-trial attorneys' fees and expenses incurred by Mrs. Mose.

The Husband's issues are as follows:

1. Whether the trial court properly acted within its discretion in awarding Wife $92,800 of after-tax marital property and awarding Husband a net after-debt of only $56,166 of largely pre-tax property.

2. Whether the trial court erred in awarding the Wife $1,500 alimony, a $414 car payment, and $235 health insurance premium in view of her ability to earn and Husband's limited ability to pay.

3. Whether Wife should be allowed attorneys' fees on appeal.

FACTS

The parties were married June 16, 1979 in Michigan. At the time of trial, wife/plaintiff was 62 years of age and the husband/defendant was 48 years of age. No children were born of the marriage. Both had been previously married. Wife was widowed after 25 years and had seven children with her first husband. At the time of the marriage to the defendant Mose, Wife owned a home and 106 acres that she received upon her first husband's death. After their marriage, Mr. and Mrs. Mose lived upon the property for about seven years before moving to Tennessee where the Husband accepted a transfer to Saturn, a General Motors subsidiary. The Husband's pension and his savings accounts with General Motors all amounted to about $10,000 at the time of the marriage. After the marriage, the Michigan house was placed by the Wife in both of their names as co-tenants. Upon moving to Tennessee, the Michigan house was sold at a net equity of $46,000. A portion of these proceeds was used to pay off the balance of a property improvement loan of $28,000. The Wife also received $8,800 from the sale of the second tract of land that was located across the road from the house. The record is not clear whether that land was also titled in the joint names of the parties. Additionally, under a land purchase contract for the aforesaid land located across the road from the house, the Wife received $108 a month through October, 1995 for the sale of this acreage. After the divorce complaint was filed, the Tennessee house, that was built by the parties in which the net proceeds from the sale of the Michigan house were used, was sold in August, 1994 for a net equity gain of $45,000. The Wife returned to Michigan to live permanently. At the trial, Husband stated he planned to transfer to the General Motors plant at Warren, Michigan to continue his employment as a general foreman in maintenance. The Wife worked outside the home during the marriage in addition to the Husband. She worked while living in Michigan as a school bus driver, making about $230 weekly. In Tennessee, she worked at the Saturn cafeteria, where she earned approximately $200 per week. The Wife saved her pay in a separate account by agreement and with the consent of the Husband. She treated her money earned by working as a separate account. The account originally accumulated about $20,000, but the Wife subsequently loaned to her son by previous marriage $10,000 from the account in order for the son to purchase a horse. At the time of the divorce, the balance in the savings account was $10,000. Wife had primary responsibility of caring for the home. At time of the divorce, the Husband had been employed by General Motors for over 30 years and had worked for several divisions including Saturn. At time of trial, he was a

general foreman at Saturn earning in excess of $90,000 annually including overtime. He had earned year-to-date, that is, October, 1994, $73,714. The parties stipulated that the present value of the pension plan of the Husband was $52,380. Husband also participated in the General Motors stock savings program and the Saturn personal choices savings account, the cumulative value of which was $48,000. The Husband withdrew $9,700 for personal use between the date the complaint was filed and the date of the trial.

It is fair to say that, based upon a thorough examination of the record, the Wife came into the marriage with no debt and significant assets while the Husband had substantial debts including $660 per month child support payments and virtually no assets except his clothes and employment with General Motors. The record further shows that during the marriage of 15 years the Husband earned substantially more than the Wife and was overall a good provider. At the trial, the Husband testified that the Wife was a good homemaker. The couple had lived in Michigan for seven years before moving to Tennessee where they lived together for eight years.

The Wife discovered that the Husband was having an affair with a co-worker at Saturn about two years before the complaint was filed. Efforts were made by both parties to reconcile, but they were not able to do so. During the course of the marriage, the Husband had always agreed with the Wife that the income earned by the Wife was hers to use as she desired. However, at the trial, the Husband listed the savings account of the Wife in the amount of $10,000 as a marital asset, as well as the $45,000 realized from the sale of the Tennessee house, and insisted that these accounts should be divided between the parties. Fault cannot be considered by the court in the distribution of marital assets, but we think it is nevertheless pertinent to note that the Husband admitted in his answer to the allegations set out in the complaint charging him with inappropriate marital conduct that the allegations were true. Also, the Husband testified under oath at trial that the charges were true and that he had had an affair three years before the complaint was filed, but had stopped it a year ago.[1]

The assets listed by the parties at the time of the trial that they owned and was for disposition by the court were as follows: cash - $45,000, savings account - $8,800, savings account - $10,000,

[1]"Q. You admitted to having an affair three years ago? A. That's correct. Q. That affair continued until when? A. About a year ago. Q. At that point did it stop? A. That's correct." Pgs. 96-97, Transcript of Proceedings.

household goods - $18,000, 1994 Lumina van - $14,000, 1993 Z-34 automobile - $15,000, Saturn savings and General Motors stock savings - $48,000, and value of pension retirement fund - $52,380. Debts consisted of a $4,000 loan from Nations Bank and a $31,000 balance on the GMAC loan for the Lumina and Z-34 vehicles.

The record shows that the parties had previously agreed that the Wife take the Lumina van valued at $14,000 and the Husband take the Z-34 automobile valued at $15,000. Household furniture of the estimated value of $18,000 was split, with $15,000 value to the Wife and $3,000 to the Husband. The parties do not take issue with the division of the personal property other than, as will be later shown, the requirement that the Husband pay the car note on the Lumina van. The financial liability of the Husband at the time of the trial was a $4,000 loan from Nations Bank and the payments in the total amount of $31,000 owed jointly by the parties to GMAC. The monthly payment on the Lumina van is $419. Husband's monthly expenses are $1,360. The Wife's expenses listed at the trial were $2,437.72. The income of the Wife at the time of the trial was $108 for the land contract ending October, 1995 and a social security payment of $331 a month. Wife testified that she was buying a house in Michigan at a price of $74,900. The $2,437.72 monthly expense included an estimated mortgage payment on the house. Wife had no other liabilities.

The court's order filed November 4, 1994 granted an absolute divorce to the Wife on the ground of inappropriate marital conduct. The order set aside as separate property to the Wife, cash in the amount of $45,000, the $8,800 and the $10,000 savings accounts. The personal property previously agreed by the parties, including the Lumina van, was awarded to the Wife, and the Husband was ordered to satisfy the remaining balance of the indebtedness thereon. The Husband further was required to maintain major medical and hospitalization insurance covering the Wife by COBRA for 36 months and at the conclusion of the 36 months, Husband's spousal support be increased by $300 per month automatically to cover additional and supplemental insurance coverage as Wife will no longer be eligible for COBRA. The trial court awarded the Wife alimony of $6,550.25 for attorneys' fees to be paid by the Husband and alimony in futuro in the amount of $2,000 monthly. In order to provide a fund to insure this payment, it was ordered that the Wife be irrevocably designated as beneficiary of Husband's life insurance in the amount of $200,000. The Husband was ordered to pay the court costs. The order further recited that the Husband receive the General Motors stock savings program and the Saturn personal choices savings account in the total

amount of $48,000, the General Motors retirement fund in the amount of $52,400, the 1993 Chevrolet Z-34 automobile and the indebtedness. The order of the court further stated:

> The court has considered 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, the relative training and education of each party, the duration of the marriage and the age and physical condition of each party in reaching a decision in this case.

The Wife was a high school graduate and the Husband had received two years of college education.

This is a divorce action held without the intervention of a jury. As such, the trial court is vested with broad discretion in adjudicating the rights of the parties. See, e.g., Evans v. Evans, 558 S.W.2d 851, 854 (Tenn. Ct. App. 1977); Fisher v. Fisher, 648 S.W.2d 244, 246 (Tenn. 1983). Rule 13(d) of the Tennessee Rules of Appellate Procedure requires this Court to review the findings of fact by the trial court de novo upon the record, accompanied by a presumption of the correctness of the findings. Unless the preponderance of the evidence is otherwise, we must affirm absent error of law. The trial court in this case did not make an oral or written findings of fact. At the conclusion of the trial, the chancellor stated that he was going to take the case under advisement and would let the parties know. So it is that this Court is presented with the transcript of the proceedings, the transcript of the technical record, the exhibits, and the court's decree. We note that the Husband presented, by a post-trial motion, a paper writing filed as Exhibit 1 to the motion styled "Findings of Fact and Conclusions of Law" and moved the court to approve. The court did not sign and the motion was apparently denied. In the case of Kelly v. Kelly, 679 S.W.2d 458 (Tenn. Ct. App. 1984), the trial court failed to make a findings of fact. It was held that the court would review the record de novo without the presumption of correctness. See Kelly, id. at 460.

> In this case, our ability to attach the presumption of correctness to the trial court's decision has been hampered by the absence of any findings of fact and conclusions of law by the trial judge or any other explanation of the rationale used to achieve the final result.
>
> * * *
>
> Rather we will proceed to review the record de novo. Since the trial court made no findings of fact, there is nothing in this record upon which the presumption of correctness contained in Tenn. R. App. P. 13(d) can attach.

We agree with Kelly and this Court will proceed to review the evidence in this case de novo without the presumption of correctness. However, the material facts necessary to support the conclusions of the chancellor granting a divorce absolute to the Wife on the ground of inappropriate marital conduct are admitted by the Husband in his answer, by counsel for the Husband in his opening statement and by the Husband in his testimony at the trial, thereby rendering that issue moot. The chancellor accordingly found for the Wife. We affirm.

Furthermore, there is no material dispute by the parties of the evidence necessary to determine the identification and division of the property, the alimony, spousal support, and the post-trial attorneys' fees incurred by the Wife. The basic question then to be answered by this Court is whether the trial court abused its discretion in its determinations to be found in its order granting the divorce.

The various state statutes[2] applicable to the issues in this case give wide discretion to the trial court in making its decision. This Court has repeatedly stated in many decisions that the trial court's discretionary decisions will be given great weight, and unless the evidence preponderates against its findings or there is error of law requiring reversal under T.R.A.P. 36(a), we must affirm. See, cf., Wade v. Wade, 897 S.W.2d 702, 715 (Tenn. Ct. App. 1994); Evans v. Evans, 558 S.W.2d at 854; Pennington v. Pennington, 592 S.W.2d 576, 577 (Tenn. Ct. App. 1979); Wallace v. Wallace, 733 S.W.2d 102, 106 (Tenn. Ct. App. 1987).

"Abuse of discretion" may be defined generally as a naked exercise of power by a court of law committed capriciously and arbitrarily without authority of law. Webster's Third International Dictionary Unabridged defines the word "capricious" to mean "marked or guided by caprice: given to changes of interest or attitude according to whims or passing fancies: not guided by steady judgment, intent or purpose." Webster's also defines the word "arbitrary" to mean "arising from unrestrained exercise of the will, caprice or personal preference."

Accordingly, this Court will review this record independently and de novo without the presumption of correctness. See Kelly v. Kelly, id. at 460.

I.

[2]See T.C.A. §§ 36-4-121 and -122; 36-5-101 and -102.

MARITAL PROPERTY

We will first consider the marital property issue raised by both parties. The Wife complains that the trial court erred by not awarding her an equitable share of Husband's retirement accounts as marital property and Husband questions whether the trial court properly acted within its discretion in awarding Wife $92,800 of after-tax marital property and awarding Husband a net after-debt of only $56,166 of largely pre-tax marital property. Both parties cite basically the same authorities to support their contentions, not because the facts are the same, but because these cases lay down certain basic principles that the courts must follow in making decisions to distribute marital property.

In divorce cases, the distribution of marital property rests squarely in the discretion of the trial court under statutory and case law guidelines, but each case must be decided upon its own facts on an ad hoc basis. Two cases that are generally the most quoted for this purpose are Barnhill v. Barnhill, 826 S.W.2d 443 (Tenn. Ct. App. 1991), and Batson v. Batson, 769 S.W.2d 849 (Tenn. Ct. App. 1988). Barnhill states at pages 449-50:

> T.C.A. § 36-4-121(a) provides that marital property should be equitably divided without regard to fault. An equitable division, however, is not necessarily an equal one. Trial courts are afforded wide discretion in dividing the interest of the parties in jointly owned property (citing authorities).

Accordingly, the trial court's distribution will be given great weight on appeal, Edwards v. Edwards, 501 S.W.2d 283, 288 (Tenn. Ct. App. 1973), and will be presumed to be correct unless we find the preponderance of the evidence otherwise. Lancaster v. Lancaster, 671 S.W.2d 501, 502 (Tenn. Ct. App. 1984).

T.C.A. § 36-4-121(c) sets forth factors which are intended to guide the court in making an equitable distribution:

> [T]he court shall consider all relevant factors including:
>
> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial labilities and financial needs of each of the parties;
>
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;

(4) The relative ability of each party for future acquisitions of capital assets and income;

(5) The contribution of each party to the acquisition, preservation, appreciation, or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled his or her role;

(6) The value of the separate property of each party;

(7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective;

(9) The tax consequences to each party; and

(10) Such other factors as are necessary to consider the equities between the parties.

T.C.A. § 36-4-121(b)(1)(A) defines the "marital property" to mean:

[A]ll real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date.

(B) Marital property includes income from, and any increase in value during the marriage, of property determined to be separate property in accordance with subdivision (b)(2) 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 a homemaker, wage earner, parent, or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

(D) Property shall be considered marital property as defined by this subsection for the sole purpose of dividing assets upon divorce and for no other purpose; and

(2) 'Separate property' means:

(A) All real and personal property owned by a spouse before marriage;

(B) Property acquired in exchange for property acquired before the marriage;

(C) Income from and appreciation of property owned by a spouse before marriage except when

> characterized as marital property under subdivision (b)(1); and
>
> (D) Property acquired by a spouse at any time by gift, bequest, devise, or descent.

Batson v. Batson, id. at 856 states as follows:

> Tennessee is a dual property jurisdiction because its divorce statutes draw a distinction between marital and separate property. Since Tenn. Code Ann. § 36-4-121(a) (Supp. 1988) provides only for the division of marital property, proper classification of a couple's property is essential (citing authorities). Thus, as a first order of business, it is incumbent on the trial court to classify the property, and then to divide the marital property equitably (citing authorities).
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> ***
>
> A trial court's division of marital property is to be guided by the factors contained in Tenn. Code Ann. § 36-4-121(c). However, an equitable property division is not necessarily an equal one. It is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case.

Id. at 859.

The trial court explicitly set out in its order the factors it considered. They were: 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, the relative training and education of each party, the duration of the marriage, and the age and physical condition of each party.

We think that the trial court properly considered all relevant factors under the facts of this case necessary to its decision and agree that this was a case of balancing the equities between the parties in order to effectuate a just and reasonable distribution of the marital property. Although the Michigan house and adjacent lot owned by the Wife prior to the marriage were subsequently placed in the joint names of the parties and the proceeds of the sale of the house were used to purchase and build a house in Tennessee jointly owned by the parties, we agree with the trial court that transmutation did not occur[3] because the Husband did not intend it to be. See, e.g., Batson, id. at

[3]Transmutation occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property. One method of causing transmutation is to purchase property with separate funds, but to take title in joint tenancy. This may also be done by placing separate property in the names of both spouses. The rationale underlying both of these doctrines is that dealing with property in these ways creates a rebuttable presumption of the gift to the marital estate. Batson v. Batson, 769 S.W.2d 849, 858.

858.

Husband testified at the trial that while it never became an issue until the last few years, he did tell his wife that what she had had, what was hers, that he considered it to be hers.[4] Furthermore, referring to the savings accounts of $10,000 and $8,800, Husband testified:

> I told her I would not mess with that money and I kept out of it except for times that she talked about, where I dipped in and had taken some money, and I have replaced it. But I didn't mess with that money.[5]

Again, referring to the $45,000 gained from the sale of the Tennessee house, Wife testified:

> Q. Why do you think that's separate? You mention that you had put this real estate in both your names. What is the true source of those monies right there?
>
> A. I feel that I had the house and property before I even met Jeff. It was something my first husband accumulated for me and my family. And, really, Jeff didn't put anything into the house, when you figure the loan that he made for the improvements was paid back by the selling of the home.
>
> So he came into the marriage with nothing. I think he should go out with nothing, as far as the home.[6]

Langford v. Langford, 421 S.W.2d 632, 634 (Tenn. 1967) says: "It is clear that the determination of jointly owned property is a question of fact and the trial court is not held to the record title." Although Husband at the trial adopted a different position that the $45,000 and the $8,800 were marital property, his testimony plainly refutes such a theory. We hold that the $45,000 and the $8,800 are separate property and find that the trial court did not abuse its discretion by distributing this marital property to the Wife. The $10,000 savings account should ordinarily be determined to be marital property since the Wife acquired this money during the marriage by saving her payroll checks while employed outside the home. However, the Husband consented to her treating this account as her own property. This, in effect, was a gift from Husband to Wife.[7] Thus, it was never the intention of either party that this account be jointly held. We, therefore, hold that the $10,000 savings account was properly determined by the trial court to be separate property.

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[4]See Pg. 107, Transcript of Proceedings.

[5]See Pg. 108, Transcript of Proceedings.

[6]See Pg. 44, Transcript of Proceedings.

[7]T.C.A. § 36-4-121(b)(2)(D) provides "separate property" means "property acquired by a spouse at any time by gift, bequest, devise or descent."

Wife alleges that the trial court erred by failing to provide for an equitable division of the marital assets by omitting to award her a share of the retirement accounts consisting of the GM pension retirement plan, the GM stock savings program, and the Saturn personal choices savings account. The value of the pension plan is $52,380 and the accumulated value of the two savings plans is $48,000. The accounts were valued at approximately $10,000 before the marriage, leaving a net value of $90,380. T.C.A. § 36-4-121(b)(1)(B) provides that marital property also includes the value of vested pension, retirement or other fringe benefits accrued during the marriage. Wife insists that she is entitled to a one-half portion because in the absence of proof to the contrary, it is presumed that the parties owned the marital property equally. Harrington v. Harrington, 798 S.W.2d 244 (Tenn. Ct. App. 1990). We agree with the principle, but disagree that Wife is entitled to a share of the retirement accounts under the particular facts of this case because there is proof to the contrary that effectively rebuts the presumption. The trial court did consider the factors enumerated in T.C.A. § 36-4-121(a) just as we do, and we find that unlike Harrington where the couple had been married for 35 years and had three children of the marriage, the parties here were married only 15 years and had no children. Mr. Harrington was an on-the-road salesman and was away from the home much of the time, placing the heavy burden of homemaker and raising the three children solely upon Mrs. Harrington. In the case sub judice, both worked outside the home and there was no responsibility of raising children although Wife's two children by previous marriage lived with them. In both cases, the husband was the principal income producer. In Mrs. Mose's favor are the factors of her age, her lack of earning capacity compared to the Husband's, and her limited ability by age and education to earn a substantive income in the future. We will discuss the alimony in futuro later, but, for purposes of deciding this issue, we are of the opinion that on the whole, an equitable and just division of the marital property was reached by the trial court. As said in Harrington, id. at 245, "On the other hand we have also said that the statute T.C.A. § 36-4-121(c) does not mandate an equal division of the marital estate but requires an equitable division considering the factors in the statute." We would add "and also the facts peculiar to each case." We affirm the division by the trial court of the marital property and the identification of the separate property.

The personal property division previously agreed upon by the parties including the Lumina van to the Wife and the Z-34 automobile to the Husband is not an issue except that the Husband complains that he must pay the Lumina indebtedness. We find no abuse of discretion by the trial

court in requiring the Husband to do so and affirm. Husband acknowledged at the trial that he would provide for Wife's major medical and hospitalization insurance. He now claims the court erred by requiring him to pay a $235 monthly premium. We find the court's decision to be reasonable and, in light of the Husband's previous testimony at the trial, we do not disagree with the court's decision and affirm.

II.

ALIMONY

The trial court awarded as alimony the Wife's attorneys' fees in the amount of $6,550 to be paid by the Husband. It awarded alimony in futuro of $1,500 per month[8] with the requirement in order to insure payment that Wife be irrevocably designated as beneficiary on the life insurance policy of the Husband for $200,000 and lastly that the Husband pay court costs. Wife asserts that the court erred in reducing the alimony in futuro from $2,000 to $1,500 in the absence of additional record evidence demonstrating a substantial and material change in the circumstances. Husband charges the trial court with abuse of discretion in awarding $1,500 per month alimony. Husband's argument is based upon facts not in the record to support his contention.

On January 13, 1995, a hearing was held on both parties' T.R.C.P. 59 motions to alter or amend judgment. No additional testimony or evidence was offered. The record is silent. Any comments by either party concerning the reasons or reasoning of the trial court in reducing the alimony in futuro is purely speculation and will not be considered by this Court. We are independently reviewing this evidence de novo without the presumption of correctness. We will not make our decision by attempting to discern reasons for the trial court's decisions. See Kelly v. Kelly, 679 S.W.2d at 460. We cannot agree with the contentions of either party. Under Rule 59, T.R.C.P., it is not necessary that there be a substantive and material change in circumstances to warrant the trial court on its own motion, upon proper notice to the parties, or on motion of either party to alter or amend judgment if filed and served within thirty days after the judgment has been properly entered. This statutory procedure affords the trial judge the discretion to correct any mistake of fact or law it deems to have made without granting a new trial. Such procedure saves time and efficiency in the appellate process and promotes equity and justice to the litigants.

T.C.A. § 36-5-101(d)(1) provides that:

> 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. . . .
>
> * * *

[8]The trial court in its original order allowed $2,000 per month, but upon a Rule 59 motion reduced that amount to $1,500.

> [T]he 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 in training to improve such party's earning capacity to a reasonable level;
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> (C) The duration of the marriage;
>
> (D) The age and physical 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;
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> (G) The separate assets of each party, both real and personal, tangible and intangible;
>
> (H) The provisions made with regards to the marital property as defined in § 36-4-121;
>
> (I) The standard of living of 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.

Considering these factors, we find that the trial judge failed to adequately provide alimony in futuro for the Wife. Her age of 62 years, together with a lack of formal education, qualifies her only for minimum wage work. There is value to the proposition that the Wife was a good homemaker. Another factor is the relative fault of the parties. The record shows the Husband's income to be $7,164 a month and over $90,000 for the last two years including overtime. Wife's income was about $800 per month or $9,600 annually. Husband's earning capacity is about nine times greater than the Wife's.

> As a general matter, the courts set the amount of a support award based on the needs of the innocent spouse and on the ability of the obligor spouse to pay. Fisher v. Fisher, 648 S.W.2d 244, 246-47 (Tenn. 1983); Barker v. Barker, 671 S.W.2d 843, 847 (Tenn. Ct. App. 1984). If one spouse is economically disadvantaged compared to the other, the courts are generally inclined to provide some type of support.

Batson v. Batson, 769 S.W.2d at 861.

In consideration of all relevant factors, we think that the trial court's original award of $2,000 was proper. Because the Wife is 62 years of age and partially disabled as a result of a car wreck, her ability to earn income is substantially limited while the Husband, who at age 48, has a vastly superior earning capacity with thirty years of employment with GM. We do not agree with Husband's assertion that Wife is not willing to work. She has worked her entire life. She suffered an injury in an automobile accident and while she has made a recovery, she is disabled to work in certain job categories that would entail heavy lifting for instance. We find based upon an independent review of the relevant factors set out in T.C.A. §§ 36-4-121(c) and 36-5-101(d) and upon the evidence in this record that the $2,000 per month is a proper award. The Husband earns over $90,000 per year, overtime pay notwithstanding. Overtime as a general foreman with 30 years plus seniority is readily available to the Husband. The Wife so testified and the Husband generally agreed subject to a slight qualification. He testified that he is transferring to the Powertran/Warren General Motors, North American Organization in Warren, Michigan, and while confident he would work overtime on Saturdays, Sundays were questionable. In other words, the earning capacity of the Husband is entirely in his hands. His outstanding debts at the time of the trial consisted only of a $4,000 loan at Nations Bank and the indebtedness on the two vehicles. If the Husband retires or experiences a change in income or earning capacity, his proper recourse is to petition the trial court for relief. We modify the trial court's award to the Wife of alimony in futuro by fixing the amount to be at $2,000 per month.

III.

ATTORNEYS' POST-TRIAL FEES

Wife asks that her post-trial attorneys' fees be paid by the Husband. The Husband opposes. While we have the discretion to allow legal expenses, in light of this Court's additional award of

alimony in futuro to the Wife, we think it would be unjust and unreasonable to burden the Husband with additional post-trial attorneys' fees. Both parties appealed and we feel each are financially capable of paying their own attorneys' fees.

The judgment of the trial court as modified in this opinion is affirmed. The costs of the appeal will be taxed in equal proportion to Carol Jean Mose and Jeffrey Norman Mose, for which let execution issue if necessary.

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WILLIAM H. WILLIAMS, SENIOR JUDGE

CONCUR:

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W. FRANK CRAWFORD, P.J., W.S.

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DAVID R. FARMER, J.