

In this divorce case, the trial court granted a divorce and divided the marital estate. Additionally the wife (plaintiff) was awarded alimony in solido and attorney's fees. From this judgment, the husband (defendant) has appealed. We affirm the judgment of the trial court.

The defendant presents the following issues for our review:

1. Whether the Trial Court erred in awarding the wife a divorce based upon the relative fault of the parties after previously awarding the parties a divorce from one another on stipulated grounds?
2. Whether the Trial Court erred in awarding the wife alimony in solido and attorney fees because her needs were sufficiently provided for by the disproportionately large share of the marital estate she received?

The appellee presents the following additional issues:

1. Whether the trial court was correct in its division of the marital estate and in awarding the wife alimony of \$315.55 [\$315.53] per month and attorney fees.
2. Whether the appellant, who is in wilful contempt of court in that he has not made payment of alimony as ordered by the court leaving the appellee to pay the mortgage to preserve the assets at issue in the appeal, should be barred from pursuing this appeal by the equitable defense of "clean hands" [sic] and the appeal should be dismissed.

By order entered on June 20, 1995, the trial court granted a divorce to the parties on stipulated grounds pursuant to T.C.A. § 36-4-129. The court also awarded the plaintiff three months alimony of \$200.00 per month and reserved all other matters pending further orders of the court. On January 24, 1996, the court conducted another hearing to decide the issues that had been reserved at the earlier hearing. After a trial the court granted a divorce to the plaintiff based on relative fault notwithstanding his earlier decree granting a divorce on stipulated grounds and, among other things, the court awarded the plaintiff supplemental attorney's fees in the amount \$1,000.00.

We will first look to the second issue raised by the plaintiff. The plaintiff has attempted to supplement the record in this case by filing an order of the trial court entered on August 20, 1996. In the August order, the court was ruling on a petition wherein it was alleged that the defendant was in contempt of court. Neither a motion to supplement the record nor to consider post-judgment facts has been made in this court. We are of the opinion that this issue is not properly before this court and we decline to address it.

We will address the remaining issues in order. In the first issue the defendant complains that the court erred in granting a divorce to the plaintiff after having previously granted a divorce

to the parties pursuant to T.C.A. § 36-4-129. Firstly, we note that the first order granting a divorce is not clear as to whether the trial court awarded a divorce to both parties rather than to either party alone. Secondly, we note that the earlier order had not become final at the time of the entry of the second and final judgment.

T.C.A. § 36-4-129 provides as follows:

36-4-129. Stipulated grounds and/or defenses —Grant of Divorce. —(a) In all actions for divorce from the bonds of matrimony or from bed and board, the parties may stipulate as to grounds and/or defenses.

(b) The court may, upon such stipulations or upon proof, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone.

Since the order of June 20, 1995, was not final, the trial court was at liberty to exercise his discretion and amend or change the previous order at any time.¹ We, therefore, hold that the trial court in awarding the divorce to the plaintiff in the second and final order in this case was a proper exercise of discretion granted by T.C.A. § 36-4-129 and was not error. We resolve the first issue in favor of the plaintiff.

¹We do not have the benefit of a transcript of hearing which resulted in the June 20 order.

Defendant's second issue complains of the trial court's action in awarding the plaintiff alimony in solido and attorney fees because her needs were sufficiently provided for by the division of the marital assets. The alimony award was for \$315.53 payable to the plaintiff until the indebtedness on the parties' residence, which was awarded to the plaintiff, was satisfied. We note here that the first and second issue become intertwined because defendant argues that fault on the part of the defendant is one of the factors to be considered when addressing the issue of alimony. See T. C. A. § 36-5-101(d)(1)(K). We find nothing in the record, however, to suggest that the court based its decision relating to alimony in any way upon the relative fault of the parties.

As to the award of alimony and attorney fees, it is well-settled that "the amount of alimony and counsel fees to be awarded in a divorce suit is largely in the discretion of the trial judge and the appellate courts will not interfere except upon a clear showing of abuse of such discretion." Crouch v. Crouch, 53 Tenn. App. 594, 605, 385 S.W2d 288, 293 (1964). 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, 772 S.W2d 432 (Tenn. App. 1989). While it is true that the plaintiff received a higher percentage of the marital estate than the defendant, it is demonstrated by the record that there are no

liquid assets from which the plaintiff can satisfy either the mortgage payments on the marital residence or attorney fees. The record further demonstrates that the defendant has a greater earning capacity than the plaintiff. The court specifically found that the plaintiff is economically disadvantaged with respect to the defendant. It is well-settled that an equitable division is not necessarily an equal one. Trial courts are afforded wide discretion in dividing the interest of parties in jointly owned property. Harrington v. Harrington, 798 S.W2d 244 (Tenn. App. 1990); Fisher v. Fisher, 648 S.W2d 244, 246 (Tenn. 1983). Accordingly, the trial court's distribution will be given great weight on appeal, Edwards v. Edwards, 501 S.W2d 283, 288 (Tenn. App. 1973), and will be presumed correct unless we find the preponderance of the evidence is otherwise. Lancaster v. Lancaster, 671 S.W2d 501, 502 (Tenn. App. 1984) and Barnhill v. Barnhill, 826 S.W2d 443. See also Rule 13(d), T.R.A.P. As to the award of alimony and attorney fees we find no abuse of discretion. As to the distribution of the marital estate, the evidence does not preponderate against the judgment of the trial court. We find no merit in this issue.

Our resolution of the issues presented by the defendant is also dispositive of the remaining issues raised by the plaintiff. We find it unnecessary to discuss it further.

We affirm the judgment of the trial court in all respects. Costs are assessed to the defendant-appellant and this cause is remanded to the trial court for the collection thereof.

Don T. McMuray, J.

CONCUR:

Houston M. Goddard, Presiding Judge

Herschel P. Franks, Judge

IN THE COURT OF APPEALS

RHONDA MILLER,)	SEVIER CIRCUIT
)	C. A. NO. 03A01-9606-CV-00205
)	
Plaintiff - Appellee)	
)	
)	
)	
)	
vs.)	HON. BEN W HOOPER, II
)	JUDGE
)	
)	
)	
JERRY LEE MILLER,)	AFFIRMED AND REMANDED
)	
Defendant - Appellant)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Sevier County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court in all respects. Costs are assessed to the defendant-appellant and this cause is remanded to the trial court for the collection thereof.

PER CURIAM