

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
April 3, 2019 Session

<b>FILED</b> 05/16/2019 Clerk of the Appellate Courts
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**DIANE DRAIN SHACKELFORD v. JERRY ROBERT SHACKELFORD**

**Appeal from the Circuit Court for Rutherford County  
No. 72418 Barry R. Tidwell, Judge**

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**No. M2018-01178-COA-R3-CV**

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In a case involving a long-term marriage, the trial court found that the husband performed most of the household duties and the wife earned most of the income. Moreover, the husband’s earning capacity was substantially less than that of the wife at the time of the divorce. The trial court denied the husband’s request for alimony, and the husband appealed. We conclude that the trial court erred in failing to award the husband alimony and reverse and remand that part of the trial court’s decision.

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

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Maurice Andre D. Brunelle, Murfreesboro, Tennessee, for the appellant, Jerry Robert Shackelford.

Martin Stephen Sir and Ellison M. Berryhill, Nashville, Tennessee, for the appellee, Diane Drain Shackelford.

**OPINION**

**FACTUAL AND PROCEDURAL BACKGROUND**

Diane Drain Shackelford (“Wife”) and Jerry Robert Shackelford (“Husband”) married in 1986 in Johnson City, Tennessee, where they both worked for the Veterans Administration (“the VA”). Wife earned two bachelor’s degrees and a doctorate in pharmacy before the marriage. She worked as a pharmacist. Husband had not finished his associate’s degree and was working as a pharmacy technician (“pharmacy tech”) when the parties married.

In 1987, the couple moved to Tampa, Florida after Wife applied for and obtained a position as a spinal cord injury specialist with the VA; Husband made a lateral transfer as a pharmacy tech with the VA and later moved to a position as a pharmacy tech at Merck-Medco. During their time in Tampa, Wife went back to school, attending classes in the evening, and earned her master's degree in healthcare administration. The parties' first child, Sarah, was born in 1992, and their second child, Hallie, was born in 1995.

In 1996, Husband and Wife decided to move to Fayetteville, Arkansas, where Wife took the position of chief of pharmacy at the VA there. Husband obtained a position as a pharmacy tech at Washington Regional Hospital and, later, at Walmart in Fayetteville. Then, in 1998, the parties moved to Lexington, Kentucky, where Wife obtained a better chief of pharmacy position. Husband accepted a pharmacy tech position working for the State of Kentucky.

The parties moved to Brentwood, Tennessee in 2002 after Wife obtained a new position managing the VA hospital pharmacies in Nashville and Murfreesboro as well as ten to twelve clinics around the state. This was a promotion for her. After the move to Brentwood, Husband initially did not work, but he returned to the workforce in 2006 when he took a position as a pharmacy tech at Vanderbilt. He left that job in 2007 for part-time work at a Kroger in Brentwood, near the children's school. The parties moved their residence from Brentwood to Murfreesboro in 2014, when Husband retired.

Wife filed a divorce complaint against Husband in circuit court on January 30, 2017, alleging grounds of irreconcilable differences and inappropriate marital conduct. Husband filed an answer and counter-complaint alleging the same grounds and requesting that the court award him alimony.

Husband subsequently filed a motion for pendente lite support, and the trial court appointed a special master to "hear all interim issues." After the parties supplied the special master with information concerning their income and expenses, the special master held a hearing and entered a report on April 13, 2017, detailing his findings of fact and conclusions of law. Wife was ordered to pay "the cell phone bill, expenses related to the marital home, and \$620.00 per month temporary alimony to the Husband." Husband testified that he was currently seeking employment. The matter was set to be reviewed in 120 days. The trial court entered an order approving the special master's report on April 28, 2017. The court entered an agreed order on October 17, 2017, stating that Wife's obligation to pay temporary alimony ended after July 2017 because Husband had obtained employment.

### Trial

The case went to trial on January 30 and April 2, 2018. At that time, Husband was 64 years old and Wife was 58 years old; they had been married for 31 years. Wife earned

\$13,491 a month in her job with the VA. Husband earned \$1,733 a month as a custodian and \$832 in monthly social security benefits.

Wife was the first witness to testify. In describing the parties' various moves and employment changes, Wife stated that she did not agree with Husband's decision not to work when they moved to Brentwood. He finally went back to work at Vanderbilt, but did not stay there long. Wife presented a W-2 indicating that Husband made \$16,417 at Vanderbilt in 2007, although he stopped working there in June of 2007. Wife disagreed with Husband's decision to resign from his job at Vanderbilt and to obtain instead a part-time position as a deli clerk at Kroger. Husband did not inform her of his decision until after the fact.

After the family moved to Murfreesboro, Husband stopped working. According to Wife, he told her that he did not think he needed to work anymore. Wife testified that they moved to Murfreesboro because "there was no way to continue living in that house paying the debt that we had. I just couldn't sustain it any further." When asked what factors caused the decline in their financial situation, Wife cited the loss of income from Husband's job at Vanderbilt and the increasing needs of their daughters as college approached. She testified that she had asked Husband to increase his hours at Kroger, to apply for pharmacy tech positions, or to get a second job.

Wife further testified that, in her experience at the VA, there were two levels of pharmacy techs, certified and uncertified. For an uncertified pharmacy tech such as Husband, the pay would range from \$32,000 to \$43,000 a year. In order to become certified, one had to pass a national exam. Wife tried to encourage Husband to take the exam, but he never did. As to Husband's decision to begin drawing social security at age 62, Wife testified that she felt this was a mistake because it caused a reduction in benefits and was not necessary because they had moved into a smaller house and reduced their expenses.

With regard to the child-rearing responsibilities, Wife testified that, before the children started school, she and Husband "worked together to try to make sure that their needs were met." She similarly stated that she and Husband shared the housework. Wife acknowledged that, once Husband stopped working in 2002, he picked the children up from school and she took them to school "occasionally." Wife testified that she tended to help the children with their homework, and that the family often went out to eat for meals. When Husband worked at Kroger in Brentwood, his work was near the children's school, but Wife stated that "there were many times when I took them to school." Husband would pick them up or the children would have band practice after school; if there was band practice, Wife could pick them up or come to watch band practice.

One of the children had significant medical problems, and Wife recalled taking her to the doctor "several times." The child also had problems at school, and the parties

considered moving her to a different school due to her dislike for school. They ultimately decided to engage in family therapy with the child. Wife testified about taking the children to dental appointments. She felt that she and Husband worked together to take care of the children.

Wife testified at some length about the disagreements between her and Husband concerning the parenting of one of their daughters. The daughter withdrew from college, was not working, and wanted to use money that had been set aside for her education to buy a car. Husband gave the money to the daughter over Wife's objections.

On cross-examination, Wife acknowledged that Husband was the pit crew leader for the children's high school band and that he was usually the one who drove them home from practice.

Wife's salary for 2017 was \$161,900, and she could earn performance awards in addition to her salary. Wife testified about her pension and her savings account and stated that she contributed over \$900 every two weeks toward her savings account. She acknowledged that the most Husband earned for any year during the marriage was around \$16,000 and that he worked full-time until 2002 and part-time for a period after that. Wife agreed that the parties enjoyed a middle class lifestyle during the marriage and further testified:

Q. . . . But the lifestyle --- well, it wasn't based on him earning 15 or \$16,000 a year, was it?

A. It helped. Every little bit helps.

Q. Sure. But your lifestyle was achieved primarily through your income because you made a significant amount of more money than he did, true?

A. I'm a pharmacist, yeah.

Wife testified that her lifestyle had not changed since the divorce had been filed. She had continued to save the same amount of money.

When asked about Husband's ability to take care of the children after school, Wife gave the following testimony:

Q. Do you think Mr. Shackelford, taking care of the home and children and the events after school, freed you up to use your work ethic that you described earlier and do well at your employment?

A. I took leave. I am able to take leave whenever I need to. What he did as far as picking them up -- they could have been in after school care. There wasn't a need for that. It didn't free me up to do my job. I could have done either way. I could have taken care of them or whatever else, too, and I did. So I don't -- no, I don't agree with that.

Q. So you don't think that helped free you up at work at all?

A. Not really because I could have done it.

Q. But you didn't have to do it, did you? Because Mr. Shackelford was doing it.

A. He didn't have to either.

Q. But he was.

A. He wouldn't work. So, yes, he was free to do that.

Q. Okay. Do you agree that Mr. Shackelford was present at almost every doctor's appointment the children had throughout their minority?

A. No.

Q. He wasn't present at almost every one?

A. No.

Q. Not every one.

A. No. I have leave records. I was called a lot to go and take them and pick them up from school, take them to the doctor. No.

Husband was the next witness to testify. He was living in a condominium in Knoxville that the parties originally purchased for their daughters to live in while attending college. Husband stated that he completed a year and a half of college after high school; he did not finish his associate's degree.

At the time of the hearing, Husband was working at the University of Tennessee as a midday porter. He worked from 12:00 noon until 8:30 at night. It was his job to "replenish paper products for restrooms, we clean carpet, windows. Mostly mine is picking up spills from the college students." Husband agreed that his duties were similar to janitorial work, but not as detailed. For his position as a midday porter, Husband earned \$10 an hour; he worked forty hours a week.

Husband submitted a statement of his monthly expenses. He testified about the condition of the condominium and its location in what he characterized as a complex primarily for college students. He also gave his estimate of the cost of purchasing a home comparable to those in which the parties lived during the marriage and described the various homes in which the parties had lived during the marriage.

Asked about the parties' standard of living during the marriage, Husband testified: "We just purchased what we needed, what the girls needed. I didn't really think about it. I didn't have a budget that I knew of. We would just buy what we wanted." Husband was then asked about his current financial situation, and he testified: "I have to watch everything I spend." Husband further testified:

A. Well, I'm making \$10 an hour, same thing I made when I was at Kroger. But groceries, electric, and the HOA—and then this coming December, the HOA decided they were going to hit us with a \$1,000

assessment. So now my HOA has gone over 3,000—almost \$4,000—a year for that. And then electric, gas, food, and I had to take out a half-million dollar umbrella policy that was required by the Homeowner's Association, which cost me, you know, some more money, and then I pay the regular insurance on that. And then I've had lots of auto repairs. My daughter was gone off to school for four years, so I had to keep her car up and then I also had to keep my truck up and there's—just everything, just different things that have popped up at different times, and I'm just living paycheck to paycheck.

Q. Now, before you're paid—how often are you paid?

A. Every two weeks.

Q. What's your typical balance in your checking account the day before you're paid?

A. Maybe \$100.

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Q. Can you identify the document that I just handed to you?

A. Yes. This is my First Tennessee IRA account.

Q. Okay. What does that show as the beginning balance?

A. \$27,717.

Q. Okay. And the statement goes through December 31 of 2017; is that correct?

A. Yes.

Q. What does it show the balance as on that date?

A. \$7,918.69.

Q. Okay. So there's several withdrawals on here. Can you go through, beginning on the February 13th withdrawal, and describe what each of those is for?

A. The February 13th withdrawal was for attorney fees, I believe.

THE COURT: And that's this year or what year is this?

MR. BRUNELLE [Counsel for Husband]: 2017.

BY MR. BRUNELLE:

Q. And then we have March 2nd.

A. That was my first car repair.

Q. And then March 10th.

A. That's still in March. Then I—I'm not even working, so I had to pull \$300 out probably to buy groceries or something.

Q. And then we go to a \$400 withdrawal on March 27th.

A. 400 sounds like the one for the ignition system I had to put on my daughter's Civic.

Q. And then we go to a \$200 withdrawal on April 10th.

A. Again, that's either electric or groceries. I tried to pull small amounts out when I could, not to deplete my IRA.

Q. At this point, you're not working; is that correct?

A. I am not working, and I'm pulling two, three, \$400 out every week or two just to maintain food and pay my electric and everything.

Q. Okay. When did you start working at the University of Tennessee?

A. The day after Memorial Day of 2017, May 30th. I will be there a year this coming 30th.

Q. And let's look at the October 13th withdrawal. I believe 9,000.

A. That's also another attorney fee plus court reporting costs and—

Q. And then we have a \$300 withdrawal on the 21st of November. What was that for?

A. That would also be in the timeline for groceries or paying the electric bill.

Q. And then the last one on this sheet is from December 18th.

A. \$1,700.

Q. Yes, sir. What was that for?

A. December 17th. I'm not really sure. I think I had some insurance to pay because everything is coming back around in December.

Q. Now, are you having to withdraw from your IRA to make ends meet?

A. I'm still withdrawing from my IRA, yes.

Q. This ends in December. What's the current balance?

A. My current balance is 6,000.

Q. And what's reduced it from this amount to this 6,000?

A. I've had other car repairs on my truck. I've had to buy a complete exhaust system, a catalytic converter that goes with that system, and I had to put a new wiring system on the truck. It melted and got in contact with a hot area in the vehicle, and I haven't really driven my truck in two or three months because I hadn't repaired everything to the extent it needs to be because I don't have the money to do that with.

Asked how his living situation differed from the way he had lived during the marriage, Husband stated that he no longer bought clothing, shoes, or other necessary items. He just got by from week to week.

Husband testified about his employment history and the moves that the parties made during their marriage. He stated that, when they lived in Tampa and Wife attended classes in the evenings, he took care of Sarah. Throughout the marriage, Husband testified, Wife's career was the priority because "[s]he was kind of like climbing the corporate ladder within the VA hospital system." According to Husband, "[o]nce she became the chief of pharmacy for Fayetteville, then that opened up a whole new game for her to advance herself." Husband stated that, each time they moved, he had to start over again at the bottom of the pay scale.

When the parties moved to Lexington, Kentucky, Husband testified, he did not return to work immediately. He stayed at home to "get things settled for the family, get

the kids where they need to go, take them to school until we find out exactly what we wanted to do.” The girls attended Montessori school during the summer and then, in the fall, the older daughter, Sarah, started first grade. Husband estimated that he went back to work about six to eight months after the move to Lexington. He obtained a position as a pharmacy tech working for the State of Kentucky.

Husband testified that he did not initiate any of the family’s moves. Wife “found those jobs and it was good for her so we moved.” The move to Nashville from Lexington allowed Wife to gain a promotion in her career. Husband again stayed out of work for a period of time and acted as a stay-at-home dad before returning to work as a pharmacy tech at Vanderbilt University hospital. He worked there for six to eight months. According to Husband, he left that position because the parties’ younger daughter “was having difficulties in school and needed more attention.”

Husband took a part-time position at the Kroger deli in Brentwood, just a few blocks from the middle school and high school. In his position at Kroger, Husband worked from 8:00 in the morning until 2:00 in the afternoon. He testified that this schedule allowed him to “drop them off at school and pick them up in the afternoons.” Husband stated that he took the “deli job in order to get those hours to get the kids where they needed to go and everything, not the minimum wage.” He ended up working there for ten years.

Questioned as to why he worked part-time at Kroger, Husband stated that he did so in order that he “could participate with the kids’ activities at school.” He testified that Wife got home around 6:30 to 7:00 in the evening. Husband was the one who generally took the children to school in the morning and picked them up in the afternoon. He was the one who generally took them to the doctor. He was a Girl Scout cookie dad<sup>1</sup> and a band pit crew leader.

Husband testified that, after he had worked at Kroger for ten years, the girls were in college and Wife was growing tired of her commute, so the parties downsized from their home in Brentwood to a smaller home in Murfreesboro. At that point, Husband decided to retire. He stated that he would be “making the same salary and taking social security that I would be working at Kroger and there still had to be things done at the new house.”

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<sup>1</sup> As a cookie dad, Husband’s activities included the following:

We would take orders for the cookies, go to the warehouse, bring the cookies to our house in Brentwood, and then the parents of the other Girl Scouts would come to our house and they would pick up their orders and then they would deliver their cookies like my daughters did.

Wife coordinated the statistics concerning the number of cookies they needed to order.



Husband testified that he was currently making ten dollars an hour. He did not know how much longer he could continue working. He had varicose veins that had moved into the upper part of his legs, and the knots were increasing in size. Husband's job did not allow him to sit down, except when he took a fifteen-minute break or during his thirty-minute lunch. Otherwise, he stood for eight hours a day. All of his work, even as a pharmacy tech, had required him to be on his feet all day. Husband testified that he did not believe he could acquire future assets with an income of \$10 an hour and \$850 a month in social security benefits.

In addition to social security benefits, Husband testified, he would be eligible to receive \$56.51 per month from the State of Kentucky when he reached age 65, as well as an additional \$80.22 per month from his Kroger pension. He had not yet received an official notification from the VA, but he did not expect to receive any benefits from his time there. Husband requested an award of alimony from the trial court, stating that he could not meet his monthly expenses or maintain a lifestyle at all comparable to the lifestyle he and Wife had enjoyed during their marriage without alimony.

On cross-examination, Husband testified that he "chose not to work full time so that [he] could be there to help [his daughter] when she had problems at school and to get her to counseling which she had to go to." Husband was not aware of Wife's objection to his decision to work part-time. He felt that he "needed to work part time in order to support our children, not just financially but mentally and physically."

On redirect examination, Husband stated that he needed to buy a new car because his truck was not reliable and required him to spend a lot of money on repairs. At present, he could not qualify for a car loan.

Asked about the money originally designated for Hallie's education that he gave to Hallie, against Wife's wishes, Husband testified:

A. . . . It was [Hallie's] money, and then she also was supposed to receive half of the other bonds that we set aside for education to help pay for her school or whatever she wanted to do.

Q. Okay. And this word was used multiple times. I think it's an important word. "Permission." Were you expected throughout this marriage to get permission to do really anything financially?

A. Yes. I mean, I had to ask for stuff. I mean—

Q. And that's because—was it because you didn't make the majority of the money?

A. Because I didn't make majority of the money and she wanted to know where everything was going, I assume.

Q. Was that a pretty regular occurrence throughout this 31-year marriage?

A. Yes.

The last witness was Hallie, the parties' 22-year-old daughter.<sup>2</sup> She offered the following testimony concerning her parents' involvement in her upbringing:

Q. . . . Was your father involved in your day-to-day life?

A. Yes.

Q. Was he heavily involved in your upbringing?

A. Oh, yeah.

Q. Okay. Now, you had to get to school from preschool all the way to high school. Who took you to school on most days?

A. My dad.

Q. And did he take you—was it pretty close to even with your mom or—

A. No.

Q. —did your dad take you much more frequently?

A. No. My mom would hardly ever take me. If she ever did, maybe once from elementary school to high school.

Q. Who picked you up from school on most days?

A. My dad.

Q. Now, do you recall what time in the evening you remember your mother generally getting home from work?

A. About 6:30, 7:00, somewhere around in there.

Q. So who was in charge of your care after school?

A. My dad.

Q. Now, did you ever have to go to the doctor while you were at school?

A. Yes.

Q. Which parent took you more often to the doctor's office?

A. My dad.

Q. Did you have to do some counseling and things like that—

A. Yeah.

Q. —while you were in school?

A. Yes.

Q. Who would primarily take you to those counseling sessions?

A. My dad would.

Q. Okay. Which parent would you say you relied on—which parent did you rely on primarily throughout your childhood?

A. My dad.

Q. And why do you say that?

A. He was there through all of my annoying high school years where, you know, I had to go get—if I was sick, he would take me to the doctors. If I got out of school earlier, for whatever reason, he would be there to pick me up. He was just always around.

. . . .

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<sup>2</sup> Hallie's former boyfriend also testified, but his testimony is not relevant to the issues on appeal.

Q. [Your mother] was involved in your life, true?

A. Yeah.

Q. What types of things did your mom do with you?

A. I mean, we would go on vacation together. Band concerts, she would go to band concerts with us. Pretty much any band-related thing, marching band, sometimes the camps, she would be there.

....

Q. Which one of your parents was home more often?

A. My dad.

### Trial court decision

In a final order entered on June 6, 2018, the trial court awarded the marital home (valued at \$307,000) to Wife and the condominium in Knoxville (valued at \$113,000) to Husband. The total value of marital assets awarded to Wife was \$647,992.73; the total value of marital assets awarded to Husband was \$435,583.73. The trial court awarded all marital debt, in the amount of \$235,562.00, to Wife. After reviewing all of the statutory factors, the trial court concluded that it was not necessary to make an award of alimony to Husband. Each party was to pay his or her own attorney fees.<sup>3</sup>

### Issues on appeal

On appeal, Husband argues that the trial court erred (1) in its division of marital assets, (2) in failing to award him any alimony, and (3) in awarding him only \$1,146.00 in attorney fees pre-trial and none at trial. Both parties seek an award of attorney fees on appeal.

### ANALYSIS

#### I. Division of Marital Property.

Husband asserts that the trial court erred in its division of marital property because it reduced his award despite evidence that Wife paid her attorney fees with a credit card classified by the court as marital debt.

A trial court's division of marital property "involves the distribution of both marital assets and marital debts." *Pollan v. Pollan*, No. M2011-01896-COA-R3-CV, 2012 WL 2582336, at \*3 (Tenn. Ct. App. July 3, 2012); *see also Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Before dividing a marital estate, a trial court must identify all property interests at issue and classify each property interest as either separate

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<sup>3</sup> In an order entered on December 12, 2017, the trial court ordered Wife to pay the reasonable attorney fees (\$1,146) associated with Husband's motion to compel Wife to respond to certain interrogatories.

or marital. *Summer v. Summer*, 296 S.W.3d 57, 60 (Tenn. Ct. App. 2008). Marital property is defined as “all 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.” Tenn. Code Ann. § 36-4-121(b)(1)(A). Once a trial court classifies divorcing parties’ property as marital or separate, the court is tasked with equitably dividing the marital property between the parties “without regard to marital fault in proportions as the court deems just.” Tenn. Code Ann. § 36-4-121(a)(1); *see also Larsen-Ball v. Ball*, 301 S.W.3d 228, 231 (Tenn. 2010). An equitable division of property “is not necessarily an equal one.” *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988); *see also Owens v. Owens*, 241 S.W.3d 478, 490 (Tenn. Ct. App. 2007) (“A division of marital property is not rendered inequitable simply because it is not precisely equal or because each party did not receive a share of every piece of marital property.”) (citations omitted). The division of marital property “is not a mechanical process” but rather is guided by the factors set forth in Tenn. Code Ann. 36-4-121(c).<sup>4</sup> *Kinard v. Kinard*, 986 S.W.2d 220, 230 (Tenn. Ct. App. 1998).

A similar analysis applies with respect to debt. Our Supreme Court has defined marital debt as “all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing.” *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn. 2003). The following four factors are to be used by trial courts as guidelines

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<sup>4</sup> Pursuant to Tenn. Code Ann. § 36-4-121(c), a trial court must consider the following factors in making its division of marital property:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities 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)(A) The contribution of each party to the acquisition, preservation, appreciation, depreciation 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 its 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, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) In determining the value of an interest in a closely held business or similar asset, all relevant evidence, including valuation methods typically used with regard to such assets without regard to whether the sale of the asset is reasonably foreseeable. . . . ;
- (11) The amount of social security benefits available to each spouse; and
- (12) Such other factors as are necessary to consider the equities between the parties.

in the equitable distribution of marital debt: “(1) the debt’s purpose; (2) which party incurred the debt; (3) which party benefitted from incurring the debt; and (4) which party is best able to repay the debt.” *Id.* at 814 (quoting *Mondelli v. Howard*, 780 S.W.2d 769, 773 (Tenn. Ct. App. 1989)).

The classification of property as separate or marital is “inherently factual” and will be reviewed in accordance with Tenn. R. App. P. 13(d). *Owens*, 241 S.W.3d at 485. Tennessee Rule of Appellate Procedure 13(d) directs appellate courts to review a trial court’s findings of fact “de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” A trial court has a great deal of discretion in determining the manner in which it divides marital property, and an appellate court will generally defer to a trial court’s decision regarding what is equitable unless that decision is inconsistent with the factors set out in Tenn. Code Ann. 36-4-121(c) or the evidence preponderates against the division. *Jolly v. Jolly*, 130 S.W.3d 783, 785-86 (Tenn. 2004). Appellate courts “are disinclined to disturb the trial court’s decision unless the distribution lacks proper evidentiary support or results in some error of law or misapplication of statutory requirements and procedures.” *Larsen-Ball*, 301 S.W.3d at 234 (quoting *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007)).

In the present case, the trial court made the following rulings regarding the division of marital assets and debts:

With regard to the parties’ marital home at 3122 Palomar Drive, where the wife currently resides, the Court finds that it has a value of approximately \$307,000.00 and approximately \$207,000.00 is owed on the house, leaving approximately \$100,000.00 in equity in the marital home. The Court awards the marital home to the wife and she assumes responsibility for all debt on the house and is awarded all equity. The Court also finds that the 2015 Honda CR-V is marital property and is hereby awarded to the wife and its value is \$18,909.00. The CR-V has approximately \$1,966.00 in equity that is also awarded to the wife. The Court further finds that the condominium in Knoxville at 3918 Cherokee Woods Way is marital property and is hereby awarded to the husband. Its value is approximately \$113,000.00 and is unencumbered. The Court also finds that the 1989 Toyota Tacoma is marital property and it is awarded to the husband. Its value is approximately \$500.00.

The remaining miscellaneous items of personal property on Trial Exhibit 1 will be awarded to the party designated on that Exhibit, and the Court finds that the proof at trial supported the values listed thereon. . . . The Court further finds that each party will retain sole, exclusive ownership of any other personal property currently in his or her possession.

Regarding the Veteran's Affairs Thrift Savings Plan and the Veteran's Affairs Pension, the Court finds that these accounts are marital property and will be divided equally, fifty percent (50%) to each party. . . . The husband's fifty percent share of the VA Thrift Savings Plan is also \$226,889.14, and the husband's fifty percent share of the VA Pension is also \$95,194.59. Therefore, the total value of marital assets received by the wife is \$647,992.73, and the total value of marital assets received by the husband is \$435,583.73.

. . . .  
In this case, the parties agree that all five (5) debts listed on each of their 12.02 statements will belong to the wife, and their values are agreed upon as evidenced at the hearings. Accordingly, the total amount of marital debt assigned to the wife is \$235,562.00, and the total amount of marital debt assigned to the husband is \$0.00.

Husband argues that the trial court failed to classify a list consisting of numerous bank accounts and savings bonds which Husband values at approximately \$35,104.87.<sup>5</sup> In its decision, however, the trial court stated: "The remaining miscellaneous items of personal property on Trial Exhibit 1 will be awarded to the party designated on that Exhibit, and the Court finds that the proof at trial supported the values listed thereon." This list includes the accounts to which Husband refers. Exhibit A classifies the accounts as marital property and, with one exception (worth \$4,943.83), awards them to Wife.

As Husband points out, the trial court did not specifically address all of the statutory factors in its division of marital assets and debts. The court did, however, make findings of fact and conclusions of law sufficient to explain its classification of assets and debts and their division between the parties. Husband received a total of \$435,583.73 in marital assets and no debt; Wife received \$647,992.73 in marital assets and \$235,562.00 in marital debt, leaving her with a net benefit of \$412,430.73.<sup>6</sup> The trial court's decision is "readily ascertainable," and Husband fails to identify any way in which the trial court abused its discretion. *See generally Turman v. Turman*, No. W2014-01297-COA-R3-CV, 2015 WL 1744278, at \*6 (Tenn. Ct. App. Apr. 14, 2015) (quoting *Pandey v. Shrivastava*, No. W2012-00059-COA-R3-CV, 2013 WL 657799 (Tenn. Ct. App. Feb. 22, 2013)).

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<sup>5</sup> According to Exhibit A, the total value of the accounts and savings bonds was \$20,673.21.

<sup>6</sup> Husband complains that, "while the Trial Court assigned payment of all marital debt to Appellee, it subtracted one half of the value of that debt from Appellant's award of the assets it determined to be marital." We find nothing in the record to support this assertion.

## II. Alimony.

Husband asserts that the trial court erred in failing to award him alimony because the evidence supports a finding that he was the economically disadvantaged spouse and incapable of rehabilitation under Tenn. Code Ann. § 36-5-121(d)(2).

A trial court has “broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of the award.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011); *see also Mayfield v. Mayfield*, 395 S.W.3d 108, 114 (Tenn. 2012). The *Gonsewski* Court described the standard of review appellate courts apply to a trial court’s award of spousal support:

[A] trial court’s decision regarding spousal support is factually driven and involves the careful balancing of many factors. *Kinard v. Kinard*, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998); *see also Burlew [v. Burlew]*, 40 S.W.3d [465,] 470 [Tenn. 2001]; *Robertson v. Robertson*, 76 S.W.3d 337, 340-41 (Tenn. 2002). As a result, “[a]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision.” *Kinard*, 986 S.W.2d at 234. Rather, “[t]he role of an 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.” *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006). Appellate courts decline to second-guess a trial court’s decision absent an abuse of discretion. *Robertson*, 76 S.W.3d at 343. An abuse of discretion occurs when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010). This standard does not permit an appellate court to substitute its judgment for that of the trial court, but “‘reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives,’ and thus ‘envision[s] a less rigorous review of the lower court’s decision and a decreased likelihood that the decision will be reversed on appeal.’” *Henderson*, 318 S.W.3d at 335 (quoting *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). Consequently, when reviewing a discretionary decision by the trial court, such as an alimony determination, the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision. *Wright*, 337 S.W.3d at 176; *Henderson*, 318 S.W.3d at 335.

*Gonsewski*, 350 S.W.3d at 105-106 (footnote omitted).

Under Tennessee law, four types of alimony are available: rehabilitative alimony, alimony in futuro, transitional alimony, and alimony in solido. Tenn. Code Ann. § 36-5-121. The General Assembly has stated its preference that rehabilitative alimony be awarded when appropriate. *See* Tenn. Code Ann. § 36-5-121(d)(2). Where rehabilitation is not feasible and one spouse is economically disadvantaged when compared with the other spouse, however, “the court may grant an order for payment of support and maintenance on a long-term basis or until death or remarriage of the recipient . . . .” Tenn. Code Ann. § 36-5-121(d)(3); *see also* Tenn. Code Ann. § 36-5-121(d)(4) (providing that award of alimony in futuro may be made “where rehabilitation is not feasible”).

A trial court is directed to consider the following factors in determining whether to award alimony to a party:

- (1) 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;
- (2) 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 earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) 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;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) 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;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.



Tenn. Code Ann. § 36-5-121(i). The two most important factors a court is to consider are the need of the disadvantaged spouse and the ability of the obligor spouse to pay the support. *Gonsewski*, 350 S.W.3d at 110.

In the present case, the trial court reviewed all of the statutory factors regarding alimony and made findings of fact. The court found that factor one, Tenn. Code Ann. § 36-5-121(i)(1) (relative earning capacity, needs, and financial resources of each party), favored Wife, stating that “while the wife clearly earns more income than the husband now, the husband has had opportunities to advance his career throughout the duration of the marriage and simply did not elect to do so.” At the time of the hearing, Wife earned \$13,491 a month and Husband earned a total of \$2,565 a month. The most Husband earned during the marriage was approximately \$16,000 a year. According to Wife, if Husband had stayed with the VA, he could have earned between \$32,000 and \$43,000 a year as a full-time uncertified pharmacy tech, and his earning potential would have been greater if he had taken the certification exam. Even if Husband had taken advantage of all opportunities for career advancement, however, his earning capacity was always going to be far less than that of Wife.

With respect to factor one, the trial court further noted that Husband was awarded assets of approximately \$435,000.00—mainly one-half of Wife’s VA pension, one-half of the VA thrift savings account, and the condominium. Husband’s share of the pension funds (\$95,194.59) will not be available until Wife retires. Moreover, the trial court failed to address the issue of Husband’s need under factor one. Husband submitted a statement of monthly expenses in the amount of \$3,617, which includes a mortgage payment in anticipation of his plans to buy a house. According to Husband’s testimony, he was forced to rely on funds from his IRA during the pendency of the divorce to pay his attorney fees and meet his monthly financial obligations. In analyzing the alimony factors, the trial court must determine the level of the requesting spouse’s need. *See Bewick v. Bewick*, No. M2015-02009-COA-R3-CV, 2017 WL 568544, at \*12 (Tenn. Ct. App. Feb. 13, 2017). In light of the drastic disparity between Husband’s and Wife’s earning capacities, we disagree with the trial court’s decision to weigh factor one in Wife’s favor.

Factor two concerns the “relative education and training of each party” and their ability to secure additional training and education. Tenn. Code Ann. § 36-5-121(i)(2). The trial court stated: “It is evident that the wife is more educated and earns a higher income than the husband; however, the husband did not advance his own career and chose not to receive further education and training.” The court also acknowledged that Husband “was the primary homemaker over the years,” but found that he had “ample opportunity during the course of the marriage to continue his schooling and/or attempt to advance within the Veteran’s Affairs system.” As discussed above, even accepting the court’s findings with respect to the opportunities available to Husband, Husband’s

earning capacity would have remained much lower than Wife's earning capacity. The trial court concluded that this factor favored neither party.

Factor three addresses the duration of the marriage, in this case 31 years. Tenn. Code Ann. § 36-5-121(i)(3). The trial court concluded that this factor favored neither party, reasoning as follows: "[B]oth parties were employed for the majority of the marriage and both parties are employed currently." We respectfully disagree. The long duration of a marriage is generally a factor favoring alimony where both parties have contributed significantly to the marriage, when necessary to prevent one party from "revert[ing] to a marginal standard of living" after the divorce. *See Willmore v. Willmore*, No. M2007-02146-COA-R3-CV, 2009 WL 1260212, at \*7 (Tenn. Ct. App. May 6, 2009).

The trial court found factor four, Tenn. Code Ann. § 36-5-121(i)(4), the age of the parties, to favor neither party, although Husband was almost 65 at the time of the hearing, while Wife was only 58. Likewise, the trial court determined that factor five, Tenn. Code Ann. § 36-5-121(i)(5), the physical condition of each party, favored neither party. Factor six, Tenn. Code Ann. § 36-5-121(i)(6), concerns minor children and does not apply here. Factor seven, Tenn. Code Ann. § 36-5-121(i)(7), addresses separate property and also does not apply here.

We agree with the trial court that factor eight, Tenn. Code Ann. § 36-5-121(i)(8), favors neither party as the trial court divided the marital property substantially equally. The trial court found that factor nine, Tenn. Code Ann. § 36-5-121(i)(9), standard of living, favored Husband because the "proof showed that the wife's standard of living has not changed much, if at all, since the parties' separation; however, the husband's standard of living has decreased." We agree with the trial court's analysis on this factor.

As to factor ten, Tenn. Code Ann. § 36-5-121(i)(10), tangible and intangible contributions to the marriage, the trial court stated: "Proof at trial revealed the classic case of one party (the wife) making a lion's share of the income and the other party (the husband) performing the lion's share of the household duties and responsibilities." The court found this factor favored neither party. We agree with the trial court's factual finding but disagree with its conclusion that factor ten should favor neither party. The General Assembly has expressly recognized as the public policy of this state the equal dignity and importance of the contributions to the family of the homemaker and the breadwinner:

(1) Spouses have traditionally strengthened the family unit through private arrangements whereby one (1) spouse focuses on nurturing the personal side of the marriage, including the care and nurturing of the children, while the other spouse focuses primarily on building the economic strength of the family unit. This arrangement often results in economic detriment to the

spouse who subordinated such spouse's own personal career for the benefit of the marriage. It is the public policy of this state to encourage and support marriage, and to encourage family arrangements that provide for the rearing of healthy and productive children who will become healthy and productive citizens of our state.

(2) The general assembly finds that the contributions to the marriage as homemaker or parent are of equal dignity and importance as economic contributions to the marriage. Further, where one (1) spouse suffers economic detriment for the benefit of the marriage, the general assembly finds that the economically disadvantaged spouse's standard of living after the divorce should be reasonably comparable to the standard of living enjoyed during the marriage or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(c). In cases where one spouse's contributions to the marriage have been in the form of homemaking responsibilities, factor ten generally favors the homemaker spouse because that spouse tends to earn less money. *See Parrish v. Parrish*, No. W2013-00316-COA-R3-CV, 2013 WL 3203352, at \*15 (Tenn. Ct. App. June 21, 2013) (stating that wife's contributions during 30-year marriage as homemaker and part-time wage-earner weighed in her favor in alimony determination); *Gorman v. Gorman*, No. M2010-02620-COA-R3-CV, 2011 WL 5599867, at \*9 (Tenn. Ct. App. Nov. 16, 2011) (recognizing wife's contribution to the marriage "by dropping out of the work force to care for the parties' children and her resulting economic disadvantage"). Because Husband performed the lion's share of the household and childcare duties and Wife was the primary income-earner, factor ten should favor Husband to some degree.

Because no fault was assigned to either party, the trial court found that factor eleven, Tenn. Code Ann. § 36-5-121(i)(11), favored neither party.

According to the trial court, one of the statutory factors favored Wife and one favored Husband; therefore no award of alimony was appropriate. The trial court concluded it was not necessary to award alimony in light of "the division of marital assets, the earning capacities of both parties during the marriage and post-separation, and the assignment of all marital debt to the wife." We disagree.

In *Stratienko v. Stratienko*, 529 S.W.3d 389, 405 (Tenn. Ct. App. 2017), involving the dissolution of a 26-year-marriage, this court affirmed the trial court's decision to award alimony in futuro where there was "a significant income disparity between the parties" and, "[w]ithout an award of long-term support, Wife would have no anticipation of maintaining a standard of living even approaching that of Husband's." Similarly, in *Smarsh v. Smarsh*, No. E2011-01767-COA-R3-CV, 2012 WL 1390663, at \*5-6 (Tenn. Ct. App. Apr. 23, 2012), this court affirmed the trial court's alimony award, noting the

husband's "much greater earning capacity than the wife" and the wife's contribution to the husband's "earning ability by being a homemaker and mother, and [allowing] the husband to travel and move about with his career, such that the parties achieved a relatively high standard of living together."

Pursuant to our analysis above, factors one (relative earning capacity and need), three (duration of marriage), and ten (tangible and intangible contributions to the marriage), as well as factor nine (standard of living) as found by the trial court, favor Husband. In the division of marital assets, after marital debt is considered, the parties are left with equal assets. Husband was almost 65 years old at the time of trial, has a limited ability to accrue assets, and has minimal retirement assets of his own. Thus, he must rely upon the assets he attained as part of the divorce to secure his retirement. In light of the weight of the statutory factors and the legal principles applicable to alimony in Tennessee, we conclude that the trial court abused its discretion in declining to award alimony to Husband until Wife retires and her VA pension is activated. On remand, the trial court shall determine the type and amount of alimony to be awarded to Husband according to his need.

### III. Attorney Fees.

Husband argues that the trial court erred in awarding him only \$1,146.00 in attorney fees pre-trial and none at trial.

A trial court has the discretion to award attorney fees as alimony in solido. *See* Tenn. Code Ann. § 36-5-121(d)(1),(5); *Riggs v. Riggs*, 250 S.W.3d 453, 459-60 (Tenn. Ct. App. 2007). The decision to award attorney fees "is largely in the discretion of the trial court, and the appellate court will not interfere except upon a clear showing of abuse of that discretion." *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995) (citing *Storey v. Storey*, 835 S.W.2d 593, 597 (Tenn. Ct. App. 1992); *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964)).

The trial court ordered that Husband and Wife be responsible for their own attorney fees. Husband asserts that, in light of his financial disadvantage, the court erred in failing to award him alimony in solido for his attorney fees in accordance with the factors set out in Tenn. Code Ann. § 36-5-121(i). In light of the significant property award received by Husband, we cannot conclude that the trial court abused its discretion in declining to award Husband his attorney fees. Moreover, on remand, the trial court will award Husband alimony to provide for his monthly needs until Wife's retires and Husband's share of her pension begins.

As to the trial court's award of \$1,146.00 in attorney fees to Husband on a pre-trial contempt motion, Wife makes the unusual argument that, because the trial court's final order does not mention these fees, the issue "was dismissed and Wife is under no

obligation to pay any fees to Husband.” Wife does not cite any authority to bolster this statement. The trial court’s order remains in effect, and Wife remains obligated to pay Husband the attorney fees awarded.

We furthermore decline both parties’ requests for attorney fees incurred on appeal.

#### CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded with costs of appeal assessed equally against the appellant and the appellee, Jerry Shackelford and Diane Shackelford, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE