

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2006 Session

PENNY W. HESTER v. HARRY F. HESTER, Jr.

**An Appeal from the Chancery Court for Sumner County
No. 2003D-309 Tom E. Gray, Chancellor**

No. M2004-03023-COA-R3-CV - Filed on December 19, 2006

This is a divorce case. At the time the parties married, both worked full time. In 1994, the husband quit his job and started a business. In the early stages, the wife contributed to the business financially and performed part-time work for it as well. The business prospered and, eventually, the wife became a full-time homemaker. The parties separated and later filed for divorce. After two hearings, the trial court granted the parties a divorce, named the wife primary residential parent of the parties' minor child, ordered the husband to pay child support, divided the parties' marital estate, and awarded the wife rehabilitative alimony for seven years and alimony *in solido* for attorney's fees. As part of the property division, the trial court awarded the wife a substantial sum of money to be paid from the earnings of the business in monthly installments for ten years without interest. The wife appeals the division of marital property, the decision not to award post-judgment interest on the sum to be paid from the earnings of the business, and the amount and duration of the rehabilitative alimony award. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed.

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Vicky V. Klein and L. Anthony Deas, Madison, Tennessee, for Plaintiff/Appellant Penny W. Hester.

John R. Phillips, Jr., Gallatin, Tennessee, for Defendant/Appellee Harry F. Hester, Jr.

OPINION

Plaintiff/Appellant Penny W. Hester ("Wife") and Defendant/Appellee Harry F. Hester, Jr. ("Husband") married on September 27, 1991. Husband and Wife were married for thirteen years and lived together until June 2003. The parties have one minor child born of the marriage. At the time of the divorce, Wife was 41 years of age and Husband was 49.

The only significant separate property brought to the marriage was Wife's \$30,000 401(k) account and her double-wide trailer. The trailer was situated on a piece of property in Cottontown,

Tennessee, which was next door to Wife's parents. The trailer became the parties' first marital residence, and Wife's parents later deeded the land to Husband and Wife.

At the time the parties married, both worked full time. Wife is a high school graduate and attended Volunteer State Community College for a year and a half. For several years prior to the parties' marriage, she worked as a loan processor. Wife continued in this field, and in 1995, her annual earnings peaked at \$24,575. She stopped working as a loan processor in 1997.

Husband worked as an electrician when the parties married and had fifteen years experience in the electrical business. During this time, Husband had worked his way up from apprentice to licensed electrician, then a field superintendent, a project manager, and vice president of an electrical contracting business. In the early 1980s, Husband started an electrical contracting business, but the entity declared bankruptcy in 1988.

When the parties married, Wife had a son from a prior marriage who was disabled. Wife's son lived with the parties. In November 1993, the parties' daughter was born.

In 1994, Husband quit his job and started another electrical contracting company—Southeast Electric, Inc. ("Southeast Electric"). Southeast Electric began as a sole proprietorship operated from the living room of the parties' mobile home; there, Husband calculated job estimates, leased employees, and paid the company's bills. During the weekdays, Husband worked as an electrician on the company's job sites. While Husband focused his efforts on establishing the business, Wife continued working full time as a loan processor and cared for the parties' daughter, and her then minor son.

In 1996, the parties built a house on the land given to them by Wife's parents. Wife contributed \$15,000 from her 401(k) toward the home. With help from some of his employees, Husband did the construction on the home. By this time, Southeast Electric had outgrown the parties' mobile home, and company operations were moved into the garage attached to the newly constructed house. In addition, Wife began working part time for Southeast Electric, doing secretarial work and basic bookkeeping. Sometime during this transition, Wife contributed the remaining \$15,000 of her 401(k) to Southeast Electric's business expenses.

In 1997, Southeast Electric moved to a commercial rental property to accommodate its expanding operations. The company hired a complete office staff, and eventually a full-time bookkeeper. After Southeast Electric moved to its commercial location, Wife's direct involvement in the company diminished. She soon stopped working outside the home altogether.

Over the next few years, Southeast Electric continued to prosper, reporting revenues that ranged from \$2,499,158 in 1999 to \$5,340,451 in 2003. In January 2003, Southeast Electric, which by that time had approximately 50 employees, moved into its own newly constructed building on

Pleasant Grove Road.¹ As the company became more successful, Husband's income also increased. Husband earned \$197,700 in 1997, \$270,500 in 1998, \$188,202 in 1999, \$269,999 in 2000, \$320,474 in 2001, \$322,500 in 2002, and \$415,000 in 2003.

During this time, Wife was a full-time homemaker. She assumed most, if not all, of the household and child-rearing responsibilities. The parties' daughter was involved in dance and karate, and Wife periodically volunteered at her school. In addition, Wife managed the parties' personal finances. Wife allocated the money from Husband's paycheck between two joint banking accounts—a checking account and money market account. She paid the marital expenses and balanced the checkbook.

During their marriage, the parties lived an affluent lifestyle and accumulated a substantial marital estate. Turning their first house into a "guest house," they custom built a larger brick home with a pool on the land from Wife's parents. They hired a housekeeper and a lawn service. The family vacationed at least once and sometimes twice a year. The parties' net marital estate exceeded \$2.5 million.

In June 2003, Husband told Wife that he no longer loved her, and that he wanted a divorce. He then moved into the guest house. On July 11, 2003, Wife filed a complaint for divorce, alleging irreconcilable differences and inappropriate marital conduct. Wife sought to be designated the primary residential parent of the parties' daughter and asserted that she was in need of financial assistance. Husband's answer denied irreconcilable differences or inappropriate marital conduct, but admitted Wife's need for financial assistance, asserting that it could be addressed by an award of temporary support—namely, rehabilitative or transitional alimony. Husband later filed a counter-complaint for divorce, alleging irreconcilable differences and that Wife was guilty of inappropriate marital conduct. In her response, Wife denied that she engaged in inappropriate marital conduct and asserted a need for permanent financial support.

In December 2003, the parties made an attempt to reconcile. Unfortunately, it was unsuccessful. Thereafter, pending the trial, Husband was ordered to pay Wife \$1,100 each week in support, as well as the expenses associated with the parties' marital home, the premiums on his life insurance and Wife's car insurance, and reasonable dance and school expenses for the parties' daughter. The case was tried on July 29, 2004 and September 1, 2004.

At the hearings, both parties testified. Much of Husband's testimony focused on the financial status of Southeast Electric as of the time of trial. After acknowledging the company's success in 2003—when Southeast Electric grossed its highest sales of over \$5 million—Husband discussed the company's 2004 performance. According to Husband, the "construction market [was] flat" as of July 2004, which resulted in limited projects and declining sales. Consequently, the company had reduced its workforce from over 60 employees to 30 employees. The company had previously been

¹The parties had previously purchased this land, and Husband built the facility. The company pays Husband rent for use of the building.

debt free, but in 2004, it borrowed \$200,000 against a \$355,000 line of credit, and Husband loaned the company an additional \$30,000. While his compensation in 2003 had been over \$400,000, Husband said that he had substantially cut his salary, receiving \$105,000 as of July 29, 2004.² He also said that the company had elected not to distribute profit sharing in 2004. To counteract the market downturn and increasing competition, Husband testified, the company was trying new marketing techniques and bidding on jobs outside its usual territory.

In his testimony, Husband also questioned eighteen unexplained withdrawals from the parties' personal bank accounts. Wife managed the parties' finances and, according to Husband, while Wife entered every check written from the accounts, she often made cash withdrawals that went unrecorded. Husband asserted that between January 2002 and June 2003, Wife withdrew a total of \$26,173.97 in cash from the parties' accounts. On cross examination, Husband acknowledged that he had access to the checkbooks and bank statements during this time and that Wife sometimes made cash withdrawals for him.

In her testimony, Wife did not dispute the eighteen cash withdrawals, but said that the only money she spent, aside from paying bills and buying groceries, was for everyday living—e.g., clothing, decorations for the home and lawn, dry cleaning, and “stuff like that.” She said that Husband had never questioned her spending during the marriage and that neither party had ever been required to explain cash withdrawals. She denied secreting any of the parties' funds.

Both parties testified about Wife's monthly expenses. In her post-divorce expense statement, filed on July 29, 2004, Wife's monthly expenses were broken down into three categories—household expenses, automobile expenses, and general expenses. For household expenses, Wife reported a total of \$2,086 per month; this category included items such as property taxes, utilities, pool and yard maintenance, and homeowners insurance.³ For automobile expenses, Wife reported \$923 per month. Of this amount, \$500 was allocated to a car payment; Wife testified that her 1998 town car, which had 88,000 miles on it at the time of trial, was unreliable and needed to be replaced in the near future. In the category of general expenses, Wife reported a monthly total of \$4,966.80. This included groceries, clothing, the daughter's school supplies and extracurricular activities, Christmas and birthday gifts, and a vacation allowance, as well as expenses for hair and nails, gym membership, kickboxing, housekeeping, dining out, bottled water, decorations, and “miscellaneous” items. In total, Wife's expense statement showed a monthly deficit of \$7,975.

Wife testified that the statement accurately reflected her monthly expenses during the marriage and acknowledged that the parties enjoyed an “affluent” lifestyle. She said that she wanted

²This amounts to a total salary of \$190,672 for 2004.

³This amount does not include the mortgage payment for the marital residence. According to Wife, the parties were trying to pay off the mortgage in five years and, prior to their separation in June 2003, made payments of \$5,100 a month; this amount exceeded the required obligation. After the parties separated, Husband paid the \$5,100 for June, July, and August, but made interest only payments thereafter. Wife testified that the mortgage will mature in 2008 and reported an outstanding balance of \$225,500 at the time of trial.

to maintain that lifestyle for herself and their daughter. Husband maintained that Wife's claimed expenses were "excessive," and commented that, "lifestyles change and adjustments have to be made."

Both parties presented expert testimony on the value of the parties' marital residence, which included the newer living quarters, the pool, and the "guest house." Lloyd Andrews, a certified residential appraiser, testified for Wife. Andrews emphasized what he characterized as the home's rural location, which, he explained, greatly affected its marketability. Andrews opined that, despite the customized amenities and a combined living area of 4,837 square feet, the fair market value of the home was \$475,000. James Samuels, a certified general appraiser, testified for Husband. Samuels' testimony focused more on the home's amenities—e.g., the high ceilings, pool, and guest house. Samuels asserted that, despite the home's "unique" location just outside the city of White House, its fair market value was \$700,000.

Finally, each party presented the testimony of a certified public accountant on the fair market value of Southeast Electric; David Mensel testified for Wife and James Trumble testified for Husband. Not surprisingly, while both experts used similar valuation approaches, they came to different conclusions. Under the "market approach"—a method based on the sales of comparable businesses—Wife's expert, Mensel, found that Southeast Electric had a value of \$1,655,540. Using the same method, Husband's expert, Trumble, determined a slightly lower value of \$1,653,580. The divergence between the experts' valuations was more marked under the income approach, a method based on future cash flow. Using the income approach, Wife's expert Mensel opined that Southeast Electric had a value of \$1,431,750, while Husband's expert Trumble determined a value of \$800,591.⁴ Mensel testified that the market approach was the superior method of valuation, based in part on the sufficiency of comparable transactions. On this basis, Mensel opined that the fair market value of Southeast Electric was \$1,655,540. Husband's expert Trumble, however, found the quantity of comparable sales to be deficient, as well as the data available on those sales. Ultimately, Trumble used a combination of the income and market approaches, giving 90% weight to the income approach and 10% to the market approach. With this methodology, Trumble asserted that the fair market value of Southeast Electric was \$890,000.

At the conclusion of the hearings on September 1, 2004, the parties stipulated to the existence of grounds for divorce, pursuant to T.C.A. § 36-4-129. The final decree was entered on November 17, 2004. Therein, the court declared the parties divorced, designated Wife as the primary residential parent, ordered Husband to pay \$2,100 per month in child support, and required Husband to deposit \$500 per month in an account for post-secondary education for the parties' daughter. In valuing the marital estate, the trial court accepted the valuations of Husband's experts as to the value of the marital residence, \$700,000, and the value of Southeast Electric, \$1,653,580 (by the "market

⁴ Among other things, the disparity in valuations under the income approach arose from the experts' use of different earnings periods. Mensel utilized Southeast Electric's earnings for 2003—the company's highest earnings period. Trumble, on the other hand, used an average of several years, including earnings from January 2004 to July 2004.

approach”). The trial court awarded Wife the marital residence and \$500,000 to be paid from the earnings of Southeast Electric in monthly installments of \$4,167 for ten years without interest. Husband was awarded Southeast Electric and the \$650,000 improved real property on Pleasant Grove Road. In addition, the trial court distributed the parties’ vehicles, retirement and investment accounts, household furnishings, and other personalty. In total, Husband took approximately \$1,496,000 and Wife took approximately \$1,201,000 of the net marital estate. Because Wife was responsible for the \$225,500 mortgage on the marital residence, the trial court awarded Wife rehabilitative alimony in the amount of \$3,000 per month for seven years. In making this award, the trial court stated that Wife was “capable of employment outside the home.” Finally, Wife was awarded alimony *in solido* in the amount of \$9,500 for attorney’s fees. From this order, Wife now appeals.

On appeal, Wife argues that the trial court erred in three respects: (1) in dividing the marital estate, and specifically in setting the amount of the \$500,000 award to Wife; (2) in declining to order Husband to pay post-judgment interest on the \$500,000 award to Wife; and (3) in both the amount and duration of alimony awarded to Wife. Wife also seeks an award of attorney’s fees incurred in this appeal.

Our standard of review is *de novo* upon the record, according a presumption of correctness to the trial court’s findings of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000). To the extent the trial court made no specific findings of fact, however, we review the record to determine where the preponderance of evidence lies. *See Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002); *see also Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). The trial court’s legal conclusions are reviewed *de novo* and accorded no presumption of correctness. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005).

On appeal, Wife argues that the trial court, instead of awarding Husband 55% and Wife 45% of the net marital estate,⁵ should have divided the marital property equally between the parties. Specifically, Wife contests the amount of the \$500,000 award and asks this Court to award her an additional \$147,387 to equalize the distribution. She contends that the “the law seems to support a presumption that the division [of marital property] should be equal changed only by the Court’s consideration and weighing of the relevant factors.” Wife maintains that the duration of the marriage, the disparity in the parties’ earning capacity, her contributions to the business, and her contributions as a homemaker and parent, taken together warrant, at minimum, an equal division of the marital property.

In reviewing this issue, we note that a trial court’s division of marital property is not mechanical and must be guided by the factors set forth in T.C.A. § 36-4-121(c). *Manis v. Manis*, 49

⁵Pursuant to Rule 7 of the Rules of the Court of Appeals of Tennessee, Wife attached a statement to her appellate brief detailing the trial court’s distribution of the marital property. According to Wife’s statement, Husband received \$1,496,156 (55%) and Wife received \$1,201,382 (45%) of the net marital estate.

S.W.3d 295, 306 (Tenn. Ct. App. 2001); **Brown v. Brown**, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994). The relevant factors are:

- (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) 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) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

T.C.A. § 36-4-121(c)(1)-(11) (2001). The trial court is afforded wide discretion in dividing marital property, **Fisher v. Fisher**, 648 S.W.2d 244, 246 (Tenn. 1983); **Manis**, 49 S.W.3d at 306, and its distribution will be given “great weight” on appeal. **Ford v. Ford**, 952 S.W.2d 824, 825 (Tenn. Ct. App. 1997); **Wilson v. Moore**, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). Thus, we ordinarily “defer to the trial courts in these matters unless their decisions are inconsistent with the factors in [section] 36-4-121(c) or are not supported by the preponderance of the evidence.” **Brown**, 913 S.W.2d at 168 (citing **Barnhill v. Barnhill**, 826 S.W.2d 443, 449-50 (Tenn. Ct. App. 1991)).

While there is a presumption that marital property is owned equally, there is no presumption favoring an equal division. **Bookout v. Bookout**, 954 S.W.2d 730, 731 (Tenn. Ct. App. 1997) (citing **Salisbury v. Salisbury**, 657 S.W.2d 761 (Tenn. Ct. App. 1983)); *see also* **Batson v. Batson**, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988) (“[A]n equitable property division is not necessarily an equal one.”). Instead, the goal is to divide the property in a fair and equitable manner, considering the unique facts of the case and weighing those facts in light of the relevant statutory factors in T.C.A. § 36-4-121(c). *See, e.g.,* **Cohen v. Cohen**, 937 S.W.2d 823, 832 (Tenn. 1996); **Ellis v. Ellis**, 748 S.W.2d 424, 427 (Tenn. 1988).

In this case, neither party brought a substantial amount of property to the marriage. The bulk of the parties' marital estate was earned after they were married. While the thirteen-year duration of the marriage was substantial, it cannot be characterized as an "exceptionally long" marriage, as Wife contends. *See Ricketts v. Ricketts*, No. M2005-00022-COA-R3-CV, 2006 WL 2842717, at *8 (Tenn. Ct. App. Oct. 3, 2006) (finding that a marriage of ten years cannot be considered an exceptionally long duration). During the marriage, Wife made significant contributions to the parties' largest marital asset—Southeast Electric; she provided the land on which the business was launched and contributed the sum of her 401(k) as seed money for business expenses as well as the parties' first house, which the company partially occupied in 1996. Wife worked part time for the company during its early years, while caring for the parties' minor daughter, and later assumed the responsibilities of a full-time homemaker.

Clearly, while Wife tended to the household duties and the parties' daughter, Husband was able to focus his efforts on the business. His hard work along with Wife's efforts proved fruitful. From 1999 to 2003, the company's gross sales more than doubled, going from \$2,499,158 to \$5,340,451. In addition, Husband's annual income substantially increased, ranging from \$197,700 in 1997 to \$415,000 in 2003. Consequently, by the time the parties divorced, at the ages of 41 (Wife) and 49 (Husband), they had accumulated a substantial marital estate.

Based on the above evidence, and in light of the relevant statutory factors, Wife is entitled to a significant share of the parties' marital property. Accordingly, the trial court awarded Wife \$500,000 to be paid from the earnings of Southeast Electric in monthly installments of \$4,167 over the next ten years. In addition, she received the marital residence, which the court valued at \$700,000, all of the marital household furnishings, two vehicles, and approximately \$175,000 in banking, retirement, and investment accounts. Thus, as noted above, Wife received 45% of the parties' net marital estate.

After a careful review of the record, we must conclude that the trial court appropriately considered Wife's contributions in distributing the marital estate, specifically regarding the \$500,000 award. At trial, the court heard testimony regarding Southeast Electric's declining performance in 2004; due to a market downturn, the company had cut its workforce by half, elected against the distribution of profit-sharing, incurred a substantial amount of debt, and significantly reduced Husband's salary. Despite this unrebutted evidence, the trial court accepted the "market approach" valuation of \$1,653,580 by Husband's expert—the second highest figure presented by the experts—and awarded Wife \$500,000 to be paid from the earnings of the company. In effect, Wife received 30% of the business's fair market value at the time of trial.

While the apparent disparity in the parties' earning capacity gives us some pause, in light of the overall substantial size of the marital estate and the deference accorded a trial court's division of marital property, we must conclude that the evidence does not preponderate against the trial court's division of the parties' marital estate. Accordingly, we affirm the trial court's decision on this issue.

Wife argues next that the trial court erred in not ordering Husband to pay interest on the \$500,000 award to Wife. She contends that the trial court was without authority to deny her post-judgment interest at the rate of 10% per annum for ten years on the sum of \$500,000, pursuant to T.C.A. § 47-14-121 (2001). Accordingly, she asserts that the installments payments should be \$6,607 per month instead of \$4,167 per month.

As indicated above, the trial court, in dividing the parties' marital estate, awarded Wife "\$500,000.00 cash from Husband payable at \$50,000.00 per year for ten (10) years to be paid in monthly installments of \$4,167.00." In doing so, the trial judge explained his reasoning:

No indication at trial was made to cause the Court to find that Southeast Electric, Inc. is for sale or contemplated to be sold. If it is sold within the next ten (10) years the cash award to [Wife] should be paid in full from proceeds of the sale. No interest is awarded because payments to Wife will come from earnings of the corporation.

Clearly, the trial court, without granting Wife an interest in Southeast Electric, intended to make a distributive award of part of the value of the corporation in an attempt to achieve equity in the overall division of the parties' marital estate. An additional award of interest would upset the balance the trial court sought to achieve.

Moreover, we disagree with Wife's assertion that the trial court did not have authority to make the award without an accrual of interest over the ten-year payment period. To the contrary, a "party's right to postjudgment interest is based on that party's entitlement to use the proceeds of the judgment after the award." *Vooys v. Turner*, 49 S.W.3d 318, 322 (Tenn. Ct. App. 2001) (citing *West Am. Ins. Co. v. Montgomery*, 861 S.W.2d 230, 232 (Tenn. 1993)); *see also Williams v. Williams*, No. E1999-02750-COA-R3-CV, 2000 WL 816821 (Tenn. Ct. App. June 23, 2000) ("[T]he rule is that the statutory interest does not begin to accrue until the party awarded judgment becomes entitled to the money."). In the instant case, the trial court ordered that the \$500,000 be paid in future installments. Wife is not entitled to use the proceeds of each installment until that installment is due. *See Price v. Price*, 472 S.W.2d 732, 734 (Tenn. 1971) (denying post-judgment interest from the date of the decree because the award was payable in monthly installments). Nothing in the record indicates, nor does Wife allege, that Husband has failed to make the required payments. *See Whiteside v. Whiteside*, No. 03A01-9707-CV-00272, 1998 WL 237715, at *12 (Tenn. Ct. App. May 7, 1998) (awarding post-judgment interest from the date that each unpaid installment matured). Consequently, we affirm the trial court's decision on this issue as well.

As her final issue, Wife contends that the trial court erred in its award of rehabilitative alimony in the amount of \$3,000 per month for seven years. Wife maintains that the trial court erred in both the amount and duration of spousal support awarded. She asserts that \$3,000 per month is

insufficient to account for her present need, which she says amounts to \$6,016 per month.⁶ She argues that she should not be required to encroach upon her award of marital property, namely the \$500,000, to satisfy her present need, but rather should be able to invest this money towards her future security. As to the duration of the alimony award, Wife asserts that the disparity in the parties' ability to earn income, the length of the marriage, and the combined efforts of the parties in amassing a sizeable estate, which includes an income-producing business, warrant an award of alimony *in futuro*. According to Wife, while Husband will be able to maintain the marital standard of living long past the seven-year period, she will continue to be economically disadvantaged.

Trial courts are afforded broad discretion in deciding whether spousal support is warranted and in determining the type, amount, and duration of such support. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). Accordingly, a trial court's findings as to spousal support are reversed only in instances in which this discretion "has manifestly been abused." *Hanover v. Hanover*, 775 S.W.2d 612, 617 (Tenn. Ct. App. 1989). "If the discretionary decision is within the range of acceptable alternatives, appellate courts will not substitute their decision for that of the trial court simply because the appellate court would have chosen a different alternative." *Clement v. Clement*, No. W2003-02388-COA-R3-CV, 2004 WL 3396472, at *19 (Tenn. Ct. App. Dec. 30, 2004).

We must also be mindful of the legislative preference for rehabilitation. T.C.A. § 36-5-101(d)(1)(C) ("It is the intent of the general assembly that a spouse who is economically disadvantaged relative to the other spouse, be rehabilitated whenever possible."). A rehabilitative alimony award is intended to provide the economically disadvantaged spouse an opportunity to obtain the education or training necessary to allow the disadvantaged spouse to achieve an "appropriate standard of living, as compared to the standard of living enjoyed during the marriage." *Ricketts v. Ricketts*, 2006 WL 2842717 at *5 (citing *Robertson v. Robertson*, 76 S.W.3d 337, 340-42 (Tenn. 2002)). The purpose of rehabilitative alimony is to encourage and aid the disadvantaged spouse in becoming self-sufficient. *Burlew v. Burlew*, 40 S.W.3d 465, 471 (Tenn. 2001). Where economic rehabilitation is not feasible, however, a court may award alimony *in futuro*.⁷ See T.C.A. § 36-5-101(d)(1)(C); see also *Burlew*, 40 S.W.3d at 471.

Furthermore, there are no hard and fast rules for determining whether spousal support is warranted and, if so, the nature and extent of such support. *Ricketts*, 2006 WL 2842717 at *6 (citing *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001)). Instead, these decisions are factually driven and require the trial court to carefully balance the relevant statutory factors in section 36-5-101(d)(1)(E) of the Tennessee Code Annotated. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). The statutory factors are:

⁶This figure is derived from Wife's expense statement, which is discussed above, but does not include the \$1,959 attributed to general expenses for the parties' daughter. Furthermore, as Wife points out, this amount does not include the \$739.34 in monthly mortgage interest payments on the marital residence.

⁷Alimony *in futuro* provides long-term financial support to a disadvantaged spouse who is not capable of economic rehabilitation. See generally *Burlew*, 40 S.W.3d at 471.

- (i) 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;
- (ii) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
- (iii) The duration of the marriage;
- (iv) The age and mental condition of each party;
- (v) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (vi) 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;
- (vii) The separate assets of each party, both real and personal, tangible and intangible;
- (viii) The provisions made with regard to the marital property as defined in § 36-4-121;
- (ix) The standard of living of the parties established during the marriage;
- (x) 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;
- (xi) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
- (xii) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

T.C.A. § 36-5-101(d)(1)(E)(i)-(xii) (Supp. 2004).⁸ Of these factors, the most important are the need of the disadvantaged spouse and the ability of the obligor spouse to pay. *Bratton*, 136 S.W.3d at 604; *Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1998).

In this case, the trial court did not fully explain its decision that rehabilitative alimony was feasible, nor did it expressly make any findings of fact regarding the relevant statutory factors in T.C.A. § 36-5-101(d)(1)(E). Instead, the trial court took the case under advisement and issued a final decree that simply stated that “this is an appropriate case for rehabilitative alimony” because Wife was allocated the responsibility for paying the mortgage on the marital residence and because Wife was “capable of employment outside the home.” Consequently, we have independently reviewed the record in light of the relevant statutory factors.

⁸The alimony provisions of section 36-5-101 have since been removed, Act effective July 1, 2005, ch. 287, § 1. The above factors may now be found in T.C.A. § 36-5-121 (2005).

Wife is a high school graduate and attended a community college for a year and half. At the time of the marriage, she was working full time as a loan processor and gained several years of experience in that field. When the parties divorced after thirteen years of marriage, Wife was 41 years of age, and nothing in the record reflects that she suffers from any physical or mental limitations. In addition, the parties' minor daughter was 10 years old at the time of trial and attending school during the daytime. Thus, with the proper financial support, Wife is capable of acquiring additional training or education and reentering the workforce.

Regarding the division of property, moreover, both parties received a substantial amount of marital property. Specifically, Husband was awarded approximately \$1,496,000 and Wife was awarded approximately \$1,201,000 of the marital estate. Husband took the parties' major income-producing asset—Southeast Electric—along with the Pleasant Grove Road land and facility. On the other hand, Wife, who contributed to the growth of the business both directly and indirectly, received a \$500,000 cash award to be paid from the earnings of the business over the next ten years. In addition, Wife received the marital residence, which is on the land deeded to the parties by Wife's parents and has a fair market value of \$700,000. Wife also received the bulk of the parties' investment and retirement accounts.

Notably, the trial court made no express finding on the parties' relative earning capacity, and this is a substantial factor. The record reflects that Wife's earnings peaked in 1995 at \$24,575. In contrast, from 1997 to 2004, Husband's average salary, despite its recent decline, was approximately \$271,000. The parties also established an affluent lifestyle during the marriage, one which allowed Wife to fully devote herself to homemaking and child-rearing for about seven years. Clearly, the disparity in the parties' ability to earn income and their marital standard of living weigh against the decision to make the award of support temporary in this case. In determining an alimony award, however, every relevant statutory factor must be considered, including the division of marital property and the duration of the marriage. *See, e.g., Cooke v. Cooke*, No. M2001-03026-COA-R3-CV, 2003 WL 21392003, at *8 (Tenn. Ct. App. June 17, 2003) (“Neither the standard of living . . . nor the income or earning potential of the other spouse can be used as the sole or determinative factor.”). Here, the trial court's division of marital property coupled with the award of rehabilitative alimony affords Wife the opportunity to substantially increase her earning capacity. Moreover, from the statement of expenses submitted by Wife, there is room for Wife to reduce expenses without a substantial adverse effect on herself or the parties' daughter.

This issue presents a close question. However, after considering all of the relevant statutory factors, we cannot say that the trial court abused its discretion in the amount or duration of the award to Wife of rehabilitative alimony. Therefore, we affirm on this issue as well.

Finally, we have considered Wife's request for attorney's fees, and find that it must be denied.

The decision of the trial court is affirmed. Costs of this appeal are to be taxed to Plaintiff/Appellant Penny W. Hester, and her surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE