

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2014 Session

KIMBERLY MODENA RAY v. ROGER LEE RAY

**Direct Appeal from the General Sessions Court for Warren County
No. 8602 Larry B. Stanley, Jr., Judge Sitting by Interchange**

No. M2013-01828-COA-R3-CV - Filed October 28, 2014

This is an appeal from a divorce proceeding. The parties were married thirteen years and started a successful business during that time. The husband became disabled during the marriage and was no longer able to work. Following a two-day bench trial, the trial court valued the parties' marital assets, including the business, and attempted to divide the marital property equally. The court ordered the wife to pay the husband \$2,100 per month in alimony *in solido* for five years. It declined to award attorney's fees to either party. On appeal, the wife raises several issues regarding the trial court's valuation and division of marital property, and both parties challenge the alimony award. The husband also seeks an award of attorney's fees. For the following reasons, we affirm in part, vacate in part, and remand for further proceedings. Specifically, we affirm the trial court's division of marital property, and we vacate and remand for additional findings on the issues of alimony and attorney's fees. We deny the request for attorney's fees on appeal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court
Affirmed in part, Vacated in part and Remanded**

BRANDON O. GIBSON, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and JOHN W. MCCLARTY, J., joined.

Thomas F. Bloom, Nashville, Tennessee, for the appellant, Kimberly Modena Ray.

Donald N. Capparella and Elizabeth Noel Sitgreaves, Nashville, Tennessee, for the appellee, Roger Lee Ray.

OPINION

I. FACTS & PROCEDURAL HISTORY

Kimberly Modena Ray (“Wife”) married Roger Lee Ray (“Husband”) in 2000. At the time of the marriage, Husband had recently left his position as a vice-president at Bass Pro Shops and purchased a fishing rod company. Wife was a nurse. Around 2001 or 2002, Husband and Wife started their own home healthcare staffing company, Nurse One Team One, LLC (“Nurse One”). The company was successful, and the parties enjoyed a very comfortable lifestyle. In 2006, Husband and Wife bought another home health agency, which they re-named Assertive Medical, Inc. (“Assertive”). In purchasing Assertive, Husband and Wife paid one million dollars in cash toward the purchase price of two million dollars, and they financed the balance.

Also in 2006, Husband was injured in a hunting accident and became very ill with pancreatitis. As a result of complications, Husband had surgery to remove several organs and became diabetic. In 2008, Husband was diagnosed with a very aggressive form of leukemia, and he spent almost a year in a hospital located out-of-state. Due to his illnesses, Husband was no longer actively involved with the parties’ businesses. Wife also spent a great deal of time out-of-state with Husband. Consequently, the parties hired a new CEO to “take over” and run Assertive. In the parties’ absence, an Assertive employee embezzled about half a million dollars from the company. There was also a sexual harassment suit against Nurse One, which eventually settled for \$117,000.

The parties sold the fishing rod company in 2009. Husband and Wife sold Assertive in April 2010 for approximately \$2.25 million, but they did not receive the proceeds from the sale at that time. Wife left Husband in September 2010. She continued to operate Nurse One without participation by Husband. Wife filed a complaint for divorce in June 2011, and Husband filed an answer and counter-complaint for divorce.¹ Both parties asked the trial court to equitably divide their marital property and award them attorney’s fees. Husband, who is permanently disabled, also sought alimony *pendente lite* and an award of alimony *in futuro*. The trial court entered an order approving an agreement between the parties whereby Wife would pay \$1,750 per month to Husband as temporary alimony, and she would continue to pay Husband’s \$1,133 health insurance premium and monthly life insurance premium

¹The case was filed in general sessions court. The general sessions court judge recused himself, and the case was transferred to be heard before Judge Larry B. Stanley, Jr., sitting by interchange.

from the Nurse One bank account, as had been done in the past.²

Husband filed a motion for an inventory and accounting of the assets of Nurse One. He also filed a motion specifically asking the trial court to order Wife to provide all bank account statements and all financial documents for Nurse One. After two hearings, the trial court granted Husband access to all business accounts, the Quickbooks system, and other records of Nurse One, and it ruled that he could go to Nurse One's office with Wife and her attorney in order to review and copy business records.

At some point during the proceedings, the checks from the sale of Assertive were issued to Husband and Wife. Although the company was sold for over \$2 million, after the payment of various debts, the parties received two much smaller checks from the sale – one for roughly \$225,000 and another for approximately \$178,000. Wife took control of these checks and deposited them into the Nurse One bank account without Husband's consent. Husband filed a series of motions asking the trial court to require a specific accounting of all funds received from the sale of Assertive, in addition to all payments and reimbursements from Nurse One to Wife, with receipts for all reimbursements. He also asked the court to require all checks issued by Nurse One to be signed by both parties or the parties' designated representatives.

The parties filed cross-motions for contempt, each alleging that the other spouse had engaged in various unapproved and improper financial transactions. The trial court found both parties in contempt for engaging in financial transactions without leave of the court. The trial court also found that Wife had "made specific threats that she would bankrupt or dismantle [Nurse One] and start a new business in the same business line before the [Husband] would receive anything from the business." The trial court's order provided that Wife would continue to operate Nurse One, but any checks, other than payroll and regular expenses, were to be approved and signed by a representative for Husband. The trial court also ordered Wife to provide an accounting of the funds from the sale of Assertive and to provide receipts for any payments made to her other than regular payroll for the last two years. Finally, the trial court ordered the executive director at Nurse One to produce an affidavit regarding the balance of the company's bank account. Nurse One's executive director submitted an affidavit indicating that the current balance of the Nurse One bank account was \$30,334.

²Pursuant to Tennessee Code Annotated section 36-5-121(k), a court "may direct a party to pay the premiums for insurance insuring the health care costs of the other party, in whole or in part, for such duration as the court deems appropriate." Such an award is properly categorized as alimony. *O'Daniel v. O'Daniel*, 419 S.W.3d 280, 289 (Tenn. Ct. App. 2013).

The trial court conducted a bench trial over the course of two days in March and April 2013. Much of the testimony was devoted to the evolution of Nurse One and its current financial situation.³ Wife acknowledged that Husband was co-owner of Nurse One, but she generally downplayed his involvement with the company. Wife testified that she came up with the idea for Nurse One and was responsible for changing its business plan over the years in response to various obstacles and demands. When asked whether Husband also worked at the company, she implied that he did not, stating, “Mr. Ray was at [the fishing rod company]. This was my – this was my business plan.” Wife went on to say, “I don’t recall Mr. Ray being involved very much with Nurse One.” Wife testified that when Husband became ill in 2006, she got “sidetracked” and was unable to be as “hands-on” with the parties’ businesses. She testified that her current role in Nurse One was Administrator and half-owner. Wife emphasized that Husband had not been involved with the business since he had been disabled, and she asked the trial court to award her the company.

Husband’s attorney stipulated that Husband did not oppose Wife being awarded the company; Husband simply wanted his share of the value of the company as half-owner. Husband testified that he was asking for an award of one-half of the value of the business due to the fact that he was one-half owner and because he thought such an award would be fair. He added, “We built it together.” Husband served as President and CFO of Nurse One. He said he initially devoted his time equally to the fishing rod company and to Nurse One, but due to Nurse One’s success, he eventually spent about 85 percent of his time working for Nurse One. Husband claimed that he and Wife both worked “night and day” at Nurse One, approximately sixty hours per week, during the early years. Husband testified that he and Wife were “a perfect mix” in operating Nurse One because he contributed business experience from his corporate tenure at Bass Pro Shops, and Wife handled the nursing aspects of the company. Husband said Wife began running the business once he became ill.

The parties’ accountant for the past ten years testified that before Husband became ill, he “was in the office doing the business and the numbers part of it” while Wife “was in the field, the nurse.” The accountant was of the opinion that Husband was “actively involved” with Nurse One and “as involved as [Wife]” until he got sick. In fact, she said that “Nurse One did its best when they worked together. They were a good team. He handled the business, the numbers side of it; and she handled the nursing and the field stuff.”

The parties retained William Robert Vance, Jr., a business evaluation analyst, as their

³Nurse One was the largest marital asset. The parties’ home was sold prior to trial and was not at issue. The parties stipulated that each would retain the items of personal property in his or her possession, such as vehicles and household items. Both parties were also expected to receive \$125,000 from a life insurance policy in the near future, which was not disputed.

“mutual expert” to value the business. Mr. Vance issued a report and testified that Nurse One should be valued somewhere between \$500,000 and \$650,000. He selected a wide valuation range because “the books were not in very good shape.” Nurse One had between 160 and 165 employees at the time of trial. Wife testified that the business was currently “struggling.” She testified that her weekly “draw” from the company was “supposed to be around \$3,000 a week.” This would equate to roughly \$156,000 per year. However, Wife said she did not always receive her weekly draw if the company was low on funds. Wife testified that in 2011 her personal income from Nurse One was about \$128,000, according to her K-1. However, the parties’ accountant confirmed that Wife’s receipt of \$128,000 in “guaranteed payments” in 2011 did not include the payments Nurse One made toward debts on Wife’s behalf. The parties’ accountant testified that in the three years before the divorce proceedings, Wife “drew” from Nurse One \$458,134 in 2008, \$436,790 in 2009, and \$266,174 in 2010, according to company balance sheets. Mr. Vance, the valuation expert, testified that Nurse One’s Quickbooks reflected total owner compensation for 2010 and 2011 of about \$266,000 per year.

Wife confirmed that she received separate checks from Nurse One for reimbursement of out-of-pocket expenses, in addition to her \$3,000 weekly paychecks. Wife initially claimed that Nurse One only reimbursed her for gas, but later she said that her reimbursement checks also cover bills for hotels, meals, and other expenses. Counsel for Husband then questioned Wife about some specific receipts her attorney provided in response to the trial court’s order to produce receipts to support Wife’s reimbursements for the past two years. These receipts included expenditures at a nail salon, a makeup counter at a department store, a jewelry store, an outlet store, and other seemingly personal expenses. Wife was asked whether she thought it was appropriate to be reimbursed for a \$68 expense at a nail salon, and she replied, “Yes, I do.” Wife also admitted that she had hired her boyfriend to act as her “Assistant Administrator” at Nurse One and paid him \$1,500 per week, more than any other employee, despite the fact that he had no experience in the nursing field. Wife and her boyfriend maintained a joint bank account.

The parties’ accountant testified that she had expressed concern, after the divorce was filed, about Nurse One paying personal expenses for Wife, such as her yard maintenance and personal auto insurance, and classifying those as company expenses rather than personal draws to Wife. The accountant explained that reimbursements to the owner for company expenses are not counted as personal draws to the owner on the company balance sheet. Thus, she confirmed that receiving money in this manner would be “a good way to get money and nobody knows about it.” The accountant added, however, that there should be some type of receipts or records to substantiate the expenses that are reimbursed.

Extensive testimony was presented at trial about the proceeds from the sale of

Assertive. Wife did not dispute that she deposited the two checks from the sale into Nurse One's bank account without telling Husband. Husband testified that Wife "intercepted" the checks and told him that he would never see a penny from them. As stated earlier, the first check was roughly \$225,000, and the second was about \$178,000. Wife testified about certain bills she paid with some of the proceeds of the \$225,000 check. Husband did not dispute the necessity of paying most of these bills, such as Nurse One's accountant's fees and worker's compensation expenses. However, Wife also paid herself \$15,000 from the sale proceeds, with a check for "fuel, rent, and past payroll," and Husband disputed the necessity of this single transaction. The total amount of the bills Wife paid did not exceed the amount of the \$225,000 check. Even after payment of the admittedly legitimate bills Wife paid, and paying herself \$15,000, there should have been \$68,942 in funds remaining from the \$225,000 check, a fact Wife acknowledged during her testimony. After Wife deposited the second check for \$178,000 and paid certain bills, a balance of \$53,047 from that check should have remained in Nurse One's account. In sum, a total balance of \$121,989 from the sale of Assertive should have remained in the Nurse One bank account after Wife paid the various bills and paid herself \$15,000.

As previously discussed, prior to trial, the trial court ordered Wife to produce an accounting of the funds from the sale of Assertive. Wife testified that she provided such an accounting to her attorney showing "where every dime of that money has been spent," but it does not appear that the document was introduced at trial. Wife generally testified that all of the money was "put back into Nurse One," and after the payment of debts, "we walked away" with somewhere between \$30,000 and \$40,000. Wife denied that she took any of the sale proceeds for her own personal use. Counsel for Husband asked if the remaining funds went to Wife in the form of reimbursement checks, and Wife acknowledged, "[t]here's a lot of those," but she claimed that was because she had not received a paycheck "for a very long time."

In summary, Husband did not challenge Wife's payment of legitimate expenses with the proceeds from the sale of Assertive, but he asked to be awarded one-half of the \$15,000 "reimbursement" check Wife paid herself from the sale proceeds. He also claimed that he should be awarded one-half of the funds that should have remained after payment of the bills, or one-half of approximately \$121,000 (the balance of \$68,942 from the \$225,000 check, and \$53,047 from the \$178,000 check).⁴ Husband testified that he had no idea what happened to that money because he was not allowed on the premises of Nurse One, and he had no

⁴The total of these two sums is \$121,989. However, Husband and his attorney used approximate numbers during Husband's testimony, and in its final order, the trial court found that "there was approximately \$121,000 remaining" from the sale of Assertive after all expenses and debts were paid. Husband does not challenge the trial court's calculation of the balance as an even \$121,000.

records to review.

A subpoena had been issued requiring Wife to produce receipts for the expenses for which she had been reimbursed by Nurse One. At trial, the executive director of Nurse One, Veola Sutherland, testified that she had the receipts in a large banker box in a closet in the basement of the Nurse One office, and when she went to retrieve them to bring them to trial, they were gone. She testified that she last saw the box “the week before last.” Ms. Sutherland testified that the same thing happened the last time she was ordered to bring receipts to court – the documents “disappeared” and were never found. Wife similarly testified that the receipts at issue were in a box in the basement of the Nurse One office, but “they disappeared.” Wife suggested that Husband had a key to the office and may have taken the missing documents. Husband testified that he had not possessed a key to the office in several years, and he had no idea what happened to the receipts. Ms. Sutherland claimed that the box generally only contained receipts for gas and office supplies and that she had never approved reimbursement checks for expenses that she would consider improper, such as Wife getting her nails done.⁵ She acknowledged, though, that since the divorce proceedings had been pending, Nurse One had paid for Wife’s student loans, her eye exam and prescription glasses. Ms. Sutherland also testified that during the divorce proceedings, she experienced problems with someone deleting deposits from the Quickbooks software, which would make it appear as if the company did not have as much money in its bank account. She said the only people with access to the Quickbooks software, besides herself, were the accountant, two Nurse One employees, and Wife. Ms. Sutherland said the two employees “don’t delete anything,” and the accountant would have no reason to delete the deposit entries.

Wife testified that Husband receives about \$6,000 per month in social security and private disability payments, or \$72,000 per year, and she pointed out that these are nontaxable payments. The parties’ accountant testified that a wage earner would need to earn about \$95,000 in taxable income in order to “net” \$72,000 per year. Wife claimed that she was struggling to pay \$1,750 per month in temporary alimony to Husband, and she asked the trial court to terminate all alimony payments to Husband, including the payment of his health insurance premium.

Husband’s leukemia was in remission at the time of trial, but he testified that he suffered from “a litany list of side issues.” He remained diabetic and required eight to ten insulin shots per day, in addition to sixty pills per day. He was 100% disabled. He testified that he is usually hospitalized several times per year. From his \$6,000 monthly disability payments, Husband paid about \$3,400 per month for his medications. This left him with

⁵The trial judge apparently did not consider Ms. Sutherland to be a very credible witness, as he asked at one point during her testimony, “Do you know how ridiculous that sounds?”

\$2,600 per month “to pay for everything else,” he said. His health insurance premium was \$1,133. Husband’s statement of expenses reflected \$12,633 in monthly expenses. He testified about transportation and lodging costs he incurs when he travels to an out-of-state hospital for treatment. Husband asked the trial court to award him \$3,400 per month in alimony because that amount would cover the cost of his medications, and he claimed that Wife told him when she left that he would not have to worry about being able to afford his medications. Husband was of the opinion that he knew “the money side of [Nurse One] better than anybody,” and he was confident that Nurse One would continue to generate enough income to enable Wife to pay alimony and his health insurance.

Husband testified that his medical insurance was provided by Nurse One, and the monthly premium was around \$1,200. Husband testified that he literally could not survive if he lost his health insurance and that he would “beg” the trial court to require Wife to continue paying his health insurance through Nurse One. He said he had been declared uninsurable and would be unable to obtain insurance elsewhere. Husband said that he had received a late notice from his health insurance carrier, indicating that Wife had not paid his premium on time on at least one occasion during the divorce proceedings. Husband also asked the trial court to award him attorney’s fees due to the difficulty he had encountered in obtaining information and documents from Wife about Nurse One.

Other witnesses testified as well, but it is not necessary to recount their testimony for purposes of this opinion. The trial court took the matter under advisement and entered a written order declaring the parties divorced on April 17, 2013. The trial court classified Nurse One as a marital asset and awarded it to Wife. The trial court valued Nurse One and its real property at \$550,000. The trial court subtracted the \$117,000 EEOC settlement from that amount, for a total value of \$433,000. The trial court determined that Husband was entitled to receive one-half of that value, or \$216,500. Next, the trial court addressed the proceeds from the sale of Assertive. The court found that Assertive was sold during the marriage and that the parties profited from the sale. The court found that the money from the sale was deposited in the Nurse One bank account and that Wife withdrew \$15,000 of the money; therefore, Husband should receive \$7,500 from the withdrawn sale proceeds. The court also found that there was approximately \$121,000 remaining from the proceeds after all expenses and debts were paid and that Husband was entitled to one-half of the remaining funds, or \$60,500. Accordingly, the trial court added \$7,500 and \$60,500 to its previous award to Husband of \$216,500 (for a total of \$284,500). The trial court then reduced this amount by certain sums attributable to two lake lots awarded to Husband, which were marital assets, and his receipt of a portion of a joint tax refund.⁶ The court noted that the parties stipulated that the personal property had already been divided, and therefore, each party

⁶Husband does not challenge these offsets on appeal.

would retain the items in their possession. Overall, the trial court determined that Wife should pay Husband \$229,000 for his share of the marital estate.

The trial court found that Husband's disability income was \$72,000 per year, but that he only retains \$2,637 per month after paying for his medications. The court found that Husband "is disabled due to very serious medical problems." The court further found that Wife's income was "difficult to determine due to poor accounting, her failure to answer interrogatories regarding her income accurately, and the reimbursement of monies to her from Nurse One Team One for expenses that appear to be personal," in addition to the fact that "the receipts for such expenses disappeared after they were subpoenaed by the husband." The court also mentioned that deposits were removed from the accounting software for Nurse One. In sum, the court found it "obvious that the wife has attempted to hide the true amount of her income," and it concluded that Wife earns "in excess of \$185,000 per year." The court noted that both parties were expected to receive \$125,000 from a life insurance policy. Without further explanation, the trial court ordered that Wife would pay Husband the sum of \$2,100 per month as alimony *in solido* for a period of five years, Husband would be responsible for his own health insurance premium, and the parties would pay their own respective attorney's fees.

Wife filed a motion for new trial, which the trial court denied. Wife timely filed a notice of appeal to this Court on August 12, 2013. In October 2013, Wife filed a motion for stay pending appeal, seeking to avoid immediate payment of her financial obligations under the final divorce decree on the basis that she had been notified by the Internal Revenue Service of an \$80,000 tax deficiency incurred by Nurse One for failure to pay 941 taxes during the parties' marriage. The record before us does not contain an order resolving Wife's motion. However, in January 2014, Wife filed, in this Court, a motion to consider post-judgment facts, asking this Court to consider the IRS tax deficiency and its impact on the value of Nurse One. We entered an order denying Wife's motion based on our conclusion that the notice of a tax deficiency was not appropriate for consideration as a post-judgment fact pursuant to Tennessee Rule of Appellate Procedure 14. Wife then filed a motion asking this Court to remand the case to the trial court in order to allow her to file a Rule 60.02 motion, seeking relief from the trial court's final divorce decree. On February 20, 2014, we granted Wife's motion and remanded to the trial court "for the limited purpose of considering [Wife's] Tenn. R. Civ. P. 60 motion." The order provided that all proceedings on appeal would be "stayed pending resolution of the Tenn. R. Civ. P. 60 motion," and the trial court clerk was directed to promptly prepare and transmit a supplemental record to this Court once the trial court ruled on the motion. The order provided that Husband would have thirty days from the date of filing of the supplemental record within which to file his brief.

Following a hearing, the trial court entered an order on April 1, 2014, stating that the

Rule 60 motion was not well-taken and was therefore denied. The supplemental record was filed with this Court, and the proceedings on appeal resumed.

II. ISSUES PRESENTED

Wife presents the following issues for review on appeal, which we have slightly restated:

1. Whether the valuation of Nurse One should be reduced by the tax liability that was not considered at trial;
2. Whether the trial court abused its discretion in awarding Husband one-half of the value of Nurse One when Husband had little to no participation in the business in recent years due to his illnesses;
3. Whether the trial court erred in awarding Husband the sums of \$60,500 and \$7,500 from the proceeds of the sale of Assertive;
4. Whether the trial court erred in failing to classify and value the parties' personal property; and
5. Whether the trial court abused its discretion in awarding alimony to Husband.

In his posture as appellee, Husband has responded to each of the issues raised by Wife and also raised the following additional issues for our review:

6. Whether the issue regarding Nurse One's tax liability is properly before this Court;
7. Whether Wife waived a valuation of the parties' personal property;
8. Whether the trial court abused its discretion in awarding Husband alimony *in solido* of only \$2,100 per month for a period of five years when Husband had a need for more alimony and Wife had the ability to pay;
9. Whether Wife should have been required to pay Husband's health insurance premium of \$1,133 per month;

10. Whether the trial court abused its discretion in denying Husband's request for attorney's fees; and
11. Whether Husband should be awarded attorney's fees on appeal.

For the following reasons, we affirm the trial court's valuation and division of marital property, and we vacate and remand for additional findings on the issues of alimony and attorney's fees. We deny the request for attorney's fees on appeal.

III. DISCUSSION

A. The Post-Trial Notice of Tax Liability

We begin with Wife's contention that the valuation of Nurse One should be reduced due to the notice of tax liability that she received after trial. Husband argues that this issue is not properly before the Court because the trial court considered it in the context of Wife's post-trial Rule 60 motion on remand, and Wife did not file a second notice of appeal to directly challenge the trial court's denial of the Rule 60 motion.

"[O]nce a party perfects an appeal from a trial court's final judgment, the trial court effectively loses its authority to act in the case without leave of the appellate court." *First Am. Trust Co. v. Franklin-Murray Dev. Co.*, 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001). "An appellate court retains jurisdiction over a case until its mandate returns the case to the trial court." *Id.* (citing *Raht v. Southern Ry. Co.*, 387 S.W.2d 781, 787 (Tenn. 1965)). In *Spence v. Allstate Insurance Co.*, 883 S.W.2d 586, 596 (Tenn. 1994), our supreme court decided that a party who desires to seek relief from a trial court's judgment during the pendency of an appeal "should apply to the appellate court for an order of remand," and "leave should be freely granted by the appellate court if the motion is not frivolous on its face."⁷ However, the Court did not expressly state whether the party would be required to file another notice of appeal in order to seek review of the trial court's decision on the Rule 60 motion. The answer to this question is not readily apparent from the Rules of Appellate Procedure, and the parties have not cited any caselaw in support of their positions. Our task is further complicated by the fact that this issue implicates "jurisdictional lines" between trial and appellate courts that "are not always bright." *First Am. Trust Co.*, 59 S.W.3d at 141.

⁷The supreme court explained that "the trial court will most likely be in a better position to quickly assess the merits" of a Rule 60 motion. *Spence*, 883 S.W.2d at 596. Also, allowing the trial court to consider the Rule 60 motion could potentially "obviate the need for further legal proceedings on appeal." *City of Memphis v. Civil Service Comm'n, City of Memphis*, No. W2002-01556-COA-R3-CV, 2003 WL 22204496, at *2 (Tenn. Ct. App. Sept. 15, 2003).

The order granting Wife’s motion for remand specifically remanded the case to the trial court “for the limited purpose of considerat[ion]” of the Rule 60 motion and expressly “stayed” the proceedings on appeal until the Rule 60 motion was resolved. Upon resolution of the motion, our order directed the trial court clerk to transmit a supplemental record to this Court, and the parties were directed to proceed with the filing of their briefs. We recognize that nothing in this Court’s order, or in the Rules, suggested that Wife would need to file a second notice of appeal in order for this Court to consider the trial court’s resolution of the Rule 60 motion. If anything, our order implied that this Court would consider the trial court’s order on the Rule 60 motion without the filing of a second notice of appeal.

Our research has revealed another case procedurally similar to this one. In *Gandhi v. Rucker*, No. M2001-00271-COA-R3-CV, 2002 WL 1677720, at *5 (Tenn. Ct. App. July 25, 2002), the middle section of this Court remanded the case to the trial court for “the limited purpose” of considering a Rule 60 motion and stayed the proceedings on appeal pending resolution of the motion. The order of remand instructed the appellant to “promptly notify this court once an order resolving the motion [was] entered.” *Id.* Upon resolution of the Rule 60 motion, the appellant filed a “Notice of Renewed Appeal.” *Id.* at *7. This Court then entered an order stating that the appeal from the denial of the Rule 60 motion “should be consolidated with the currently pending appeal.” *Id.* However, we did not engage in any analysis of whether a “renewed” notice of appeal was actually necessary.⁸

A close examination of the supreme court’s *Spence* opinion does shed some light on this murky issue. When the *Spence* court fashioned the proper procedure for resolving a Rule 60 motion during the pendency of an appeal, the court looked to federal law for guidance. The court concluded that federal decisions addressing the issue were “far from uniform,” but the court discussed the two main approaches from federal courts. *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 595. The first approach, and the one ultimately adopted by the supreme court, was that a trial court had no jurisdiction to consider a Rule 60 motion after a notice of appeal had been filed. *Id.* Under this approach, a party seeking relief from a judgment after an appeal was pending was required to present his grounds for relief to the appellate court, which would remand the case to the trial court if it determined that the motion should be heard. *Id.* (citing Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2873 (1973)). The second approach was to allow a trial court to consider a Rule 60 motion while an appeal was pending. *Id.* If the trial court denied the motion, the party could file a new appeal from the denial of the motion, and the appellate court would often consider the appeal from the denial of the motion together with the appeal from the original judgment. *Id.* at 595-96; *see also* 11 *Fed. Prac. & Proc. Civ.* § 2873 (3d ed.). However, under this

⁸In fact, the Court stated at the outset of the opinion, “This case should be required reading in the first year of law school about how not to try a law suit.” *Gandhi*, 2002 WL 1677720, at *1.

approach, the trial court could not grant the Rule 60 motion without leave from the appellate court. *Id.* at 595. Our supreme court acknowledged that the second approach appeared to be the majority rule and was lauded by Professors Wright and Miller as “preferable in practice.” *Id.* at 596. Nevertheless, the supreme court “decline[d] to adopt a rule that would allow a case to be pending in more than one court at a time.” *Id.* The court said the merits of such a rule were “patently clear” based on the procedural history of the case before it. *Id.* The court explained that the Rule 60 motion in *Spence* was filed in the trial court while Rule 11 applications were pending before the supreme court. Unbeknownst to the supreme court, the trial court considered and denied the Rule 60 motion. By the time of oral argument before the supreme court on the underlying case, the appeal from the decision on the Rule 60 motion was pending in the court of appeals. Once the supreme court was apprised of this fact, it was necessary to consolidate the appeals and reschedule oral argument, because if the court of appeals had reversed the holding of the trial court on the Rule 60 motions, the issues presented in the Rule 11 applications would have been mooted. Such action by the court of appeals, or by the trial court if it had granted the Rule 60 motion in the first instance, would have served to squander the substantial time spent by the supreme court in deciding whether the Rule 11 applications were meritorious. *Id.* “Overall,” the court concluded, “this potential for either administrative oversight or for a misallocation of valuable judicial resources engendered by allowing the trial court to entertain motions for relief from judgment once an appeal is pending outweighs the considerations of judicial economy promoted by allowing the trial courts to consider such motions.” *Id.* The court explained that “the potential for administrative oversight would be substantially reduced, and the scarce resources of this Court more efficiently allocated, by the adoption of a rule requiring cases to be kept ‘together’ during the appellate process.” *Id.* (emphasis added).

Based upon the *Spence* court’s stated intention to adopt a rule that would keep cases “‘together’ during the appellate process,” we conclude that it was not necessary for Wife to file a second notice of appeal in order to challenge the denial of her Rule 60 motion. Requiring separate notices of appeal would not serve the goal of efficiently allocating judicial resources, and it could potentially lead to duplicative appellate proceedings like those involved in *Spence*. In our opinion, the timely filing of Wife’s first notice of appeal vested this Court with jurisdiction to hear and resolve all issues thereafter raised.⁹ See *In re Adoption of D.P.E.*, No. E2005-02865-COA-R3-PT, 2006 WL 2417578, at *2 (Tenn. Ct. App. Aug. 22, 2006) (citing *Torrence v. Higgins Family Ltd. Partnership*, No. E2005-1549-COA-R3-CV, 2006 WL 1132080 at *6 (Tenn. Ct. App. Apr. 28, 2006)). Accordingly, the

⁹It does not matter that Wife’s original notice of appeal did not refer to the order on the Rule 60 motion. “[T]he notice of appeal plays no part in defining the scope of appellate review.” Tenn. R. App. P. 3(f), Adv. Comm’n Cmt. It is not a “review-limiting device.” Tenn. R. App. P. 13(a), Adv. Comm’n Cmt. “[O]nce any party files a notice of appeal the appellate court may consider the case as a whole.” *Id.*

clerk properly supplemented the record in the currently pending (but stayed) appeal with the record of the trial court's decision on the Rule 60 motion. In sum, we find that the trial court's resolution of the Rule 60 motion is properly before this Court.

Turning to the merits of Wife's Rule 60 motion, Wife asked the trial court to "modify its judgment in regard to the valuation of the parties' business, Nurse One[], to reflect a federal tax liability on the business of which the parties were not aware at the time of trial." According to the motion, the IRS assessed a \$133,000 tax liability against Nurse One for failure to pay employment taxes in 2012. Wife initially claimed that the tax liability was "unknown at the time of trial," but she also claimed in her motion that "[t]hese payroll taxes could not be paid when due" because Husband had withdrawn funds from the business account to pay a joint debt prior to the divorce trial. Wife sought relief pursuant to Rule 60.02(1), based upon mistake, inadvertence, surprise or excusable neglect, and Rule 60.02(5) "based upon the inequity of saddling [Wife] with the entire tax liability incurred by the business during the parties' marriage and which was unknown at the time of trial." She attached to her motion the notice from the IRS, which listed the applicable tax period as March 31, 2012. Husband filed a response, claiming that Wife was not "surprised" by the tax liability because she knew at the time of trial in March and April 2013 that the 2012 taxes had not been paid. The trial court denied Wife's Rule 60 motion upon finding that it was "not well taken."

Relief under Rule 60.02 is an "exceptional remedy" that is "designed to strike a proper balance between the competing principles of finality and justice." *Furlough v. Spherion Atlantic Workforce, LLC*, 397 S.W.3d 114, 127 (Tenn. 2013) (internal quotations omitted). The rule provides an "escape valve" that "should not be easily opened." *Id.* It is not meant to be used in every case in which the circumstances of a party change after the entry of a judgment or order. *Id.* (citing *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 336 (Tenn. 2010)). "A party seeking relief under Rule 60.02 must substantiate the request with clear and convincing evidence." *Id.* at 128 (citing *McCracken v. Brentwood United Methodist Church*, 958 S.W.2d 792, 795 (Tenn. Ct. App. 1997)). "In general, 'the bar for attaining relief is set very high and the burden borne by the movant is heavy.'" *Id.* (quoting *Johnson v. Johnson*, 37 S.W.3d 892, 895 n.2 (Tenn. 2001)). "As a prerequisite to the extraordinary relief available under Rule 60.02(1), the movant is required to set forth in a motion or petition, or in affidavits in support thereof, facts explaining why the movant was justified in failing to avoid mistake, inadvertence, surprise or neglect." *Turner v. Turner*, 776 S.W.2d 88, 92 (Tenn. Ct. App. 1988) (quoting *Travis v. City of Murfreesboro*, 686 S.W.2d 68, 69 (Tenn. 1985)). Rule 60.02(5) "affords relief in the most extreme, unique, exceptional, or extraordinary cases" and does not "'relieve a party from his or her free, calculated, and deliberate choices.'" *Furlough*, 397 S.W.3d at 128 (quoting *Holiday v. Shoney's South, Inc.*, 42 S.W.3d 90, 94 (Tenn. Ct. App. 2000)). In reviewing a trial court's decision to grant or

deny relief pursuant to Rule 60.02, we give great deference to the trial court and will not set aside the trial court's ruling except for abuse of discretion. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003).

During the two-day trial in March and April 2013, there was no mention of an inability to pay payroll taxes during 2012, regardless of the cause. If Wife was unable to pay the taxes when they were due, as she asserts in her Rule 60 motion, certainly she was aware of this fact at the time of trial. Wife's Rule 60 motion simply failed to show facts justifying the invocation of the extraordinary relief afforded by Rule 60.02. We find no abuse of discretion in the trial court's decision to deny the motion.

B. Dividing Nurse One

The next issue presented by Wife is whether the trial court erred in awarding Husband one-half of the value of Nurse One. She claims that the business should not have been divided equally because she was the one who was responsible for "starting" the business, "growing" the business, developing new business plans to meet changing conditions, and working in the business "24/7." Wife characterizes Husband's participation in the business as being "limited to financial accounting," "restricted by medical concerns by 2006," and non-existent by 2008. Thus, Wife argues that Husband was only involved in the business on a full-time basis for four years, as compared to her constant involvement. Wife argues that, under these circumstances, "an equitable division . . . is not an equal division." She claims that Husband should be entitled to "no more than fifteen percent" of the value of Nurse One.¹⁰

Appellate courts give "great weight to the decisions of the trial court in dividing marital assets" and "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." *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007) (quoting *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996)). Dividing marital assets "is not a mechanical process and trial courts are afforded considerable discretion." *Id.* at 328 (citing *Manis v. Manis*, 49 S.W.3d 295, 306 (Tenn. Ct. App. 2001)). It is not our role on appeal to tweak the manner in which a trial court has divided the marital property. *Owens v. Owens*, 241 S.W.3d 478, 490 (Tenn. Ct. App. 2007) (citing *Morton v. Morton*, 182 S.W.3d 821, 834 (Tenn. Ct. App. 2005)). The trial court's goal is to divide the marital property in an essentially equitable manner, and the fairness of the trial court's approach is inevitably

¹⁰The record is unclear on what basis Wife assigns her proposed division of Nurse One.

reflected in its results.¹¹ *Id.* at 489-90.

In this case, the trial court's decision is supported by substantial evidentiary support, and the trial court did not misapply statutory requirements or procedures. Husband and Wife started the business together after they married. Although it began "pretty humbly," as Husband put it, with five nurses and a fifteen-dollar desk, the business quickly grew to be very successful. Husband owned one-half of the business and served as President and CFO of the company. He testified that he and Wife worked together as a team, "night and day," sixty hours per week. The parties' long-time accountant confirmed that Husband was "as involved as" Wife and said that Nurse One "did its best" when Husband and Wife were running the business together. It was not until Husband became ill, through no fault of his own, that his involvement with the business declined and eventually ceased. We certainly cannot say that the trial court abused its discretion in concluding that an equal division of the

¹¹In making an equitable division of marital property, a trial court is directed to consider all relevant factors, including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial 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;
- (B) For purposes of this subdivision (c)(5), dissipation of assets means wasteful expenditures which reduce the marital property available for equitable distributions and which are made for a purpose contrary to the marriage either before or after a complaint for divorce or legal separation has been filed.
- (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.

Tenn. Code Ann. § 36-4-121(c).

business was equitable under these circumstances.

C. The Proceeds of the Sale of Assertive

Wife's next contention is that the trial court erred in awarding Husband the sums of \$60,500 and \$7,500 from the proceeds of the sale of Assertive. As discussed earlier, it was undisputed that Wife took control of the checks from the sale of Assertive and deposited them in Nurse One's bank account without Husband's knowledge or consent. At the time, Wife was operating Nurse One without any participation by Husband. The parties agree that Wife paid herself \$15,000 from the sale proceeds for what she called "fuel, rent, and past payroll." However, no documentation existed to verify the claimed expenses or specifically trace the reimbursement to amounts Wife was owed. After Wife "reimbursed" herself and paid other bills, approximately \$121,000 of the sale proceeds should have been remaining. The trial court previously ordered Wife to "provide an accounting of the funds from the sale," and Wife claimed that she had prepared a spreadsheet tracing "where every dime of that money has been spent." However, the spreadsheet was not presented at trial. On appeal, Wife concedes that the sum of \$121,000 could not be "specifically traced to payment of a business expense[]," that she "did not have receipts" for that sum, and that it "could not be traced from the Nurse One[] bank account."

In dividing a marital estate, a trial court is to consider the "contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation" of marital property. Tenn. Code Ann. § 36-4-121(c)(5)(A). In this context, "dissipation of assets means wasteful expenditures which reduce the marital property available for equitable distributions and which are made for a purpose contrary to the marriage either before or after a complaint for divorce or legal separation has been filed." Tenn. Code Ann. § 36-4-121(c)(5)(B). "After the party alleging dissipation establishes a prima facie case that marital funds have been dissipated, the burden shifts to the party who spent the money to present evidence sufficient to show that the challenged expenditures were appropriate." *Altman v. Altman*, 181 S.W.3d 676, 682 (Tenn. Ct. App. 2005) (citing *Wiltse v. Wiltse*, No. W2002-03132-COA-R3-CV, 2004 WL 1908803, at *4 (Tenn. Ct. App. Aug. 24, 2004)). Determining whether marital assets have been dissipated is a factual inquiry that depends on the particular facts of the case. *Id.*

The factors that courts most frequently consider when determining whether a particular expenditure or transaction amounts to dissipation include: (1) whether the expenditure benefitted the marriage or was made for a purpose entirely unrelated to the marriage; (2) whether the expenditure or transaction occurred when the parties were experiencing marital difficulties or were contemplating divorce; (3) whether the expenditure was excessive or de

minimis; and (4) whether the dissipating party intended to hide, deplete, or divert a marital asset.

Id. at 682-83 (citing *Halkiades v. Halkiades*, No. W2004-00226-COA-R3-CV, 2004 WL 3021092, at *4 (Tenn. Ct. App. Dec. 29, 2004); *Wiltse*, 2004 WL 1908803, at *4; *Ward v. Ward*, No. W2001-01078-COA-R3-CV, 2002 WL 31845229, at *3 (Tenn. Ct. App. Dec. 19, 2002)).

Here, Husband established that Wife took the proceeds from the sale of Assertive without his consent and told him that he would never see a penny from them. Wife admitted that “every dime of that money has been spent.” Wife had the opportunity to rebut Husband’s contention that she used the funds for her own personal use by specifically accounting for them, as the trial court ordered her to do. However, Wife failed to produce any evidence to trace \$121,000 of the remaining funds. The evidence that was presented to the Court tended to show that Wife drained the company bank account with “reimbursements” for her own personal expenses, payments to her boyfriend, and other questionable transactions. Our supreme court has said “[t]he trial court is empowered to do what is reasonable under the circumstances and has broad discretion in the equitable division of the marital estate.” *Keyt*, 244 S.W.3d at 328. We also recognize that “[t]rial courts are often required to do the best they can with the evidence that is presented by the parties.”¹² *Hudson v. Hudson*, No. W2013-00999-COA-R3-CV, 2014 WL 2854257, at *4 (Tenn. Ct. App. June 23, 2014) (*no perm. app. filed*). In this case, we cannot say that the trial court abused its discretion in awarding Husband one-half of the funds remaining from the sale of Assertive after legitimate expenses were paid, in addition to one-half of the funds Wife admittedly paid herself.

¹²This is particularly true in this case. The trial judge stated during a post-trial hearing:

. . . . I do want to say then in writing this order I tried my very best, as I always do, but in this case put a significant amount of time into valuing the business and trying to make heads or tails out of a very complicated business system, which was not – the records were not well kept. The accounting was not done appropriately.

There [was] . . . very poor paperwork with regard to what went where and how much money came in. The receipts for expenditures were never produced. They were always lost when they were requested.

. . . . So I really did put a lot of time and effort into trying to appropriately value the business [I]t was not easy. This was not a paper trail that was easy to follow. It was almost impossible at times. So I wanted to get that on the record for whoever reads this down the line.

. . . .

. . . . And all I can say is that I did the best I could with the numbers I had in front of me to come up with what I did.

D. Personal Property

Next, Wife argues that the trial court erred in failing to classify and value the parties' personal property, such as vehicles and household items. Husband argues that Wife waived classification and valuation of the personal property.

Counsel for Wife informed the trial judge at the beginning of the trial that the parties owned a lot of personal property but that it "ha[d] been divided." Husband's counsel announced that Husband was willing to stipulate that the parties would keep all of the personal property in their possession, and if there were any debts associated with those assets, the parties "would eat" those debts. During Wife's testimony, she estimated that the value of the personal property in Husband's possession was greater than the value of the personal property in her possession. The trial judge then said he was under the impression that the parties had already divided the personal property and that "it was okay." A discussion ensued among the various attorneys and the trial judge regarding the difficulty in eliciting testimony regarding "every piece of property they've got," but the trial judge said, "that's up to you-all." Wife went on to testify concerning a few specific items of personal property, such as vehicles. During cross-examination of Husband, Wife's counsel asked him about certain pieces of jewelry and whether they were gifts to Wife. The following exchange took place:

THE COURT: Mr. Newman [Wife's counsel], is your client -- I understood him to say he was okay with the personal property just staying where it is.

[Wife's counsel]: I think we're okay -- we're not okay with the values that are placed on them.

THE COURT: Well, I don't think it matters if they just -- if he says that I don't care what the values are and she can keep it. If she doesn't care what the values are, he can keep it.

[Husband's counsel]: Your Honor, that is our position. We did [make a list] because they said that there was an issue on the personal property so we had to do a list.

There was a very brief discussion regarding whether a few items were gifts or marital assets, and then the trial judge interjected,

THE COURT: Let's get back to the point. Is she okay with keeping everything she's got?

[Wife's counsel]: She's okay with keeping everything she has.

THE COURT: And you're okay with keeping what you've got?

[Husband]: Yes, sir.

THE COURT: Okay.

[Wife's counsel]: You're okay with that, but we don't like the values.

THE COURT: There are no values. Just strike all the values. They're calling it even, personal property.

[Wife's counsel]: Just a moment then, Your Honor.

(A brief pause in the record.)

Wife's counsel proceeded to question Husband about other issues. At the end of the trial, the trial judge announced that he was taking the matter under advisement and said that he would try to enter a written order "before too long and especially now that the personal property is not an issue." The attorneys simply responded, "Thank you, Your Honor."

On appeal, Wife argues that she never stipulated that the division of the parties' personal property was equal or equitable. She claims that the trial judge should have classified and valued all of the personal property and awarded her an "offset" if it determined that Husband had more valuable personal property in his possession. However, the trial judge clearly believed that the parties were agreeing to "strike all the values" and "call[] it even" as to personal property. If this was not Wife's position, her attorneys should have made that clear after the trial judge's statements to the contrary. We decline Wife's invitation to remand this case to the trial court for classification and valuation of the parties' personal property at this point. *See* Tenn. R. App. P. 36(a) (stating that this Court is not required to grant relief "to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error").

E. Alimony

We now turn to the issue of alimony. The trial court awarded Husband \$2,100 per

month in alimony *in solido* for five years, and it refused to require Wife to continue paying Husband's health insurance premium. The trial court also refused the parties' requests for attorney's fees.¹³

Wife argues that Husband should not have received any alimony whatsoever. She claims that Nurse One does not generate enough income for her to pay alimony and that Husband has a sufficient "nest egg" from the division of marital property and the life insurance proceeds that he will receive. In short, she claims that Husband was not the "economically disadvantaged" spouse. Husband, on the other hand, argues that the trial court should have awarded him more alimony. He asks this Court to award him \$6,000 per month in alimony *in solido* for ten years. At trial, Husband sought \$3,400 per month in alimony *in futuro*. Husband also argues that the trial court abused its discretion in refusing to require Wife to continue paying his monthly health insurance premium. In addition, he claims that the trial court abused its discretion in failing to award him attorney's fees.

Our review of the trial court's decision regarding alimony and attorney's fees is hampered by the fact that the trial court did not state any reason for its decisions. The trial court's findings regarding these hotly disputed issues were sparse. The court found that Husband is disabled and receives \$72,000 per year in disability payments, but after paying for his medications, he only retains \$2,637 per month. The court also found that Wife earns "in excess of \$185,000" per year. By our calculation, this would equate to Wife earning in excess of \$15,416 per month (\$185,000 divided by 12). The trial court's order also noted that each party will receive \$125,000 in life insurance proceeds. Aside from these few facts, however, there were no findings or conclusions specifically addressing the issues of alimony, health insurance, or attorney's fees. The paragraphs addressing these issues simply stated:

10. The husband has a personal health insurance policy through Nurse One Team One which is \$1133 per month. Further, the Court finds that the husband shall be responsible to pay for his monthly personal health insurance policy.

.....

¹³"Attorney's fees in a divorce action are not awarded under a prevailing party theory. Instead, it is well-recognized in this State that an award of attorney's fees in divorce cases is typically considered alimony or spousal support, characterized as alimony *in solido*." *Berg v. Berg*, No. M2013-00211-COA-R3-CV, 2014 WL 2931954, at *13 n.10 (Tenn. Ct. App. June 25, 2014) (*no perm. app. filed*) (citing *McCoy v. McCoy*, No. E2012-02698-COA-R3-CV, 2013 WL 5925900, at *7 (Tenn. Ct. App. Nov. 4, 2013), *perm. app. denied* (Tenn. May 15, 2014)). Whether to award attorney's fees usually triggers consideration of the same factors that must be weighed in the award of any other type of alimony. *Id.*

16. The wife will pay to the husband the sum of \$2100 per month as in solido alimony for a period of five years.
17. Each party will pay their respective attorney fees.

There was no explanation as to why the trial judge decided that an award of alimony was appropriate, why he awarded alimony *in solido* rather than alimony *in futuro*, or why he selected this particular amount and duration of alimony. Likewise, the court made no findings regarding Husband's health insurance premium or the issue of attorney's fees. The trial court did not analyze or reference the applicable statutory factors to be considered when awarding alimony.

In *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011), our supreme court emphasized the longstanding rule in Tennessee that "trial courts should be accorded wide discretion in determining matters of spousal support." It is well-settled that "trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of the award." *Id.* We are not inclined to second-guess a spousal support decision because it "is factually driven and involves the careful balancing of many factors."¹⁴ *Id.* (citing *Kinard v. Kinard*, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998)). We

¹⁴In deciding whether to award spousal support and, if so, determining the nature, amount, length, and manner of payment, courts consider several factors listed in Tennessee Code Annotated section 36-5-121(i):

- (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;

(continued...)

review a spousal support decision for abuse of discretion. *Robertson v. Robertson*, 76 S.W.3d 337, 343 (Tenn. 2002). “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.” *Gonsewski*, 350 S.W.3d at 105 (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson*, 318 S.W.3d at 335).

In the case before us, we cannot determine whether the trial court applied an incorrect legal standard or relied on reasoning that caused an injustice because we do not know what legal standard the court applied, or what reasoning it employed. See *Halliday v. Halliday*, No. M2011-01892-COA-R3-CV, 2012 WL 7170479, at *12 (Tenn. Ct. App. Dec. 6, 2012) *perm. app. denied* (Tenn. Apr. 11, 2013) (explaining that “this Court cannot determine whether the trial court abused its discretion” in the absence of factual findings by the trial court). Discretionary choices “are not left to a court’s inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 58 (2000)). Thus, an abuse of discretion will be found “when the trial court . . . fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination.” *Id.*

“In bench trials, trial courts must make findings of fact and conclusions of law to support their rulings.” *Hardin v. Hardin*, No. W2012-00273-COA-R3-CV, 2012 WL 6727533, at *3 (Tenn. Ct. App. Dec. 27, 2012) (*no perm. app. filed*). Tennessee Rule of Civil Procedure 52.01¹⁵ states, in pertinent part:

¹⁴(...continued)

(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.

¹⁵The Tennessee Rules of Civil Procedure do not apply in general sessions court except in specific circumstances. *Masquerade Fundraising, Inc. v. Stott*, No. E2011-00309-COA-R3-CV, 2012 WL 444052, at *1 (Tenn. Ct. App. Feb. 14, 2012) (*no perm. app. filed*). However, the Rules do apply to “general sessions courts exercising civil jurisdiction of the circuit or chancery courts.” Tenn. R. Civ. P. 1. In this divorce case, the general sessions court was exercising civil jurisdiction of the circuit and chancery courts, thus the Tennessee Rules of Civil Procedure were applicable. See *Whitworth v. Whitworth*, No. (continued...)

In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.

“Simply stating the trial court’s decision, without more, does not fulfill this mandate.” *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8 (Tenn. Ct. App. Oct. 24, 2012) (*no perm. app. filed*).

There is no bright-line test by which to assess the sufficiency of factual findings, but “the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue.”

Lovlace v. Copley, 418 S.W.3d 1, 35 (Tenn. 2013) (quoting 9C *Federal Practice and Procedure* § 2579, at 328). We have held that “the General Assembly’s decision to require findings of fact and conclusions of law is ‘not a mere technicality.’” *Hardin*, 2012 WL 6727533, at *3 (quoting *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009)). It serves the important purposes of facilitating appellate review and promoting the just and speedy resolution of appeals. *Id.* Without sufficient findings and conclusions, “this court is left to wonder on what basis the court reached its ultimate decision.” *Id.* (quoting *In re K.H.*, 2009 WL 1362314, at *8).

“One remedy appellate courts typically apply when a trial court’s factual findings fail to satisfy the Rule 52.01 requirement is to remand the case to the trial court with directions to issue sufficient findings and conclusions.”¹⁶ *Lovlace*, 418 S.W.3d at 36. In the case before us, the trial court’s order does not indicate how or why it reached its decision on the

¹⁵(...continued)

E2008-01521-COA-R3-CV, 2009 WL 2502002, at *5 (Tenn. Ct. App. Aug. 17, 2009); *see also Basham v. Basham*, No. 01-A-01-9402-GS00047, 1994 WL 388281, at *4 (Tenn. July 27, 1994) (“The General Sessions Court for Warren County, while exercising divorce jurisdiction, is a court of record[.]”)

¹⁶Alternatively, the appellate court may choose to conduct a de novo review of the record to determine where the preponderance of the evidence lies. *Lovlace*, 418 S.W.3d at 36. In other words, we may decide to “soldier on” without factual findings by the trial court, particularly if the case involves only a clear legal issue, or when the trial court’s rationale is readily ascertainable. *Pandey v. Shrivastava*, No. W2012-00059-COA-R3-CV, 2013 WL 657799, at *5 (Tenn. Ct. App. Feb. 22, 2013) (citing *Hanson v. J.C. Hobbs Co., Inc.*, No. W2011-02523-COA-R3-CV, 2012 WL 5873582, at *10 (Tenn. Ct. App. Nov. 21, 2012)). We find this remedy inappropriate in this case because the issue of alimony is factually-driven and particularly within the purview of the trial court. Moreover, “appellate courts are ill-equipped to make the type of credibility determinations that would be necessary to resolve the factual disputes” involved in this case. *Lovlace*, 418 S.W.3d at 36.

issues of alimony, Husband's health insurance premium, or attorney's fees. Because the trial court did not make any findings to explain its decision, we cannot discern whether the trial court abused its discretion. We therefore vacate the trial court's order as it pertains to these issues and remand for entry of an order addressing these issues in compliance with Rule 52.01. *See Parrish v. Parrish*, No. W2013-00316-COA-R3-CV, 2013 WL 3203352, at *2 (Tenn. Ct. App. June 21, 2013) (*no perm. app. filed*) (discussing the need for specific findings under Rule 52.01 to explain an award of alimony)¹⁷; *Hudson v. Hudson*, No. 02A01-9412-CH-00282, 1996 WL 165293, at *4 (Tenn. Ct. App. Apr. 4, 1996) (remanding for appropriate findings regarding a spouse's ability to pay some or all of the other spouse's insurance costs as alimony); *Kathryne B.F. v. Michael B.*, No. W2013-01757-COA-R3-CV, 2014 WL 992110, at *8 (Tenn. Ct. App. Mar. 13, 2014) (*no perm. app. filed*) (remanding for specific findings concerning the trial court's reasons for denying a request for attorney's fees). Pending entry of the trial court's order on remand, in order to maintain the status quo, we reinstate the provisions of the October 25, 2011 order memorializing the parties' agreement as to temporary alimony. Specifically, Wife shall be required to pay \$1,750 in temporary alimony to Husband on the first day of each month, and Wife shall pay Husband's current health insurance premium and monthly life insurance premium.

E. Attorney's Fees on Appeal

Finally, we consider Husband's request for an award of attorney's fees on appeal. Tennessee, like most jurisdictions, adheres to the so-called "American rule" for awarding attorney's fees. *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009) (citing *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998); *Pullman Standard, Inc. v. Abex Corp.*, 693 S.W.2d 336, 338 (Tenn. 1985)). "Under the American rule, a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American rule applies, allowing for recovery of such fees in a particular case." *Id.* (citing *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005); *John Kohl*, 977 S.W.2d at 534). Our discretion to award attorney's fees on appeal is constrained by the American Rule. *Massey v. Casals*, No. W2011-02350-COA-R3-JV, 2012 WL 6697594, at *3 (Tenn. Ct. App. Dec. 26, 2012), *perm. app. denied* (Tenn. June 13, 2013).

Tennessee Code Annotated section 36-5-103(c) authorizes a court to award attorney's

¹⁷In *Parrish*, 2013 WL 3203352, at *2, this Court determined that a trial court failed to make sufficient written findings concerning the basis for an award of alimony, pursuant to Rule 52.01, but we did not remand the case because we were able to ascertain the trial court's reasoning based upon the chancellor's oral statements from the bench. In this case, however, there is no transcript of an oral ruling that might reveal the trial judge's thought process because the matter was taken under advisement.

fees to an alimony recipient who is forced to defend an action to reduce or terminate that alimony. *Owens v. Owens*, No. M2012-01186-COA-R3-CV, 2013 WL 3964793, at *6 (Tenn. Ct. App. July 30, 2013), *perm. app. denied* (Tenn. Nov. 13, 2013) (citing *Evans v. Evans*, No. M2002-02947-COA-R3-CV, 2004 WL 1882586, at *13 (Tenn. Ct. App. Aug. 23, 2004)). However, we were unable to review the alimony award in this case and have remanded the matter for further consideration. As a result, neither party was successful on appeal with regard to the issue of alimony. Although Husband was successful in defending the trial court's valuation and distribution of marital property, the statute does not authorize an award of attorney's fees for defending a marital property division.¹⁸ *See, e.g., Wiser v. Wiser*, 339 S.W.3d 1, 22 (Tenn. Ct. App. 2010) (finding no authority permitting an award of attorney fees with respect to an issue that was part of the division of marital property). For these reasons, Husband's request for an award of attorney's fees on appeal is respectfully denied.

IV. CONCLUSION

For the aforementioned reasons, we affirm the decision of the general sessions court as it relates to the valuation and distribution of marital property, and we vacate and remand for additional findings on the issues of alimony, Husband's health insurance premium, and attorney's fees. Costs of this appeal are taxed to the appellant, Kimberly Modena Ray, and her surety, for which execution may issue if necessary.

BRANDON O. GIBSON, JUDGE

¹⁸Husband does not argue that Wife's appeal was frivolous pursuant to Tennessee Code Annotated section 27-1-122.