

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 30, 2007 Session

MICHAEL DELANEY GALLIGAN v. LINDA MEDDERS GALLIGAN

**Direct Appeal from the Chancery Court for Warren County
No. 7069 Robert E. Corlew, III, Chancellor, Sitting by Interchange**

No. M2006-00833-COA-R3-CV - Filed on August 10, 2007

This is the second appeal of a domestic relations case. On remand, the trial court divided the marital assets equally; declined to award the wife attorney's fees and prejudgment interest; and denied the husband's Rule 60 motion based upon wife's concealment of financial information. On appeal, the husband asserts that the short duration of their marriage dictates an award of all marital property to him and additionally challenges the trial court's denial of his Rule 60 motion. The wife, on the other hand, asserts she is entitled to prejudgment interest and attorney's fees incurred at trial and on appeal. We affirm.

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

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and DONALD P. HARRIS, SR. J., joined.

Winston S. Evans, Nashville, Tennessee, for the appellant, Michael Delaney Galligan.

Thomas F. Bloom, Nashville, Tennessee, for the appellee, Linda Medders Galligan.

OPINION

This is an appeal of a property division ordered by the trial court on remand. Michael Delaney Galligan (Mr. Galligan) challenges the court's equal division of marital assets in light of his short-term marriage¹ to Linda Medders Galligan (Ms. Medders). He also challenges the trial court's denial of his Rule 60 motion based upon Ms. Medders's failure to produce financial records and information requested in discovery. Ms. Medders, on the other hand, appeals the trial court's denial of prejudgment interest and attorney's fees and

¹The parties married on October 5, 1996, and Mr. Galligan filed for divorce on July 28, 1999.

further requests that this Court award attorney's fees incurred on appeal. For the reasons set forth below, we affirm the judgment of the trial court.

Mr. Galligan and Ms. Medders married on October 5, 1996. The parties lived separately throughout the marriage, with Ms. Medders residing in Georgia and Mr. Galligan residing in Tennessee. They commuted on the weekends to see each other and had planned to live together following Ms. Medders's daughter's graduation from high school in the spring of 1997. Mr. Galligan worked as an attorney in McMinnville and functioned as the "wage earner" of the two. He paid all of their living expenses, while Ms. Medders worked part time for a travel agency, for the travel "perks." Mr. Galligan earned significantly more income as an attorney and generated the following amounts: (1996) \$151,853, (1997) \$394,063, (1998) \$167,431, (1999) \$558,385. On the other hand, Ms. Medders earned the following income: (1996) \$8,788, (1997) \$6,406, (1998) \$5,676, (1999) \$3,538. At the time of the divorce, Mr. Galligan was 58 and Ms. Medders was 50; both parties were in good health. Ms. Medders had completed two (2) years of college and, at the time of the proceedings, had enrolled in several classes at a local college.

The Initial Proceedings

Mr. Galligan filed for divorce on July 28, 1999, on the grounds of inappropriate marital conduct. Ms. Medders counterclaimed on the same grounds but later amended the filing to include adultery. Mr. Galligan denied any inappropriate marital conduct and similarly denied the commission of adultery at any time before the parties separated in June of 1999. He conceded to an affair with a woman beginning June 26, 1999, after he and Ms. Medders had separated.

Prior to trial, Mr. Galligan had filed motions to impose sanctions and to compel production in response to Ms. Medders's failure to respond to discovery requests. According to Mr. Galligan, at the April 3, 2000, hearing, the trial court ordered Ms. Medders to produce all requested documents in her custody and control. And, by agreement of the parties, the trial court set a trial date for three days later. The trial took place on April 6 and 7, 2000. During cross-examination, Ms. Medders acknowledged the existence of an undisclosed "custodial" account with A.G. Edwards; moreover, Ms. Medders produced a five-month old statement for a BankAmerica account at trial. Only days after conclusion of the trial, BankAmerica submitted a current statement showing a balance totaling seven thousand dollars (\$7,000) more than the older one produced by Ms. Medders. Based on these factors, Mr. Galligan filed a renewed motion for sanctions with the trial court after conclusion of the trial. The trial court issued a letter ruling on April 27, 2000, and filed its final judgment on May 17, 2000. Although recognizing Ms. Medders's admission and failure to produce certain records, the trial court denied the renewed motion for sanctions because both parties

agreed to an unusually speedy trial date and because Ms. Medders had produced substantial numbers of documents.

The trial court found that Ms. Medders's net worth at the time of the marriage totaled approximately \$526,580 and, as Mr. Galligan emphasizes, Ms. Medders testified at trial that she used no proceeds from her separate investments to pay for living expenses. Ms. Medders also owned five rental properties in Florida and similarly used the rental income to reduce the mortgages on those properties and to maintain them. The trial court found Mr. Galligan's net worth at the time of the marriage was approximately \$365,487. The trial court further noted that, at the time of divorce, Ms. Medders's net worth had increased by \$141,392 and Mr. Galligan's had decreased by \$95,399.

In its final judgment, the trial court expressly found that Ms. Medders never moved to McMinnville and that, contrary to her assertions, Ms. Medders was absent from McMinnville virtually all of the time during the marriage. It based this finding upon telephone records establishing her location on particular days as well as an adverse inference to this effect due to Ms. Medders's refusal to produce additional records showing her whereabouts during the time in question. The trial court also suggested that Ms. Medders did not fulfill the role of "homemaker" when it found that she did not keep house or cook; that Mr. Galligan usually cooked most meals the couple ate at home; and that Mr. Galligan employed a housekeeper throughout the duration of the marriage.

The trial court granted the divorce to Ms. Medders and also found that Mr. Galligan had expended marital assets in the amount of \$36,000 for the benefit of his girlfriend. The court awarded that amount to Ms. Medders as attorney's fees. The only marital property divided in the initial proceeding was bank stock in the amount of \$150,000, divided equally by the trial court.

Both parties filed motions to alter or amend the judgment which the trial court denied. From a judgment awarding her a divorce, half of the bank stock, and thirty-six thousand dollars in attorney's fees, Ms. Medders appealed and challenged, *inter alia*, the trial court's classification and division of certain assets. From the text of the opinion and the statement of issues, it does not appear that Mr. Galligan sought relief from the trial court's denial of his renewed motion for sanctions.

The First Appeal

On appeal, this Court affirmed in part, reversed in part, and remanded. *Galligan v. Galligan*, No. M2001-00619-COA-R3-CV, 2002 WL 773059 (Tenn. Ct. App. Apr. 30, 2002), *perm. app. denied* (Tenn. Oct. 21, 2002). We reversed the trial court's award of

attorney's fees because they were awarded as punishment for Mr. Galligan's affair. *Galligan*, 2002 WL 773059, at *12. Because Ms. Medders asserted that she could not pay her attorney's fees, this Court remanded that issue for a finding as to whether the facts warranted an award of attorney's fees. *Id.* This Court also found that the nine thousand dollar (\$9,000) increase in equity of Mr. Galligan's separate real property was marital property and subject to division. *Id.* at *6. Moreover, we noted the distinct possibility that some part of Mr. Galligan's retirement account was also marital property but remanded that issue for a determination by the trial court. *Id.* at *4. Because this element was unknown, we declined to divide the marital estate and instead remanded that issue as well. *Id.* at *6.

Proceedings on Remand

After the filing of this Court's opinion on April 30, 2002, and the subsequent denial of Ms. Medders's request for permission to appeal to the Tennessee Supreme Court, Ms. Medders filed a motion on November 22, 2002, to set the remand hearing. On December 23, 2002, Mr. Galligan filed both a response to Ms. Medders's motion and a Rule 60 motion seeking the following relief: an order requiring Ms. Medders to produce the requested documents (as previously ordered before the divorce proceedings), leave to supplement the record with any evidence obtained from those documents, and denial of Ms. Medders's motion to set the remand hearing until she complied with the order. The trial court filed a letter ruling and stated as follows:

Initially, we agree with the Plaintiff that the Defendant should have produced the information requested earlier. Because of a trial date which suddenly opened on the Court's calendar . . . , an immediate trial date became available for the hearing of this case in April of 2000. Both counsel quickly agreed to that trial date, at the mutual urging of their clients, but with continued hesitation, due to the abruptness of the setting. At the time the trial was conducted, both parties knew the documentary evidence which has been produced, and were aware of those matters which had not been produced. While we are sensitive to the allegations of the Plaintiff that the Defendant intentionally withheld information, we believe the motion in this case comes too late. After the case was heard on April 6 and 7, 2000, we rendered our opinion by letter dated April 25, 2000. . . . Nonetheless, the motion pursuant to Rule 60 was not filed until some period in excess of two years after the final order was entered. . . . Under the terms of [*Wright v. Quillen*], we believe the motion should be respectfully denied.

The court later entered an order and specified that Ms. Medders would bear the burden of proof in showing she had no liquid assets with which to pay her attorney's fees.

On remand, the trial court established that \$81,701 of Mr. Galligan's retirement account and the \$9,000 of increased equity in Mr. Galligan's (separate) real property constituted marital property. The court had already divided the bank stock evenly and similarly halved the above amounts on remand. Although Mr. Galligan had argued that he deserved 100% of these assets due to the short duration of the marriage, the trial court stated that the facts did not justify such an award. It noted as follows:

We think it is fair to recognize that the proof showed that Mr. Galligan had the greater earning capacity. It is also fair to consider that Mr. Galligan depleted or "wasted" marital assets as we found previously with regard to the gifts to another during the term of the marriage. Mr. Galligan also has the larger debt structure. We have previously observed the short duration of the marriage and substantial separate properties of each.

....

... We have noted that some of the factors which we are required to consider favor Mr. Galligan and some favor Ms. Medders. Considering all of the factors, we find that this is a case where the additional marital property determined by the Court of Appeals should be divided equally, just as we previously divided the bank stock. We appreciate Mr. Galligan's argument that the factors which we are required to consider justify a 100% award to him of this property. We do not find such a decision to be justified, however, under the facts of the case.

The final issue, then, is whether Ms. Medders is entitled to attorney's fees. . . . Eliminating the fault . . . , we find no other basis for the award of attorney's fees: each party has the ability to pay their own fees; they each have the ability to earn income though Mr. Galligan's ability in this area is greater; the duration of the marriage was short; the parties are both in good health and of the age to be gainfully employed, though Mr. Galligan is eight years older than Ms. Medders; the wife's separate estate is larger than that of the husband; the division of marital property has been equal; and the parties lived in separate households.

Finally, the court determined that prejudgment interest was not appropriate, and neither was post-judgment interest from the entry of this Court's order because the sums determined on remand were unliquidated. The trial court entered its order on August 8, 2005, and Mr. Galligan filed his notice of appeal seventeen days later.

Overall, according to the trial court's valuations and division on remand, Mr. Galligan received \$801,545 in separate property, \$120,350 in marital property, and \$612,756² in debt. Ms. Medders received \$965,253 in separate property, \$120,350 in marital property, and \$365,154 in debt. Mr. Galligan contends that an equal division of assets is inequitable, particularly for a marriage of such short duration. Although there are some minimal discrepancies in most of the values reported by the parties, the primary amount in dispute involves the value of Ms. Medders's separate property. Mr. Galligan contends it totals *at least* \$970,529, as the balance of the "custodial" account has never been disclosed. On appeal, Mr. Galligan asks this Court to modify the trial court's ruling and award him all marital assets. Alternatively, he requests a remand for the trial court to consider the financial information withheld by Ms. Medders. Or, he proposes, in lieu of a remand, an adverse inference would serve the same function of establishing the true value of Ms. Medders's separate property. Ms. Medders, on the other hand, challenges the trial court's denial of prejudgment interest and attorney's fees and additionally asks this Court to award her attorney's fees incurred on appeal.

Issues Presented and Standard of Review

We restate below the issues raised by Mr. Galligan on appeal:

- (1) Whether, instead of dividing the marital property equally, the trial court should have awarded all of the marital property to Mr. Galligan so that the parties would have been restored to the same position in which they would have been if this brief marriage had never occurred;
- (2) Whether the trial court should have granted the Rule 60 Motion of Mr. Galligan; and
- (3) Whether, in the alternative to granting the Rule 60 Motion, the trial court should have presumed that the net worth and income of Ms. Medders were much greater than she had disclosed.

Ms. Medders, in turn, presents only the issue of whether the trial court abused its discretion in failing to award her prejudgment interest.

In a non-jury case, we review the trial court's decisions *de novo* upon the record with a presumption of correctness as to the findings of fact. Tenn. R. App. P. 13(d); *Union*

²This amount includes a 1999 Federal Income Tax Liability of \$229,746. Mr. Galligan does not dispute the classification of the debt or its allocation to him.

Carbide v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993). On the other hand, we review the lower court's conclusions of law with no such presumption. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

Analysis

Division of the Marital Estate

After the trial court classifies and values each asset, it then must divide the marital estate in an equitable manner. Tenn. Code Ann. § 36-4-121(a)(1) (2005); *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at *7 (Tenn. Ct. App. Sept. 1, 2006)(*no perm. app. filed*); *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). To do so, it must consider and weigh very carefully the relevant statutory factors set forth in section 36-4-121(c) of the Tennessee Code.³ Although we presume that marital property is owned equally, *Bookout v. Bookout*, 954 S.W.2d 730, 731 (Tenn. Ct. App. 1997), an equitable division of the marital estate does not necessarily mean a precisely equal one. *Robertson v.*

³This section of the Code provides as follows:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial 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.

Tenn. Code Ann. § 36-4-121(c) (2005)

Robertson, 76 S.W.3d 337, 341 (Tenn. 2002); *Fox*, 2006 WL 2535407, at *7; *Batson*, 769 S.W.2d at 859. A fair division of marital property is evident in its final results. *Fox*, 2006 WL 2535407, at *7 (citing *Altman v. Altman*, 181 S.W.3d 676, 683 (Tenn. Ct. App. 2005)). Trial courts are vested with a great deal of discretion when classifying and dividing the marital estate, and their decisions are entitled to great weight on appeal. *Sullivan v. Sullivan*, 107 S.W.3d 507, 512 (Tenn. Ct. App.2002). Accordingly, unless the court's decision is contrary to the preponderance of the evidence or is based on an error of law, we will not interfere with the decision on appeal. *Id.*

Given our standard of review and the deference accorded to decisions of trial courts in dividing marital estates, we cannot say the evidence preponderates against the property division in this case. The record reveals that the trial court noted and carefully weighed the statutory factors as required. Further, although the evidence might support another result, it does not preponderate against the one reached by the trial court.

We address first Mr. Galligan's contention that the case of *Batson v. Batson*, 769 S.W.2d 849 (Tenn. Ct. App. 1988), controls the property division under consideration here. He asserts that *Batson* compels an award of all marital property to him in light of the short duration of the marriage. This Court's decision in *Batson* restored the parties, as closely as possible, to their respective pre-marital financial positions. *Batson*, 769 S.W.2d at 889. The short duration of the parties' marriage, only one of several statutory factors, supported this result under the circumstances of that case. *Id.* at 859. Specifically, there was a significant economic and earning disparity between the couple, with the husband having a net worth ten times larger than the wife's and an annual income nine times greater. *Id.* This Court placed greatest emphasis on the spouses' financial contributions to the accumulation of assets during the marriage, noting the wife's minimal financial input. *Id.* at 859–60. Additionally, the largest portion of the estate consisted of retirement funds that would decrease in value if liquidated. *Id.* at 860. And, finally, this Court noted that the wife's non-monetary contributions would best be considered as an issue for alimony. *Id.*

Many opinions discussing *Batson* link its application to the existence of marital property thus classified by virtue of Tennessee Code Annotated Section 36-4-121(b)(1)(B). Pursuant to this section, the increase in value of the separate property of one spouse becomes marital property when the non-owner spouse has substantially contributed to the preservation and appreciation of the separate asset.⁴ This classification shift is commonly known as

⁴Or, if the owner spouse accrues additional retirement benefits during the course of the marriage, then the increase in value also becomes marital property. *See* Tenn. Code Ann. § 36-4-121(b)(1)(B)(2005).

“statutory transmutation” and associated with the rule in *Batson*. See *Woodward v. Woodward*, No. E2006-01110-COA-R3-CV, 2007 WL 1386093, at *7 (Tenn. Ct. App. May 11, 2007), *perm. app. pending*, (“The fact that transmutation of Husband’s separate property had occurred . . . triggers the application of *Batson* in this short duration marriage.”)(Swiney, J., dissenting)(arguing for the application of *Batson* in a case of “common law” transmutation); *Powell v. Powell*, 124 S.W.3d 100, 107 (Tenn. Ct. App. 2003)(noting that the bulk of the marital estate in *Batson* consisted of an increase in the value of the husband’s retirement account during the course of the marriage); *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988)(“When a marriage is short, . . . claims by one spouse to another spouse’s separate property are minimal at best.”)(quoting *In re Marriage of Wallace*, 315 N.W.2d 827, 830–31 (Iowa Ct. App. 1981)). In this case, the trial court classified the retirement account funds and the increased equity in Mr. Galligan’s real property as marital property pursuant to Tennessee Code Annotated Section 36-4-121(b)(1)(B). Mr. Galligan does not dispute the classification of the assets subject to division, but instead challenges the property division.

Mr. Galligan relies on the rule in *Batson* in urging this Court to award all marital property to him. Indeed, in marriages of short duration, the value of a spouse’s non-monetary contributions is diminished. *Batson*, 769 S.W.2d at 859. Particularly when statutory transmutation has generated the bulk of the marital estate, those non-monetary contributions carry less weight in determining how the marital assets should be divided. Yet, a review of the authorities reveals that *Batson* does not control all marriages of short duration. For example, in the case of *Holloway v. Holloway*, this Court found *Batson* inapplicable to a case in which the parties’ accumulation of marital debt made a return to pre-marital financial positions impossible. *Holloway v. Holloway*, No. 01A01-9304-CH-00151, 1993 WL 350138, at *1 (Tenn. Ct. App. Sept. 15, 1993)(*no perm. app. filed*). Additionally, in *Powell v. Powell*, this Court declined to apply *Batson* because the bulk of the marital estate consisted of property acquired during the course of the marriage and because the parties made equal, albeit negligible, contributions to the property’s increase in value. *Powell*, 124 S.W.3d at 107. And, in the recent case of *Woodward v. Woodward*, this Court declined to apply *Batson* where there was no disparity between the financial positions of the parties and where the appellant husband had failed to establish the net worth of both parties at the time they married. *Woodward v. Woodard*, No. E2006-01110-COA-R3-CV, 2007 WL 1386093, at *4–5 (Tenn. Ct. App. May 11, 2007). Moreover, the separate property at issue in that case became marital property by virtue of “common law transmutation,”⁵ which had occurred

⁵ A separate asset becomes marital property through “common law transmutation” when it is

treated in such a way as to give evidence of an intention that it become marital property The rationale underlying [this doctrine] is that dealing with property in [this way] creates a rebuttable

(continued...)

because the owner spouse evinced an intent to give the real property to the marital estate by placing it in the names of both parties. *Woodard*, 2007 WL 1386093, at *3.

We likewise distinguish the facts of this case from those in *Batson*. The first distinction lies in the composition of the marital estate. More than half of the marital property consists of bank stock jointly owned (and mutually purchased) by Mr. Galligan and Ms. Medders. Each party invested fifty thousand dollars (\$50,000) of separate assets in this stock that, at the time of the divorce, had increased in value from one hundred thousand dollars (\$100,000) to one hundred fifty thousand dollars (\$150,000). The balance of the marital property, worth approximately ninety thousand seven hundred-one dollars (\$90,701), consists of the increase in value of Mr. Galligan's separate assets. Nine thousand dollars (\$9,000) of this amount represent increased equity in Mr. Galligan's mountain realty (from mortgage payments made with marital income), and the remaining eighty-one thousand seven hundred-one dollars (\$81,701) represent the increased value of Mr. Galligan's retirement account (from contributions made during the course of the marriage and from market forces).

Although we agree with *Batson's* proposition that each spouse's financial contributions to the accumulation of assets become more significant in marriages of short duration, other countervailing factors exist in this case. It is true that Ms. Medders made no direct financial contributions to the realty or to the retirement account. Even her homemaking contributions were similarly minimal, as found by the trial court. Indeed, the Galligans spent very little time together as a married couple. These factors certainly weigh in favor of Mr. Galligan's position. Yet, just as contributions become more significant in short-term marriages, so does the dissipation of marital assets. The trial court found that Mr. Galligan dissipated thirty-six thousand dollars (\$36,000) of marital assets in buying gifts for the woman with whom he had an extramarital affair. Although there are several similarities between this case and *Batson*, we find that Mr. Galligan's dissipation of marital assets is a significant difference. Finally, we note yet another factor that distinguishes this case from *Batson*: the lack of economic disparity between the parties. Although Ms. Medders does not

⁵(...continued)

presumption of a gift to the marital estate. This presumption is based upon the provision in many marital property statutes that property acquired during the marriage is presumed to be marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Woodward, 2007 WL 1386093, at *3 (quoting *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002)). This form of transmutation, founded upon principles of acquisition by gift, transforms the separate asset into a marital asset in its entirety. In this respect, "common law transmutation" differs materially from the statutory form, where a non-owner spouse's interest in the increased value of a separate asset does not necessarily correlate to an interest in the asset itself. See *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at *3 (Tenn. Ct. App. Sept. 1, 2006)(*no perm. app. filed*).

earn an annual income anywhere close to Mr. Galligan's, she does have the greater net worth.

We decline to apply *Batson* in this case for three reasons. First, over half of the marital estate consists of bank stock jointly owned and mutually purchased by the parties. Second, despite Ms. Medders's negligible contributions to the increased value of the realty and retirement account, Mr. Galligan dissipated marital assets in the amount of thirty-six thousand dollars (\$36,000) in furtherance of an extramarital affair. Finally, the financial positions of the parties are quite unlike those in *Batson*; although Ms. Medders earned very little during the course of the marriage, she has the greater net worth of the two parties, both of whom have significant separate assets. In light of the trial court's detailed findings and these factual distinctions from *Batson*, we are unable to conclude that the evidence preponderates against the trial court's division of the marital estate.

Denial of Rule 60 Motion

The second and third issues raised by Mr. Galligan on appeal pertain to the trial court's denial of his Rule 60 motion. The relief sought in that motion included an order requiring Ms. Medders's compliance with the April 3, 2000, order; leave to supplement the record with that evidence once produced; and a denial of the motion to set the remand hearing until Ms. Medders complied with the order. On appeal, Mr. Galligan contends that the trial court should have granted his motion and now asks this Court to remand the case or to adopt an adverse inference regarding Ms. Medders's net worth as an alternative measure.

Mr. Galligan's Rule 60 motion was, in essence, a motion to compel. The gravamen of this motion was previously set forth in Mr. Galligan's renewed motion for sanctions following the initial divorce proceedings. Even though the court denied his renewed motion for sanctions in the final judgment, Mr. Galligan did not present this issue in the first appeal, in which attorney's fees, the classification of assets, and the division of the marital estate were among the issues presented to this Court. One waives the right to appellate review concerning an issue that was not, but could have been, raised in a previous appeal. See *Melton v. Melton*, No. M2003-01420-COA-R10-CV, 2004 WL 63437, at *3 (Tenn. Ct. App. Jan. 13, 2004), *perm. app. denied* (Tenn. June 14, 2004); *Bing v. Baptist Mem'l Hosp.-Union City*, 937 S.W.2d 922, 924 (Tenn. Ct. App. 1996). The time for Mr. Galligan to press this argument was in the first appeal. His delayed pursuit of this issue has resulted in its waiver.

Prejudgment Interest

Ms. Medders challenges the trial court's denial of prejudgment interest and argues that Mr. Galligan has deprived her of her share of the retirement funds and the increased value in the real property for six (6) years. The Tennessee Code provides, in pertinent part, that:

Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state . . . may be awarded by courts or juries in accordance with the principles of equity . . .

Tenn. Code Ann. § 47-14-123 (2001). The court must determine whether fairness dictates an award of prejudgment interest in light of the circumstances, keeping in mind that the purpose of such an award is compensatory, not punitive. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). In addition to principles of equity, two other criteria inform the court's discretion: whether the existence of the obligation is reasonably disputed, and whether the amount of the obligation is reasonably ascertainable. *Id.* at 927–28. We review a trial court's denial of prejudgment interest under an abuse of discretion standard. *Id.* at 927. No abuse of discretion exists in cases where the trial court applies the guiding principles of law and the evidence supports its decision. *See id.* In this case, we find no abuse of discretion where the delay in setting the remand hearing occurred due to Ms. Medders's failure to comply with the trial court's order compelling the production of certain documents. We need go no further than the principles of equity to support our affirmance of the trial court's action in this regard.

Attorney's Fees

Finally, Ms. Medders challenges the trial court's denial of her request for attorney's fees and additionally asks this Court to award her attorney's fees incurred on appeal. Although Ms. Medders did not include attorney's fees in her formal statement of the issues on appeal, we will nevertheless address them because she devoted several pages of her appellate brief to these points. Ms. Medders asserts that she has insufficient liquid assets with which to pay the fees. Such an award is usually characterized as alimony *in solido*. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002); *see* Tenn. Code Ann. § 36-5-121(h)(1) (2005). Of the factors a trial court must consider in reaching this discretionary decision, the most important ones are the need of the economically disadvantaged spouse and the ability of the other spouse to pay. *See* Tenn. Code Ann. § 36-5-121(i)(2005); *Owens v. Owens*, No. M2005-00639-COA-R3-CV, 2007 WL 957184 (Tenn. Ct. App. Mar. 29, 2007)(citing *Eldridge v. Eldridge*, 137 S.W.3d 1, 24–25 (Tenn. Ct. App. 2002)). Ms. Medders has substantial personal assets, and the record abundantly supports the trial court's decision to deny an award of attorney's fees. We accordingly affirm the court's denial.

In addition, where both parties are partially successful on appeal, this Court has held that no attorney fees should be awarded in respect to the appeal. *Young v. Young*, 971 S.W.2d 386, 393 (Tenn. Ct. App. 1997); *Storey v. Storey*, 835 S.W.2d 593, 598 (Tenn. Ct. App. 1992); *Baggett v. Baggett*, 512 S.W.2d 292, 294 (Tenn. Ct. App. 1973). Ms. Medders secured an affirmance of the property division, and Mr. Galligan resisted Ms. Medders's claims for attorney's fees and prejudgment interest. We accordingly decline to award her legal fees incurred on appeal.

Conclusion

We hold that *Batson* does not control the facts of this case because more than half of the marital estate consists of stock equally purchased and jointly owned by the parties; because, despite the lack of financial contribution on Ms. Medders's part, Mr. Galligan dissipated marital assets in the amount of \$36,000 in furtherance of an extramarital affair; and because the economic circumstances of the parties differ from those in *Batson*. The trial court carefully weighed the relevant factors, and we are unable to conclude that the evidence preponderates against its division of the marital estate. We likewise find no abuse of discretion in the trial court's denial of Ms. Medders's requests for attorney's fees and prejudgment interest. Accordingly, the judgment of the trial court is affirmed. Costs of this appeal are taxed to Mr. Galligan and his surety, for which execution shall issue if necessary.

DAVID R. FARMER, JUDGE