

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 15, 2023 Session

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KATHERINE J. HILL v. JAMES D. HILL

Appeal from the Circuit Court for Blount County
No. E-26986 Tammy M. Harrington, Judge

No. E2021-00399-COA-R3-CV

This appeal stems from a lengthy and acrimonious divorce, wherein the trial court, *inter alia*, divided the parties' marital assets and debts, established a permanent parenting plan and child support obligations, and declined to award alimony to the husband. Entry of the trial court's divorce decree did not occur for approximately twenty-two months following the trial, however, which the husband argues on appeal constituted a due process violation. Husband also appeals the trial court's valuation of certain assets, its division of the marital estate, its imputation of income to him for child support purposes, and its failure to join his mother as a necessary and indispensable party. Following our review, we affirm the trial court's classification of the parties' marital residence as marital property. We also affirm the trial court's dismissal of the husband's contempt petition, its denial of the husband's motion to join his mother as a party, and its imputation of income to the husband due to his voluntary unemployment. We vacate the trial court's valuation of the parties' retirement accounts and its division of marital property, and we remand those issues to the trial court for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part, Vacated in Part; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KRISTI M. DAVIS, JJ., joined.

Michael S. Kelley, Elizabeth A. Peterson, and Douglas J. Toppenberg, Knoxville, Tennessee, for the appellant, James D. Hill.

Gregory Brown and G. Alan Rawls, Knoxville, Tennessee, for the appellee, Katherine J. Hill.

OPINION

I. Factual and Procedural Background

This action originated with the filing of a complaint for legal separation by the wife, Katherine Jane Hill (“Wife”), against the husband, James D. Hill (“Husband”), in the Blount County Circuit Court (“trial court”) on August 30, 2016. Wife stated that the parties had been married since 1996 and that they had two minor children. Wife requested that the trial court adopt her proposed temporary parenting plan, which provided that the parties would share equal co-parenting time with their son, R.H., and that Husband would co-parent their daughter, A.H., two days per week.

On October 7, 2016, Wife filed a motion for removal of personal property, requesting that the trial court grant her permission to remove “excess furniture” from the marital residence so that she could furnish a separate residence that she had rented. Wife stated that further cohabitation in the marital residence was impossible due to her fear of Husband. Wife concomitantly filed a motion requesting that the trial court approve her temporary parenting plan because she had enjoyed very little co-parenting time with R.H. since the separation action was filed. Wife alleged that she believed Husband to be alienating R.H. from her. Wife subsequently filed a motion to compel regarding Husband’s past due discovery responses.

On November 8, 2016, Husband filed a proposed temporary parenting plan that provided for Wife to have co-parenting time with the children on alternating weekends. Husband’s plan further stated that R.H. would “not be required to attend co-parenting time with his Mother unless he chooses to do so.” On November 17, 2016, the trial court entered an agreed order directing that Wife could enjoy two-hour visits with R.H. at least twice per week. The parties also agreed that Wife would be allowed to remove certain items of personalty from the marital residence. The order further provided that Husband would answer all outstanding discovery by December 8, 2016.

On December 22, 2016, Wife filed a motion for civil contempt, stating that Husband had not answered Wife’s discovery requests and was accordingly in violation of the trial court’s November 2016 order. Wife also asserted that Husband had prevented her from exercising her co-parenting time with R.H. for five consecutive weeks in November and December. Wife further claimed that Husband had refused to schedule a time for Wife to retrieve the items of personalty from the marital residence pursuant to the November 2016 order. Meanwhile, Husband’s counsel was permitted to withdraw from his representation of Husband, and Husband filed *pro se* motions seeking additional time to retain new counsel, additional time to answer discovery, and a continuance of the hearing set for January 18, 2017.

On February 6, 2017, Wife filed a motion requesting leave from the trial court to amend her complaint to seek a divorce rather than a legal separation. Following a hearing conducted on January 30, 2017, the court entered an order on February 10, 2017, finding that: (1) R.H. had resumed attending co-parenting time with Wife, (2) Wife had received most of the personalty listed in the November 2016 order with the exception of certain noted items that would be replaced or made available by Husband within thirty days, and (3) Husband was in contempt for his willful failure to answer discovery. The court set a future hearing date regarding sentencing for Husband's contempt, and Husband was granted additional time to secure counsel although the court stated that it would entertain no further motions for continuance. The court also determined that Wife had incurred attorney's fees in the amount of \$3,110.00 due to Husband's failure to answer Wife's discovery requests.

On March 2, 2017, Wife filed a motion seeking the trial court's permission to sell the marital residence. Wife asserted that Husband had not paid the mortgage payment for the marital residence since November 2016 and that he refused to seek employment. Wife further averred that she could not afford to pay the mortgage in addition to her own rent and her increasing litigation costs. Wife stated that without court intervention, the marital home would be foreclosed upon and the parties' substantial equity therein lost. Subsequently, on April 3, 2017, Wife filed a motion for criminal contempt, asserting that Husband had failed to facilitate her co-parenting time with R.H. for six weeks and had failed to ensure that R.H. attended family therapy with Wife. On May 12, 2017, Wife obtained an *ex parte* order of protection against Husband from the Blount County General Sessions Court ("general sessions court"), which order was extended by the general sessions court on May 25, 2017.

On June 1, 2017, Husband filed a motion requesting that the trial court appoint a guardian *ad litem* for the children. Husband subsequently filed an answer and a counter-complaint, claiming that the parties had irreconcilable differences or, in the alternative, that Wife was guilty of inappropriate marital conduct. Husband sought an equitable division of the parties' assets and an award of spousal support. Husband attached a proposed parenting plan naming him as primary residential parent and providing Wife zero days of co-parenting time with R.H. and ninety annual days of co-parenting time with A.H.

On July 20, 2017, the trial court entered an order concerning temporary co-parenting schedules. The court ordered that Husband's sanction for his previous contempt was to pay Wife's attorney's fees in the amount of \$3,110.00. On that same date, the court entered an agreed order finding that the order of protection proceedings in general sessions court had been consolidated with the divorce matter and that the parties had agreed that Wife also would not come around Husband at his place of business,

located at 3250 Abbott Road in Maryville (“the Abbott Road Property”), or at his home.¹ On July 26, 2017, Wife filed a petition for contempt, averring that Husband had violated the order of protection by yelling at Wife at their daughter’s soccer game. Wife filed a subsequent petition asserting that Husband had violated the order of protection by sending her text messages.

On July 28, 2017, Wife filed a motion requesting an inspection of the marital property located at the Abbott Road Property. Wife postulated that the parties had a storage building at that location, that she needed to inventory the contents, but that Husband had prevented her from doing so. Wife concomitantly filed a motion requesting that the court join Husband’s mother, Judith Sue Hill (“Ms. Hill”), as an indispensable party defendant. Wife stated that Ms. Hill owned the Abbott Road Property and that Husband had indicated that certain marital assets were being stored on Ms. Hill’s property. According to Wife, Ms. Hill and Husband would not allow Wife to enter the property to inspect for marital assets. Wife further related that Ms. Hill had claimed to own all of the items located on her property. Husband responded, stating that there were no marital assets located on the real property of Ms. Hill. However, Husband did not specifically object to Ms. Hill’s joinder or to inspection of the Abbott Road Property.

On August 10, 2017, Husband filed a petition for criminal contempt, alleging that Wife had failed to afford him court-ordered co-parenting time with A.H. on four occasions. Wife also initiated another petition regarding Husband’s alleged violation of the order of protection.

On September 19, 2017, Husband filed a motion for a protective order, stating that he had recently received discovery requests from Wife concerning his potential ownership interest in a business known as Nickel Point Classic Cars (“NPCC”) and the Abbott Road Property. Husband averred that NPCC and the Abbott Road Property were owned by his parents and that any interest he might have therein would be inchoate in nature such that Husband should not have to answer discovery requests regarding those assets. Husband concomitantly renewed his motion for appointment of a guardian *ad litem* for the children.

Husband also filed a motion seeking to compel joinder of his mother as a party to the action. Husband indicated that before his father’s death, he and his father had discussed the fact that they were partners in NPCC. He stated, however, that his mother had since taken the position that she and his father were the only partners in NPCC. Husband acknowledged that his father had died intestate such that Husband would have inherited a portion of his father’s interest in NPCC as his father’s only child. Husband

¹ At various points in the record, references to the property owned by Husband’s mother state that the property is located on “Abbott Road” or “Abbott Hill Road” interchangeably. For simplicity, we will refer to this property as “the Abbott Road Property” throughout this opinion.

thus sought to have Ms. Hill joined as a party so the court could determine his interest in NPCC for purposes of dividing the parties' marital estate.

On November 1, 2017, Wife filed a motion for attorney's fees and sanctions for Husband's purported failure to cooperate with discovery. The following day, the trial court entered an order directing Husband to answer outstanding discovery, finding that his motion for protective order was premature. The court also declined to join Ms. Hill as a necessary and indispensable party.

The trial court conducted a partial trial in this action spanning January 9, 2018, through January 11, 2018. The matter was then continued for further hearing at a later date. On May 2, 2018, Wife filed a motion seeking the court's approval to have an appraisal conducted of the marital residence. On June 7, 2018, the trial court entered an order approving Wife's request for an appraisal. The trial then continued on June 19 and 20, 2018.

Upon the conclusion of the trial, the trial court granted a divorce to Wife based on Husband's inappropriate marital conduct. The court directed the parties to file proposed permanent parenting plans with regard to A.H., who was the only remaining minor child by that time because R.H. had attained the age of majority. The court instructed that the permanent parenting plans should grant each parent the same overall amount of co-parenting time with A.H. that they had enjoyed prior to trial but should also honor A.H.'s expressed wish to change homes less frequently. The court also directed the parties to submit proposals concerning the equitable division of marital assets and debts.

On August 2, 2018, Wife filed a motion for contempt, asserting that Husband had failed to make the mortgage payments relative to the marital residence as ordered and that as a result, the home would be foreclosed upon. On February 26, 2019, the trial court entered an order concerning Husband's violation of the order of protection, sentencing him to seventy-two hours in the Blount County Jail and awarding to Wife her attorney's fees in the amount of \$3,312.00. Wife subsequently filed a motion requesting that the court hold Husband in contempt for his failure to pay such fees.

On April 22, 2020, the trial court entered a final order of divorce. In that order, the court granted a divorce to Wife based upon the ground of inappropriate marital conduct. The court specifically found that Husband had "routinely engaged in behavior that was demeaning, offensive, and threatening against [Wife] on numerous occasions." The court further determined: "Husband exhibited behavior during the course of the trial that was consistent with the testimony of [Wife]. Husband made outbursts, raised his voice, and refused to comply with the Court's directives."

The trial court ordered that Wife would be the primary residential parent for A.H. and that A.H. would spend eight consecutive days with Wife followed by six consecutive

days with Husband. In making this determination, the court noted that Wife had, “throughout the child’s life, primarily provided the child with food, clothing, medical care, education, and other necessary care and has been the primary caregiver.” The court further found that Wife’s stability “in her work history, her emotional life, and her parenting responsibilities, favors granting her primary care” while Husband was “difficult, inappropriate, angry, argumentative, and unstable” at “numerous times” during the trial. As the court explained:

Additionally, the school record of the child shows that the child has had numerous unexcused tardies while under Father’s care. The record supports the Mother’s ability to get the child to school on time. The Court finds that Mother has shown a greater ability for the performance of parenting responsibilities. The Court specifically finds that Father refuses to encourage the mother/child relationship and, in fact, has actively opposed that relationship. The Father’s behavior and attitude toward the Mother is unhealthy for the minor child. The Court heard testimony from [A.H.]. The Court makes a specific finding that her testimony appeared coached and not credible. The child’s testimony obviously parroted the Father’s sentiment and was clearly coached by [Husband]. Therefore, the Court cannot give any weight to the testimony regarding the child’s preference.

With regard to payment of child support, the trial court found that Husband had testified that he was being paid \$5,000.00 per month by family members for “services rendered to them.” Husband possessed a bachelor of science degree in industrial engineering, was in good health, and had previously been employed as a teacher, engineer, and auto dealer. The court therefore imputed Husband’s income to be \$5,000.00 per month, concluding that he was voluntarily underemployed. The court determined that Wife earned \$6,088.00 per month from her employment at Blount Memorial Hospital.

The trial court directed that two child support worksheets be prepared. The first was to include both children and span the period from the filing of Wife’s initial complaint for legal separation until the date that R.H. graduated from high school. The second was to include only A.H. and span the period from R.H.’s graduation to the present.

By reason of Husband’s education and the trial court’s finding concerning his income, the court further determined that there was little income disparity between the parties for alimony purposes. The court determined that Husband had failed to demonstrate a need for alimony predicated upon the statutory factors and denied his request for such.

With regard to whether the marital residence should be classified as a marital or separate asset, the trial court considered the proof in light of the factors enumerated in *Hayes v. Hayes*, No. W2010-02015-COA-R3-CV, 2012 WL 4936282 (Tenn. Ct. App. Oct. 18, 2012). The court found that although the unimproved real property upon which the marital residence was later constructed had been gifted to Husband prior to the parties' marriage, Wife testified that she had been involved with the design and construction of the home even before the parties were married. Husband disputed this testimony. However, the court determined that (1) the property was used as the parties' marital residence during the entirety of the marriage, (2) Wife had contributed to the ongoing maintenance of the home by being the primary income earner for the family since 2004, (3) the home had fallen into disrepair after Wife left, and (4) Husband had refused to place Wife's name on the title to the home despite the fact that she was making payments for the mortgage and home equity line of credit ("HELOC") as well as providing upkeep. The court thus concluded that the marital residence had become marital property pursuant to the doctrines of transmutation and commingling. Based on the evidence presented concerning the home's value, the court set the value of the marital residence at \$183,500.00. The court awarded this asset to Husband.

The trial court proceeded to distribute the parties' marital assets and debts between them; however, the court determined that Husband maintained no interest in NPCC. The court also determined that the parties had invested \$125,000.00 in the construction of a metal shop building that was built on property belonging to Husband's mother. The court found that Husband had misled Wife into believing that he owned the real property upon which the metal shop was constructed and that Husband had represented to Wife that the building constituted their joint property. The court therefore awarded to Wife \$62,500.00 for Husband's dissipation of marital assets. The court valued Wife's retirement accounts at \$174,289.00 as of the date of separation and awarded them to Wife. After dividing the remaining marital assets, the court ordered Husband to pay court costs as well as Wife's attorney's fees related to the order of protection violations. The court dismissed Husband's petition for contempt filed against Wife.

The trial court concomitantly entered a permanent parenting plan providing that Wife would exercise 208 days of co-parenting time with the parties' daughter while Husband would have 157 days. In addition, the child support worksheets were prepared and filed as directed by the court. On May 8, 2020, Husband's attorney presented a motion to withdraw, which was granted by the trial court by order dated June 18, 2020. On June 29, 2020, Wife filed a motion for Husband to show cause why he should not be held in contempt and a motion for judgment, propounding that Husband had failed to fulfill his obligations pursuant to the court's final order of divorce.

Following his procurement of new counsel, Husband filed a motion for relief from the trial court's final order of divorce, pursuant to Tennessee Rule of Civil Procedure 60.02, on October 2, 2020. Husband posited that he did not have actual notice of entry of

the final order and permanent parenting plan until after June 28, 2020. Husband stated that he had moved residences and that he had unsuccessfully tried to contact his former counsel regarding the divorce judgment in 2018, 2019, and 2020. Husband claimed that he had not received any calls from his former counsel prior to counsel's withdrawal and had no notice that a final order had been entered. According to Husband, the delay of twenty-two months in the order's entry had prejudiced him. He asked for the final order to be altered or amended and for entry of a new final order. Husband filed numerous documents in support of his motion, including his own affidavit. Wife filed a response opposing the motion.

The trial court conducted a hearing via electronic means concerning the Rule 60.02 motion on January 14, 2021. On March 26, 2021, the court entered an order denying the motion. According to the court, although Husband testified at trial that he had moved to a cabin located in the backyard of the marital residence, "a hundred feet from the marital residence," Husband acknowledged that he still received mail at the same address and that the cabin did not have its own mailbox. Moreover, although Husband admitted that he had communicated with his former counsel via electronic mail during the course of the proceedings, he stated that he often would not "check [his email] for months at a time unless somebody tells me to check it."

According to the trial court, Husband's former counsel testified that during his representation of Husband, he communicated with Husband via electronic mail, telephone, and regular mail. He reported that when he received the court's final order, he immediately forwarded it to Husband's email and also subsequently sent it to him via regular mail and certified mail. When he was unable to obtain confirmation that his certified mail had been delivered, Husband's former counsel articulated that he hired a process server to deliver the package but that the process server was unsuccessful. He also testified that he never received any returned mail from Husband.

Analyzing Husband's claims under the standard applicable to Tennessee Rule of Civil Procedure 60.02(1) motions, the trial court ruled that Husband had not demonstrated excusable neglect. With respect to Husband's reliance on Rule 60.02(5), the court determined that Husband's argument was unavailing. The court noted that Husband was not prevented from filing an appeal by the court's delay in entry of a final order. Accordingly, the court denied Husband's motion. Husband timely appealed. Husband subsequently presented a motion in the trial court seeking to stay the judgment pending appeal.

On May 20, 2021, in this Court, Husband filed a motion seeking to remand the matter to the trial court, asserting that the trial court's final order did not resolve all issues in the case. Specifically, Husband averred that the final order left issues concerning the amount of child support and Wife's attorney's fee award unresolved. Accordingly, this

Court entered an order on June 3, 2021, granting Husband sixty days to either obtain a final judgment or show cause why the appeal should not be dismissed.

On July 29, 2021, the trial court entered a judgment, awarding to Wife attorney's fees in the amount of \$1,135.00 and awarding to Husband past child support in the amount of \$2,856.00 as of April 30, 2020. On October 18, 2021, the trial court entered an order directing Husband to file an appeal bond in the amount of \$66,500.00 in order to stay execution of the judgment. Wife subsequently filed a motion in December 2021 seeking to have the stay lifted due to Husband's failure to pay the appeal bond.

Meanwhile, on December 10, 2021, this Court entered another order directing Husband to show cause why the appeal should not be dismissed. This Court specified that the trial court's final judgment had failed to dispose of Wife's "Motion for Show Cause and Motion for Judgment seeking, among other things, to have [Husband] held in contempt." Husband subsequently filed a motion in the trial court seeking to have Wife's counsel disqualified.

On April 6, 2022, the trial court entered an "Order and Final Judgment," denying all pending motions except for the motion to disqualify counsel. On May 25, 2022, the court entered an agreed order relieving Wife's counsel and directing that the matter be stayed for forty-five days to permit Wife to retain new counsel.

II. Issues Presented

Husband presents the following issues for this Court's review, which we have restated and reordered slightly:

1. Whether the trial court erred in its analysis of the doctrines of commingling and transmutation.
2. Whether the trial court erred in its marital property distribution by assigning values to Wife's retirement accounts that were not supported by the evidence and that were from the date of separation rather than the date of divorce.
3. Whether the trial court erred by dividing the marital estate without considering the factors listed in Tennessee Code Annotated 36-4-121(c).
4. Whether the trial court impaired the parties' ability to fully settle their property interests and obtain relief when it denied Husband's motion to join his mother as a necessary and indispensable party.

5. Whether the trial court's lengthy delay in issuing its final order following trial deprived Husband of his due process right concerning his property interest in assets worth more than \$500,000.00 and his right to seek a modification of child support due to Wife's increased salary.
6. Whether the trial court failed to provide a sufficient basis for determining that Wife was not guilty of contempt for her alleged violation of a court order.
7. Whether the trial court erred in imputing income of \$5,000.00 per month to Husband.

III. Standard of Review

In a case involving the proper distribution of assets incident to a divorce, our Supreme Court has elucidated the applicable standard of appellate review as follows:

This Court gives great weight to the decisions of the trial court in dividing marital assets and “we 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.” *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996). As such, when dealing with the trial court’s findings of fact, we review the record de novo with a presumption of correctness, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). Because trial courts are in a far better position than this Court to observe the demeanor of the witnesses, the weight, faith, and credit to be given witnesses’ testimony lies in the first instance with the trial court. *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991). Consequently, where issues of credibility and weight of testimony are involved, this Court will accord considerable deference to the trial court’s factual findings. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007) (citing *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999)). The trial court’s conclusions of law, however, are accorded no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002).

Keyt v. Keyt, 244 S.W.3d 321, 327 (Tenn. 2007). See *Manis v. Manis*, 49 S.W.3d 295, 306 (Tenn. Ct. App. 2001) (holding that appellate courts reviewing a distribution of marital property “ordinarily defer to the trial judge’s decision unless it is inconsistent

with the factors in Tenn. Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence.”).

The valuation of a marital asset is a question of fact. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998). “All marital property shall be valued as of a date as near as possible to the date of entry of the order finally dividing the marital property.” Tenn. Code Ann. § 36-4-121(b)(2)(A) (Supp. 2022). The classification of property as either separate or marital is also a question of fact “to be determined in light of all relevant circumstances.” *Snodgrass v. Snodgrass*, 295 S.W.3d 240, 245 (Tenn. 2009).

IV. Classification of Marital Residence

Husband contends that the trial court erred in its determination that the primary residence of the parties during the marriage, located on Wilkinson Pike in Maryville, Tennessee (“Marital Residence”), had been converted from Husband’s separate property to marital property by reason of the doctrines of transmutation and/or commingling. As our Supreme Court has explained:

[S]eparate property becomes marital property [by commingling] if inextricably mingled with marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur. . . . [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property. . . . The rationale underlying these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also 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.

Snodgrass, 295 S.W.3d at 256 (quoting *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002)).

The proof presented at trial demonstrated that the real property upon which the Marital Residence was constructed had been given to Husband by his parents in 1994 and that the title had remained solely in Husband’s name since that time. Wife testified that the Marital Residence was under construction when the parties married in November 1996 and that they continued to live in an apartment on Husband’s parents’ property until the Marital Residence was substantially completed in January 1998. By contrast, Husband testified that the Marital Residence “was as complete as it is now” before the

date of the parties' marriage and that they had "spent the night in it" prior to the marriage. However, Husband did not dispute Wife's testimony concerning the date that the parties moved into the Marital Residence.

Wife testified that both parties contributed financially to the construction of the Marital Residence, stating by way of example that she had purchased the house plans prior to the marriage. Wife stated that she and Husband had performed a substantial amount of work themselves to complete the home, including installing and finishing the drywall, painting, staining doors, and performing some "stone work." Husband minimized Wife's testimony regarding the work she had done on the home, claiming that it was built primarily by his father and various contractors while acknowledging that Wife had painted "a little bit" and helped him stain some doors.

The proof is undisputed that the parties lived in the home together from January 1998 until they separated in July 2016. During that time, they raised a family and maintained the home together. Wife testified that Husband had frequently promised to finish things that needed to be completed on the home but then failed to follow through. Wife worked during the entirety of the marriage and contributed her income to the household. Husband worked until 2004 when he left a teaching position to pursue a business venture with his father. Wife testified regarding her belief that Husband had started his own business of buying, repairing, and selling classic cars, which was known as NPCC. Although Husband claimed that he continued to contribute money to the household, Wife stated that she struggled to pay their bills using her income and described their monetary situation as "tight."

Wife testified that the mortgage associated with the Marital Residence was in both parties' names as was a later-acquired HELOC that the parties secured using the equity in the home. The proof demonstrated that the funds withdrawn from the HELOC were used by both parties for household purposes as well as for construction of a metal building to house cars for NPCC. Wife testified that she made mortgage payments concerning the home during the marriage from marital funds. She also testified that she made payments relative to the HELOC, which she continued to do throughout the divorce proceedings, in addition to paying the homeowners' insurance premiums. Wife admitted that she had approached Husband at some point during the marriage concerning changing the title to the Marital Residence so that she would be listed as a co-owner. Notwithstanding, he refused to do so.

Based on this evidence, the trial court determined that the Marital Residence had been converted to marital property by operation of the doctrines of commingling and transmutation. We reiterate that commingling occurs when separate property is "inextricably mingled with marital property or with the separate property of the other spouse." *See Snodgrass*, 295 S.W.3d at 256. The trial court found that the Marital Residence had been "inextricably mingled with marital property (furniture, vehicles,

assets, etc.) and was not kept segregated from Wife.” We do not necessarily agree that placing items of marital personal property in or on separate real property would constitute commingling, *see id.* (explaining that when “separate property continues to be segregated or can be traced into its product, commingling does not occur”), because the Marital Residence easily could be separated from the personal property, such as furniture and vehicles. However, this Court has previously held that when unimproved, separate real property owned by one spouse is subsequently improved by construction of a residence thereon using marital funds, commingling can occur. *See Antrican v. Antrican*, No. E2009-01028-COA-R3-CV, 2010 WL 1027480, at *6 (Tenn. Ct. App. Mar. 22, 2010). In *Antrican*, this Court affirmed the trial court’s finding that the husband’s separate real property had been converted to marital property because “the Husband inextricably commingled [the 150 acres] with marital property when he built and furnished a house on [the 150 acres] with marital property which converted it to marital property.” *Id.* In other words, as in this case, the unimproved land in *Antrican* was inextricably commingled with marital property when a home was constructed thereon utilizing marital funds. *See id.* As such, we determine that the trial court properly relied on the doctrine of commingling in determining the Marital Residence to be marital property.

Transmutation, by contrast, occurs when “separate property is treated in such a way as to give evidence of an intention that it become marital property.” *See id.* In analyzing this issue, the trial court relied heavily on this Court’s opinion in *Hayes*, 2012 WL 4936282, at *1. The wife in *Hayes* owned a home prior to the parties’ marriage, which was originally titled only to her. *Id.* During the marriage, the wife secured a home equity loan against the home for the purpose of purchasing a new vehicle for herself and providing funds for the husband’s business, and the bank required her to include the husband’s name on the home’s title before it would provide the loan. *Id.* The wife therefore executed a quitclaim deed transferring title of the home to both parties. *Id.* The trial court ultimately determined, however, that the home remained the wife’s separate property. *Id.* at *5.

On appeal in *Hayes*, this Court concluded that the trial court had erred in classifying this home as the wife’s separate property. *Id.* at 13. In performing its analysis concerning the proper classification of the home, the *Hayes* Court explained:

Joint ownership of a marital residence, even one that was a spouse’s separate property prior to the marriage, gives rise to a presumption that the property is marital, not separate. The presumption created by joint ownership is not always controlling and can be overcome by evidence of contrary conduct by the parties and the manner in which the parties themselves treat the property.

This Court has outlined common factors considered when determining whether a home owned by one spouse prior to marriage should be deemed marital property:

Four of the most common factors courts use to determine whether real property has been transmuted from separate property to marital property are: (1) the use of the property as a marital residence; (2) the ongoing maintenance and management of the property by both parties; (3) placing the title to the property in joint ownership; and (4) using the credit of the non-owner spouse to improve the property. Accordingly, our court has classified separately owned real property as marital property when the parties agreed that it should be owned jointly even though the title was never changed, or when the spouse owning the separate property conceded that he or she intended that the separate property would be converted to marital property.

Fox [v. Fox], [No. M2004-02616-COA-R3-CV,] 2006 WL 2535407, at *5, 2006 Tenn. App. LEXIS 591, at *18-19 (citing *Cronin-Wright v. Wright*, 121 S.W.3d 673, 675 (Tenn. Ct. App. 2003)).

In its ruling, the trial court below found that the quit claim deed titling the High Plains home in the parties' joint names was not determinative because the "sole purpose of the quit claim deed was to facilitate a loan for [Husband], which was used for one of his many businesses" We agree with this part of the trial court's reasoning. The undisputed evidence about the reason Wife executed the quit claim deed rebuts any presumption stemming from the parties' joint ownership of the High Plains home.

However, by the time Wife executed the quit claim deed, the High Plains home had already become marital property via the doctrine of transmutation. Of course, the High Plains home started out as Wife's separate property, since Wife owned it in her sole name prior to the marriage. However, Wife herself testified at trial that, when the parties married, she opened a joint bank account to pay the mortgage because she believed at the time that "when you are married, everything is together" and that she intended for the expenses associated with the High Plains home to be "a joint thing." Even if Husband's financial contributions to the joint account were minimal, once funds were deposited in the account from any source, they were owned by the parties jointly. For several years, the mortgage payment on the High Plains home was paid from this joint

account. The parties, of course, lived together in the High Plains home throughout their marriage. Husband consistently made significant improvements to the home. Both parties borrowed monies from the equity in the home. While no one factor is determinative, all of this considered together is “evidence of an intention that [the High Plains home] become marital property.” See *Langschmidt [v. Langschmidt]*, 81 S.W.3d [741,] 747 [(Tenn. 2002)]. All of this evidence indicates an intent by the parties, at least in the first few years of the marriage, to hold the High Plains home as marital property. Later, as the parties’ relationship soured, Wife retrenched and took steps such as separating the parties’ bank accounts. By then, however, the home had become marital property under the doctrine of transmutation.

Hayes, 2012 WL 4936282, at *11-12 (other internal citations omitted).

The analysis in *Hayes* has been followed in more recent decisions from this Court. See *Dover v. Dover*, No. E2019-01891-COA-R3-CV, 2020 WL 7224368, at *6 (Tenn. Ct. App. Dec. 8, 2020); *Lewis v. Lewis*, No. W2019-00542-COA-R3-CV, 2020 WL 4668091, at *4 (Tenn. Ct. App. Aug. 11, 2020); *Carter v. Browne*, No. W2018-00429-COA-R3-CV, 2019 WL 424201, at *11 (Tenn. Ct. App. Feb. 4, 2019). In *Dover*, the husband owned a home prior to the marriage, and the associated mortgage was paid off approximately three years into the marriage. See *Dover*, 2020 WL 7224368, at *6. The wife’s name was never placed on the title to the home, however, and the trial court determined that the home remained the husband’s separate property at the time the parties divorced. On appeal, this Court disagreed, stating:

Having thoroughly reviewed the record, we must conclude that the evidence preponderates against the trial court’s finding that the Lookout Point residence remained Husband’s separate property. First, it is undisputed that the parties used the Lookout Point residence as their family home. Second, both parties contributed to ongoing management and maintenance of the property, both during the marriage and during the period of separation before trial. It is undisputed that when the parties resided together, Husband worked long hours and Wife cared for the home as well as the parties’ children. The record demonstrates that Wife paid bills for the home out of the parties’ joint bank account, helped plan renovations on the home, planted flowers, etc. Wife was also ordered by the trial court early in the litigation to pay for the utilities and maintenance expenses on the home while she and the children continued residing there. The record clearly reflects that Wife contributed greatly to the ongoing management and maintenance of the Lookout Point residence.

The third transmutation factor, whether the home is titled jointly, obviously militates against a finding of transmutation in this case because the Lookout Point residence is titled in Husband's name only. However, it is well-established that "record ownership of an asset does not always control its classification." *Malmquist v. Malmquist*, No. W2007-02373-COA-R3-CV, 2011 WL 1087206, at *25 (Tenn. Ct. App. Mar. 25, 2011); *see also Altman v. Altman*, 181 S.W.3d 676, 680-81 (Tenn. Ct. App. 2005) ("[T]he classification of property does not depend on the state of its record title but on the conduct of the parties."). Moreover, the fourth factor strongly favors a finding of transmutation in light of the proof that the parties did substantial renovations on the Lookout Point residence with marital funds. Wife was heavily involved in the improvement process and often wrote checks out the parties' joint bank account to pay for the improvements. Wife also testified that many of the renovations were done to make the Lookout Point residence more amenable to Wife and the children. For instance, Wife testified that the master bathroom and the laundry room were completely renovated to her specifications and that a play space for the children was added near the laundry room. Although both the trial court and Husband make much of the fact that Wife's credit was never used to fund the improvements, this is inapposite in light of the fact that no party's credit was needed because the renovations were paid for outright with marital funds.

While Husband asserts that he never intended for the Lookout Point residence to become a marital asset, the only evidence offered to this effect was Husband's testimony, which Wife disputed. Absent any additional evidence from Husband, it appears his "intent to keep [the home] as his separate property surfaced only after the demise of the marriage." *Phipps v. Phipps*, No. E2014-00922-COA-R3-CV, 2015 WL 335843, at *5 (Tenn. Ct. App. Jan. 27, 2015). Indeed, Husband's conduct during the marriage suggests otherwise. Under all of these circumstances, we must conclude that the evidence in the record preponderates against the trial court's finding that the Lookout Point residence remained Husband's separate property.

Dover, 2020 WL 7224368, at *6-7. *See also Lewis*, 2020 WL 4668091, at *4-5 (concluding that the evidence preponderated against the trial court's determination that the parties' marital residence, which was owned by the wife prior to the marriage and titled solely to her, remained her separate property when the parties lived in the residence throughout the marriage and used marital funds to pay the mortgage and other expenses); *Carter*, 2019 WL 424201, at *12 (concluding that the evidence preponderated against the trial court's determination that the parties' marital residence, which was owned by the wife prior to the marriage, remained her separate property when the parties lived in the

residence throughout the marriage, used marital funds to maintain the home, and utilized the husband's credit to obtain a loan to make substantial improvements to the property).

Similarly, in the instant action, Wife demonstrated that she was involved in the design and construction of the Marital Residence and that she contributed financially and by investing sweat equity in the home both before and during the parties' marriage. According to Wife, the parties resided in the Marital Residence from January 1998 until their separation in July 2016, a period in excess of eighteen years. Wife testified that the mortgage and other expenses necessary to maintain the home during the marriage were paid utilizing marital funds, and the proof established that Wife had been the primary breadwinner in the family since 2004. Both parties maintained and managed the property during the marriage, and as the trial court found, the evidence demonstrated that the home had fallen into a state of disrepair after Wife left.

In addition, Wife's credit was utilized in obtaining both the primary mortgage associated with the Marital Residence and the HELOC, which was used in part for household expenses. Of the factors recited in *Hayes*, the only factor that militates against a finding that the subject property had been transmuted to marital property was that the property remained titled solely to Husband. Both Husband and Wife stated that Wife had asked Husband to title the property jointly but that he had refused. However, as stated in *Dover*, "record ownership of an asset does not always control its classification." See 2020 WL 7224368, at *7 (quoting *Malmquist v. Malmquist*, No. W2007-02373-COA-R3-CV, 2011 WL 1087206, at *25 (Tenn. Ct. App. Mar. 25, 2011)). Rather, the focus of the transmutation analysis is "how the parties treated the property." *Lewis*, 2020 WL 4668091, at *5. Considering all of the facts presented at trial, we conclude that the evidence does not preponderate against the trial court's determination that a rebuttable presumption arose concerning transmutation of the Marital Residence to marital property.

Husband contends that the trial court erred by failing to consider whether he had adequately rebutted the presumption of a gift to the marital estate. Husband points to his testimony and Wife's acknowledgement that he had refused to place Wife's name on the property's title. We note that the presumption of a gift to the marital estate "can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate." *Snodgrass*, 295 S.W.3d at 256. In this matter, we agree with the trial court's determination that there was insufficient "evidence or proof offered that Husband ever intended to keep the property separate and apart from Wife." Although Husband refused to place Wife's name on the real property's title, the proof established that Wife and he were both involved in the design and construction of the home, that they lived there for eighteen years together, that they both oversaw the home's maintenance, and that the mortgage and other expenses were paid from marital funds. We therefore conclude that the trial court did not err in its determination that the Marital Residence was a marital asset.

V. Value of Wife's Retirement Accounts

Continuing to take issue with the trial court's equitable distribution of marital assets, Husband posits that the trial court erred in the value it assigned to Wife's retirement accounts. The trial court assigned a value to Wife's retirement accounts through her employer of "\$174,289.00 at the time of separation" and awarded those accounts to Wife in the property division. The court also awarded to Wife her Roth IRA without assigning a specific value. Husband argues that these rulings were in error because (1) the value of \$174,289.00 is unsupported in the record; (2) no value was assigned to the Roth IRA; and (3) the accounts should have been valued at the time of the final divorce decree's entry rather than the time of separation.

We agree with Husband that "marital property shall be valued as of a date as near as possible to the date of entry of the order finally dividing the marital property." Tenn. Code Ann. § 36-4-121(b)(2)(A) (Supp. 2022).² In the case at bar, although the trial was conducted in January and June 2018, the final order was not entered until April 22, 2020. Accordingly, the retirement accounts should have been valued "as of a date as near as possible to" April 22, 2020. *See id.*

The obvious difficulty with adhering to the statute's requirement in this matter is that the final order was not entered until approximately twenty-two months following the trial. In addition, the proof that was introduced concerning the value of Wife's employment-related retirement accounts was from July 2017, a date preceding the final order's entry by almost three years. Regarding the parties' respective IRA accounts, no specific value was placed thereon by the trial court. This being the case, we determine that Husband's issue concerning proper valuation of the retirement accounts has merit. We therefore conclude that the trial court's findings concerning the values of the parties' retirement accounts should be vacated and that a limited remand is necessary so that the trial court can receive evidence concerning the value of the parties' retirement accounts as of a date as near as possible to April 22, 2020. The trial court should then value all of the parties' retirement accounts accordingly.

VI. Equitable Property Distribution and the Factors Provided in Tennessee Code Annotated 36-4-121(c)

Husband advances the position that the trial court erred in its distribution of marital property by failing to first properly consider the factors enumerated in Tennessee Code Annotated 36-4-121(c). Husband relies on the mandatory nature of the language used in Tennessee Code Annotated 36-4-121(a)(1)(A), which provides that the trial court "shall" "[e]quitably divide, distribute, or assign the marital property between the parties without regard to marital fault in proportions as the court deems just based on the factors

² We note that Wife also concedes this point in her brief.

set forth in subsection (c).” See *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994) (“Trial courts have wide latitude in fashioning an equitable division of marital property. Their decisions must be guided by the factors in Tenn. Code Ann. § 36-4-121(c).”) (internal citation omitted); *Swafford v. Swafford*, No. E2017-00095-COA-R3-CV, 2018 WL 1410900, at *2 (Tenn. Ct. App. Mar. 21, 2018) (“Tenn. Code Ann. § 36-4-121(c) outlines the relevant factors that a court must consider when equitably dividing the marital property[.]”) (quoting *McHugh v. McHugh*, No. E2009-01391-COA-R3-CV, 2010 WL 1526140, at *3 (Tenn. Ct. App. Apr. 16, 2010)).

Tennessee Code Annotated § 36-4-121(c) provides:

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)(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) In determining the value of an interest in a closely held business or similar asset, all relevant evidence, including valuation methods typically used with regard to such assets without regard to whether the sale of the asset is reasonably foreseeable. Depending on the characteristics of the asset, such considerations could include, but would not be limited to, a lack of marketability discount, a discount for lack of control, and a control premium, if any should be relevant and supported by the evidence;
- (11) The amount of social security benefits available to each spouse;
- (12) Such other factors as are necessary to consider the equities between the parties; and
- (13) The total amount of attorney fees and expenses paid by each party in connection with the proceedings; whether the attorney fees and expenses were paid from marital property, separate property, or funds borrowed by a party; and the reasonableness, under the factors set forth in Rule 1.5 of the Tennessee Rules of Professional Conduct, and necessity of the attorney fees and expenses paid by each party[.]

Our review of the trial court's April 22, 2020 order, wherein the court divided the parties' marital property, reveals that the court did not specifically undertake an analysis of the above-referenced statutory factors in its order. Although the court did make various findings of fact in its order, and those findings of fact correspond to certain of the statutory factors, the court's order does not demonstrate a properly reasoned analysis of the applicable factors in this case.

In addition, as Husband points out, the trial court's April 22, 2020 order also reflects a lack of factual findings concerning certain items. For example, the trial court failed to set values for some marital assets, including Husband's Roth IRA and the parties' personal property. We note that although the court valued the parties' cattle at \$1,000.00 per head, the court failed to quantify how many cows were in the herd. As such, we are unable to determine whether the overall property distribution was equitable inasmuch as we cannot ascertain the total values of the property awarded to each party.

This Court has previously explained:

In bench trials where facts are determined solely by the judge, Tennessee Rule of Civil Procedure 52.01 states, “the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.” This requirement is critical to “facilitat[ing] appellate review and promot[ing] the just and speedy resolution of appeals.” *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009). “Simply stating the trial court’s decision, without more, does not fulfill” the requirements of Rule 52.01. *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8 (Tenn. Ct. App. Oct. 24, 2012). *See also Long v. Long*, No. E2018-01868-COA-R3-CV, 2019 WL 3986281, at *8 (Tenn. Ct. App. Aug. 23, 2019); *Trezevant v. Trezevant*, 568 S.W.3d 595, 622 (Tenn. Ct. App. 2018). Despite the absence of a “bright-line test by which to assess the sufficiency of factual findings, . . . ‘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 Charles A. Wright et al., *Federal Practice & Procedure* § 2579, at 328 (3d ed. 2005)). “The equitable division of marital property is a fact-intensive inquiry, and in the absence of sufficient findings of fact and conclusions of law regarding the classification of all property at issue, we cannot determine whether the overall distribution of marital property . . . is equitable.” *Swafford v. Swafford*, No. E2017-00095-COA-R3-CV, 2018 WL 1410900, at *6 (Tenn. Ct. App. Mar. 21, 2018). *See also Smith v. Smith*, No. E2017-00515-COA-R3-CV, 2017 WL 6467153, at *5 (Tenn. Ct. App. Dec. 18, 2017); *Halliday v. Halliday*, No. M2011-01892-COA-R3-CV, 2012 WL 7170479, at *12 (Tenn. Ct. App. Dec. 6, 2012). Rule 52.01 must be followed to ensure “the [trial court’s] decision [is] guided by a careful consideration of the relevant statutory factors” listed in Tennessee Code Annotated section 36-4-121(c). *Cox v. Cox*, No. E2016-01097-COA-R3-CV, 2017 WL 6517596, at *5 (Tenn. Ct. App. Dec. 20, 2017) (citing *Larsen-Ball v. Ball*, 301 S.W.3d 228, 234-35 (Tenn. 2010)).

Leonard v. Leonard, No. W2018-02235-COA-R3-CV, 2020 WL 1515951, at *3 (Tenn. Ct. App. Mar. 30, 2020).

In *Leonard*, this Court vacated the trial court’s order dividing the marital estate and remanded the matter to the trial court with instructions for the trial court to “make specific findings of fact and conclusions of law in accordance with Tennessee Code Annotated § 36-4-121(c) and Tennessee Rule of Civil Procedure 52.01.” *Id.* at *4. In doing so, the *Leonard* Court explained:

[T]he trial court did not properly follow Rule 52.01. While the court's Order Dividing Marital Property listed both factual findings and conclusions of law, the court neglected to mention any of the factors listed in Tennessee Code Annotated section 36-4-121(c) and failed to offer any substantive explanation for its decisions that align with those factors. The court alluded to a few facts that may align with certain factors, such as the length of the marriage; Husband's monthly income; and Husband's use of his Thrift Savings Plan to pay for marital expenses rather than to dissipate the asset, but it omitted or failed to consider many others. The court made conclusory findings and rulings to divide the marital estate, such as awarding each party "his/her personal property, vehicles, and bank accounts" and holding each "responsible for the debts in his/her own name" without listing specific values. Husband's military pension was hotly contested; yet, the court failed to detail its reasoning in awarding Wife "twenty-five percent (25%) of Husband's disposable military retired pay."

The trial court's course of action does not afford us the ability to adequately assess the division of the marital estate on appeal. Without a properly detailed order in compliance with Rule 52.01, we are unable to determine how the court reached its conclusions or whether its decision was equitable.

Id. at *3 (footnote omitted).

Similarly, here, although the trial court made certain factual findings that were relevant to an analysis of some statutory factors, the court failed to consider or omitted other factors. The trial court's order lacks a concerted analysis of the statutory factors or a discussion of their applicability. In addition, the court's order lacks values assigned to certain assets. As a result of these omissions, we are unable to adequately assess the trial court's overall marital property distribution to determine whether it is equitable. We therefore have no choice but to vacate the marital property distribution and to remand this matter to the trial court with instructions for the trial court to "make specific findings of fact and conclusions of law in accordance with Tennessee Code Annotated § 36-4-121(c) and Tennessee Rule of Civil Procedure 52.01." *Id.* at *4. The court's findings should include specific values of the assets awarded to each party as of a date as near as possible to entry of the final order on April 22, 2020.

VII. Joinder of Party

Husband contends that the trial court impaired the parties' ability to fully settle their property interests by denying Husband's motion to join his mother as a necessary and indispensable party. Husband postulates that because his mother, Judith Hill,

claimed in her testimony to own certain property that the trial court found to be marital, she should have been joined as a party pursuant to Tennessee Rule of Civil Procedure 19.01, which provides:

A person who is subject to service of process shall be joined as a party if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person properly should join as a plaintiff but refuses to do so, he or she may be made a defendant, or in a proper case, an involuntary plaintiff.

Husband asserts that the trial court erroneously determined that certain items of property which Ms. Hill claimed to own, namely the cattle and the metal shop building constructed on her real property, were marital property belonging to the parties. We note, however, that the court's actual finding concerning the metal shop building was as follows:

During the course of the marriage, the parties built an 80' x 100' metal shop building upon property that is technically titled in the name of [Husband's] mother, Judith Hill, and that said property is known as the Abbott Hill. The Court finds that [Husband] intentionally misled [Wife] by misrepresenting that this building was constructed upon property that he owned. [Wife] made substantial personal financial contributions to the construction of this building. This building was constructed during the course of the marriage and [Husband] represented to Wife that the building was jointly owned and for the benefit of their family. The Court finds that Husband's fraudulent behavior dissipated marital assets. Wife presented an un rebutted value for the building at \$125,000.00. The Court adopts the value and awards Wife \$62,500.00 for the loss of this otherwise marital asset.

Ergo, the trial court did not determine the metal building to be a marital asset; rather, the court found that Husband had convinced Wife that the metal building would be a marital asset because it was being constructed on real property owned by him rather than property owned by his family. As such, the trial court charged Husband with dissipation of marital assets concerning the value of the building, which was actually constructed on real property that did not belong to the parties. Accordingly, Husband's contention regarding the metal building is without merit.

With respect to the cattle, the trial court did find the cattle to be a marital asset and awarded the cattle to Husband at a value of \$1,000.00 per head. Inasmuch as Ms. Hill testified at trial that she was the owner of the cattle, Husband asserts that she has an interest in this property that is affected by the outcome of the divorce litigation such that she should have been joined as a necessary and indispensable party.

We note that Husband's pretrial motion to compel his mother's joinder as a party, which was filed on September 19, 2017, only sought to join her in order to determine whether Husband held any interest in NPCC or whether Husband "owned a separate estate consisting of Nickle Point Classic Cars and other real and personal property." The trial court denied the motion, and Husband did not raise the issue again either before or during the trial. However, as this Court has previously stated regarding a Rule 19 motion:

[T]he language of Rule 19 is mandatory and directive; one who is an indispensable and necessary party "*shall* be joined as a party." TENN. R. CIV. P. 19.01 (emphasis added). The requirement of joinder of indispensable and necessary parties "appears absolute and inflexible," and applies to both trial courts and appellate courts. *Pope v. Kelsey*, No. 86-17-II, 1986 WL 6564, at *2 (Tenn. Ct. App. June 13, 1986), *no perm. app.* (quoting *Glickauf v. Moss*, 23 Ill. App. 3d 679, 320 N.E.2d 132, 135-316 (Ill. 1974)). When an indispensable and necessary party has not been joined, neither the trial court nor the appellate court may proceed further with the matter. *Id.* The parties are of course obliged to bring to the court's attention the necessity of such a joinder; however, even if the parties fail to do so, the trial court or even the appellate court must *sua sponte* enforce this principle of law. *Id.* (quoting *Glickauf*, 320 N.E.2d at 135-36).

Baker v. Foster, No. W2009-00214-COA-R3-CV, 2010 WL 174773, at *4 (Tenn. Ct. App. Jan. 20, 2010).

Wife counters by positing that Ms. Hill was not required to be joined as a necessary and indispensable party because she was, in actuality, merely a "proper" party to the action. As this Court has previously explained respecting the differences between a proper party and a necessary and indispensable party:

This Court has previously noted that [Rule 19.01] is intended to "protect the interests of absent persons as well as those already before the court from multiple litigation and inconsistent judicial determinations." *Citizens Real Estate & Loan Co. v. Mountain States Dev. Corp.*, 633 S.W.2d 763, 766 (Tenn. Ct. App. 1981).

* * *

As this Court explained in *Moore v. Teddleton*, No. W2005-02746-COA-R3-CV, 2006 WL 3199273, at *6 (Tenn. Ct. App. Nov. 7, 2006), a “proper party is not the same as a necessary or indispensable party.” (quoting *Brewer v. Lawson*, 569 S.W.2d 856, 858 (Tenn. Ct. App. 1978)). This Court further elucidated:

A “proper party” to a lawsuit is one who has legal or equitable rights in the subject of the litigation. *Horton v. Tennessee Dept. of Correction*, No. M1999-02798-COA-R3-CV, slip op. at 5 (Tenn. Ct. App. M.S. Sept. 26, 2002) (citing *Steele v. Satterfield*, 148 Tenn. 649, 654, 257 S.W. 413, 414 (1923); William H. Inman, *Gibson’s Suits in Chancery* § 51 (7th ed. 1988)). A proper party is so connected with the dispute as to be under an enforceable obligation to the plaintiff, or to have a right or position with regard to the subject of the litigation that entitles him to defend against the court’s judgment. *Id.* (citing Inman, *supra*, § 53). However, a proper party is not necessarily an indispensable party for the purposes of Tenn. R. Civ. P. 19.01. *Id.* “Only a party who will be directly affected by a decree *and whose interest is not represented by any other party to the litigation* is an indispensable or necessary party, that is, one without which no valid decree may be entered settling the rights between the parties that are before the [c]ourt.” *Brewer*, 569 S.W.2d at 858 (emphasis added).

Moore, 2006 WL 3199273, at *6.

Locke v. Locke, No. M2021-01454-COA-R3-CV, 2022 WL 3650806, at *3-4 (Tenn. Ct. App. Aug. 25, 2022).

We agree with Wife that Ms. Hill was a proper party but not a necessary and indispensable one. Husband testified at trial that the cattle in question were owned by his mother and that he held no interest therein. Therefore, when Ms. Hill subsequently testified and characterized the cattle as belonging to her, her testimony did not differ from Husband’s testimony on the issue. Because Ms. Hill’s and Husband’s interests were aligned concerning the cattle, her interest was represented by Husband. *See, e.g., Haiser v. McClung*, No. E2021-00825-COA-R3-CV, 2022 WL 16559449, at *10 (Tenn. Ct. App. Nov. 1, 2022) (determining that the proposed intervenors were not necessary and indispensable parties because their position was identical to the position of an existing party); *Locke*, 2022 WL 3650806, at *5 (determining that a party’s mother was not a

necessary and indispensable party because her interest was represented by the defendants, who advanced the same argument that she would have made); *Moore v. Teddleton*, No. W2005-02746-COA-R3-CV, 2006 WL 3199273, at *7 (Tenn. Ct. App. Nov. 7, 2006) (“Although Mr. Teddleton was affected by the chancellor’s decree . . . he and the Moores would appear to have had an identity of interests. Both parties would have benefitted if the Moores were allowed to keep the property in its entirety. Also, there is no indication that Mr. Teddleton’s absence rendered the court unable to afford complete relief to the parties before it.”).

Inasmuch as Husband’s and Ms. Hill’s respective testimony concerning ownership of the cattle was the same, and Husband adequately advanced the position that Ms. Hill was the owner of the cattle, we determine that Husband represented her interest in this matter such that she was not a necessary and indispensable party. We find Husband’s arguments regarding this issue to be unavailing.

VIII. Delay in Entry of Order

Husband asserts that the trial court violated his due process rights by waiting twenty-two months to enter an order distributing the parties’ marital property and setting forth a permanent parenting plan. He argues that this delay denied him the right to control and enjoy his property, to petition for an increase in child support if Wife’s salary increased during that time, or to modify the parenting plan if circumstances changed.

In support, Husband points to Tennessee Code Annotated § 20-9-506 (2021), which provides: “When any judge of any district tries a case without the intervention of a jury . . . the judge shall be required to render the judge’s decision and have judgment entered in the case within sixty (60) days from the completion of the trial.” Husband also relies on Tennessee Supreme Court Rule 11, § III(d), which states:

No case may be held under advisement in excess of sixty days and no motion, or other decision of the trial judge that delays the date of trial or final disposition in the trial court, shall be held under advisement for more than thirty days, absent the most compelling of reasons. (See Tenn. Code Ann. § 20-9-506.) A MOTION TO RENDER DECISION setting out the facts said to constitute a failure to comply with this rule may be filed with the presiding judge and the circuit justice, or either of them.

Husband acknowledges in his appellate brief, however, that these time limits are “directory and not mandatory.” See, e.g., *Byrd v. Byrd*, No. W2021-00926-COA-R3-CV, 2022 WL 16548578, at *20 (Tenn. Ct. App. Oct. 31, 2022).

Husband also directs this Court to language contained in a prior decision, *Justice v. Sovran Bank*, 918 S.W.2d 428, 430 (Tenn. Ct. App. 1995), stating that “[a]n inordinate

delay in resolving issues in dispute results in prejudice to the judicial process.” We agree that *Justice* is instructive in this case although we determine that understanding the proper context of the above-quoted statement is necessary:

A trial court has broad discretion in the conduct of trials and the management of its docket. *See Kelley v. Brading*, 337 S.W.2d 471, 47 Tenn. App. 223 (1960). However, the elapse of four years between the evidentiary hearing and resolution of the issues in a case would be an abuse of discretion, unless there are extenuating circumstances. An inordinate delay in resolving issues in dispute results in prejudice to the judicial process. *See* T.R.A.P. Rule 36(b). The record before us does not establish any basis for the long delay in the final resolution of the case, but all public officials are afforded the presumption that they have discharged their public responsibilities in a proper manner. Delays can be and are caused by misplaced court records, cases being inadvertently removed from the docket and other extenuating circumstances.

The attorneys for the parties are required to take all reasonable steps to obtain a timely resolution of the issues in their cases. T.R.A.P. Rule 36 provides in pertinent part:

Nothing in this rule shall be construed as requiring relief be granted 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.* (Emphasis supplied).

Attorneys are understandably reluctant to ask a busy trial judge to decide the issues in their case. However, after a reasonable elapse of time, attorneys should file a joint motion with the trial court asking for a judicial determination of their case. Zealous representation requires attorneys to take all reasonable steps to bring about a timely resolution of the clients’ disputes. *See* Rule 8, Code of Professional Responsibility, canon 7. In this case, neither counsel sought relief and must bear some responsibility for the long delay.

Id. at 429-30.

Similarly, in the case at bar, the record reveals that neither the parties nor their counsel filed any type of motion or other pleading seeking to expedite a judicial determination. *See id;* *see also* Tenn. Sup. Ct. R. 11, § III(d). As such, we cannot grant relief to Husband concerning this issue when Husband also bears some responsibility for the delay. *See Justice*, 918 S.W.2d at 430; *see also* Tenn. R. App. P. 36 (“Nothing in this rule shall be construed as requiring relief be granted 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.”). This issue is therefore without merit.

IX. Contempt of Court

Husband contends that the trial court erred by failing to provide a sufficient evidentiary basis for its finding that Wife should not be held guilty of contempt. Husband urges that he presented evidence that Wife violated the court’s previous order directing that Husband’s co-parenting time with the parties’ daughter would begin on Mondays after school by testifying that Wife failed to comply with that order on July 3, 2017. The trial court determined that Husband’s contempt petition should be dismissed because “the testimony did not support a willful violation by [Wife] related to the co-parenting time in May and June, 2017.”

In his contempt petition, Husband asserted that Wife should be found guilty of criminal contempt of the trial court’s prior order concerning the parties’ respective co-parenting time. As this Court has previously explained with respect to criminal contempt:

Tennessee Code Annotated section 29-9-102 authorizes courts to “inflict punishments for contempts of court” for, inter alia, “[t]he willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts[.]” Tenn. Code Ann. § 29-9-102(3). In this situation, “[t]here are three essential elements to criminal contempt: ‘(1) a court order, (2) the defendant’s violation of that order, and (3) proof that the defendant willfully violated that order.’” *Pruitt v. Pruitt*, 293 S.W.3d 537, 545 (Tenn. Ct. App. 2008) (citing *Foster v. Foster*, No. M2006-01277-COA-R3-CV, 2007 WL 4530813, at *5 (Tenn. Ct. App. Dec. 20, 2007)). In addition, the plaintiff must show the following four elements: (1) the order allegedly violated was lawful; (2) the order was clear and unambiguous; (3) the individual charged did in fact violate the order; and (4) the individual acted willfully in so violating the order. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 354-55 (Tenn. 2008); *Furlong v. Furlong*, 370 S.W.3d 329, 336 (Tenn. Ct. App. 2011) (stating that the four-element analysis outlined in *Konvalinka* applies to criminal and civil contempt actions). As this Court has previously explained,

A person charged with criminal contempt is “presumed innocent and may not be found to be in criminal contempt in the absence of proof beyond a reasonable doubt that they have willfully failed to comply with the court’s order.” *Long*

v. McAllister-Long, 221 S.W.3d 1, 13 (Tenn. Ct. App. 2006) (citing *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996); *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993)). If the defendant is found guilty by the trial court, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the verdict of guilt. *Black*, 938 S.W.2d at 399. When the sufficiency of the evidence in a criminal contempt case is raised in an appeal, this court must review the record to determine if the evidence in the record supports the finding of fact of guilt beyond a reasonable doubt, and “if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt” we are to set aside the finding of guilt. *See* Tenn. R. App. P. 13(e) (directing that “findings of guilt in criminal actions shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt”).

Pruitt, 293 S.W.3d at 545-46.

Mawn v. Tarquinio, No. M2019-00933-COA-R3-CV, 2020 WL 1491368, at *3 (Tenn. Ct. App. Mar. 27, 2020).

In the instant case, Husband was questioned during trial concerning whether the parties had communicated about their vacations with their daughter, A.H., during the summer of 2017. Husband testified:

There was something asked, you know, how we would handle some vacation time. Our weeks were in conflict. I wanted a week. It turned out the same week she wanted. For some reason or another she got priority. I had to take what was left. And my week was basically the week after her week. And we had agreed that we would exchange on a certain day, you know, at Browns Creek at five as per usual. But instead of having them on our regular days we would have a full week. I mean what it was, was beach vacations for us both.

Upon further questioning, Husband acknowledged that Wife’s week with the child was to begin on July 3, 2017. However, Husband testified that the parties did not have an agreement in writing with regard to their respective week-long vacations with the child such that he went to the designated exchange point on Monday, July 3, 2017, at the appointed time, and Wife did not appear with the child. Husband stated that upon sending a text message to the child, he learned that she was at the beach with Wife. Husband acknowledged that he had not communicated with Wife about that week.

We reiterate that Wife may not be found guilty of criminal contempt in the absence of evidence “beyond a reasonable doubt that [she had] willfully failed to comply with the court’s order.” *Id.* at *3 (quoting *Pruitt v. Pruitt*, 293 S.W.3d 537, 545 (Tenn. Ct. App. 2008)). Following our review of Husband’s testimony, we agree with the trial court’s determination that Husband failed to demonstrate a willful violation of the trial court’s order by Wife. As this Court has previously explained concerning the “willfulness” requirement for a finding of criminal contempt:

[I]n the context of criminal contempt, willfulness has two elements: (1) intentional conduct; and (2) a culpable state of mind. *See State v. Beeler*, 387 S.W.3d 511, 523 (Tenn. 2012); *Konvalinka [v. Chattanooga-Hamilton Cnty. Hosp. Auth.]*, 249 S.W.3d [346,] 357 [(Tenn. 2008)]. Willful disobedience of any court order “entails an intentional violation of a known duty” *Beeler*, 387 S.W.3d at 523 (emphasis in original) (citing *In re Sneed*, 302 S.W.3d 825, 826 n.1 (Tenn. 2010)). The statutory definition of intentional conduct is found in Tennessee Code Annotated section 3-11-302(a) (2010): “‘Intentional’ refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Tenn. Code Ann. § 39-11-302(a). To satisfy the culpable state of mind requirement, the act must be “undertaken for a bad purpose.” *Konvalinka*, 249 S.W.3d at 357. In other words, willful disobedience in the criminal contempt context is conduct “done voluntarily and intentionally and with the specific intent to do something the law forbids.” *Id.* (quoting *State v. Braden*, 867 S.W.2d 750, 761 (Tenn. Crim. App. 1993) (upholding this definition of willful misconduct for criminal contempt)).

Duke v. Duke, No. M2013-00624-COA-R3-CV, 2014 WL 4966902, at *31 (Tenn. Ct. App. Oct. 3, 2014). Husband’s testimony concerning this issue demonstrated his own confusion regarding the vacation agreement during the summer of 2017, and Husband failed to establish that Wife acted with a culpable state of mind when failing to exchange the child on July 3, 2017, or that she acted “with the specific intent to do something the law forbids.” *See id.* We accordingly affirm the trial court’s ruling on this issue.

X. Imputation of Income to Husband

Finally, Husband asserts that the trial court erred by imputing income to him of \$5,000.00 per month. Husband acknowledges in his appellate brief that after leaving his teaching employment in 2004, he “worked in the Nickel Point Business and provided income to the family.” Husband argues, however, that his vocational expert testified that he could only earn approximately \$2,000.00 per month in the traditional work force, which evidence preponderates against the trial court’s imputation of income.

Respecting this issue, the trial court found as follows:

The proof further established that [Husband] has not been employed outside the home for several years. [Husband] testified that he was being paid \$5,000.00 per month by family members for services rendered to them. Upon being questioned about his lack of non-family subsidized employment, [Husband] was defensive, contradictory, and at times, irrational. [Husband] has a Bachelor of Science in Industrial Engineering. [Husband] testified that he is in good health and has held many positions including teacher, engineer, construction, auto dealer, and manager. The Court carefully considered the testimony of the defense's vocational expert, Dr. Patrick Dunn, and the request that income be imputed at \$2,000.00 per month for [Husband]. The court rejects that proposed imputation of income for various reasons, including but not limited to, [Husband's] own testimony. The conclusion for this Court, based upon the proof, is that [Husband] has willfully chosen to be underemployed and/or unemployed. The Court finds that [Husband's] income shall be set at \$5,000.00 per month.

Upon careful review of the evidence, we agree with the trial court's determination.

During trial, Husband acknowledged that he possessed a bachelor's degree in engineering and that he had been employed in the fields of construction and manufacturing, as well as working as a "shop" teacher at Heritage High School, for several years before deciding to leave the traditional work force in 2004 and work with his father. Husband then worked for many years buying, repairing, and selling cars. In addition, Husband testified that he helped his parents take care of the cattle on the Abbott Road Property, worked to maintain the "family farm," and, at times, sold beef on the side.

With reference to the work he performed after leaving the teaching position in 2004, Husband's testimony was replete with proclamations concerning his long hours of hard work that sometimes lasted well into the night. In contrast to Wife's testimony that she had primarily cared for the children, Husband claimed that he worked these long hours while simultaneously providing extensive and almost exclusive care for the parties' children and their home. Husband described his many skills and abilities with respect to construction, farming, sports coaching, and automobile sales, repair, and detailing.

Regarding his income, Husband claimed to pay monthly expenses in excess of \$5,600.00 and yet have no income. Husband testified that he paid his bills by gifts and/or loans from his mother and his aunt, acknowledging that he was being gifted \$5,000.00 per month or more. Husband's mother testified that she gave money to Husband and

helped him pay certain bills “when she want[ed] to.” She also testified that she paid Husband and her grandson to take care of her cattle.

Husband stated that at one time he was earning at least \$3,000.00 per month participating in his “side business” with his father. He also alternatively testified that for years, he contributed to the household budget by spending a “pile of cash” that he had accumulated in the trunk of a car. When asked if he had sought employment recently, Husband claimed that he had “asked around” about jobs to no avail. Other witnesses testified that they had discussed or heard Husband discuss his ongoing work selling cars. One of those witnesses testified that Husband had talked about having to sell a number of cars to pay his divorce attorney. She also reported that Husband had discussed hiding the money he made from the government. Husband admitted that in his deposition, he had stated that he received “very good advice” when the divorce proceedings began not to work outside the home.

This Court has elucidated the proper standard of review to be applied to a trial court’s determination concerning voluntary unemployment as follows:

A trial court’s determination regarding willful and voluntary underemployment is entitled to a presumption of correctness, and “we accord substantial deference to the trial court’s decision, especially when it is premised on the trial court’s singular ability to ascertain the credibility of the witnesses.” *Reed [v. Steadham]*, No. E2009-00018-COA-R3-CV,] 2009 WL 3295123 at *2 [(Tenn. Ct. App. Oct. 14, 2009)].

Miller v. Welch, 340 S.W.3d 708, 712-13 (Tenn. Ct. App. 2010) (quoting *Pace v. Pace*, No. M2009-01037-COA-R3-CV, 2010 WL 1687740, at *8 (Tenn. Ct. App. Apr. 26, 2010) (other internal citations omitted)). This Court further stated that “[t]he trial court has considerable discretion in its determination of whether a parent is willfully or voluntarily underemployed.” *Miller*, 340 S.W.3d at 712.

Following our thorough review of the evidence, we conclude that the trial court did not abuse its discretion in determining Husband to be voluntarily unemployed/underemployed. The evidence demonstrated that Husband is educated and has a history of employment at various positions in the fields of construction, manufacturing, teaching, and automobile sales. Husband did not prove that he was physically disabled or otherwise unable to maintain full-time employment. Although Husband testified that he had, at one time, been responsible for care for the parties’ children, the evidence established that the parties’ remaining minor child was thirteen by the time of trial, was in school full time, and was often provided transportation by her older brother. The record contains no evidence that would demonstrate a reason for Husband’s inability, as a college-educated, skilled, and healthy adult, to work full time and to earn at least the level of income imputed by the trial court.

XI. Conclusion

For the foregoing reasons, we affirm the trial court's classification of the parties' Marital Residence as marital property. We also affirm the trial court's dismissal of Husband's contempt petition, its denial of Husband's motion to join his mother as a party, and its imputation of income to Husband due to his voluntary unemployment. We vacate the trial court's valuation of the parties' retirement accounts and its division of marital property, and we remand those issues to the trial court for further proceedings consistent with this opinion. Costs on appeal are assessed one-half to the appellant, James D. Hill, and one-half to the appellee, Katherine J. Hill.

s/Thomas R. Frierson, II

THOMAS R. FRIERSON, II, JUDGE