IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 14, 2023 Session

KELLY R. HARRIS v. LONNIE C. HARRIS

Appeal from the Chancery Court for Knox County
No. 189601-3 Thomas J. Wright, Senior Judge[1]

No. E2023-00061-COA-R3-CV

At issue in this appeal is the classification and division of marital property from a nearly 22-year marriage. The trial court divided the marital property 50/50. The husband appeals. We modify the trial court's judgment to divide the marital property 75% to the husband and 25% to the wife. In all other respects, the judgment is affirmed.

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

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and THOMAS R. FRIERSON, II, J., joined.

William S. Lockett, Jr., Knoxville, Tennessee, for the appellant, Lonnie C. Harris.

Scott L. Saidak, Knoxville, Tennessee, for the appellee, Kelly R. Harris.

OPINION

I. BACKGROUND

In 1987, Lonnie C. Harris ("Husband") purchased 14.91 acres of unimproved property located on Callahan Road near its intersection with Clinton Highway. He paid $97,000 for the property. Kelly R. Harris ("Wife") and Husband were married in 1995. Prior to the marriage, Wife worked for Husband as a secretary. They dated for two years, then subsequently married. After the wedding, the couple resided at 2617 Lesa Lane for six months. The couple built an apartment over the barn on the Callahan Road land ("the Property") which they used as a marital residence for several years. They eventually built

[1] Sitting by assignment of the Tennessee Supreme Court.

a 3,420 square foot home on the Property.

During the first 10 years of the marriage, Husband was the owner of a nursery on the Property known as Bent Tree Farms. Husband testified that he "paid all the family bills which [he] had always done since [he] went in business through the Lonnie C. Harris, d/b/a Bent Tree Farms … sort of personal account … sort of a business account." Wife ran the business when Husband was away on landscaping jobs. She also maintained the household, caring for and homeschooling the couple's two children.

After 10 years of marriage, Husband decided to retire. For financial reasons, he cut his ties with Bent Tree Farms. The business was leased to Wife to run. However, even after transferring ownership of the business to Wife, Husband continued using the Bent Tree Farms checking account as he had since he opened the business. According to Husband, he would transfer money from his inheritance account (money obtained after the death of his mother) into the joint account. These monies were used to pay taxes, insurance, utilities, and all other monthly bills relative to the Property and the family. At trial, Husband contended that per the lease, Wife was "financially responsible" for all the expenses related to the nursery." Wife argued, however, that "we did everything together. . . . You still did just as you did day to day always … we did everything day to day as we normally did, as we always did in that 20 year marriage."

In 2015, Husband was diagnosed with leukemia and multiple myeloma. He contends that during the cancer treatment, Wife convinced him that he needed to make a large withdrawal from his inheritance account and deposit large sums into the Bent Tree Farms account in order to pay for his treatment. Husband asserts that instead of paying medical bills for Husband, Wife gave the money to someone she had met online. Husband also contends that Wife obtained cash advances from a credit card she secretly opened in her name and gave those funds to persons that she had become acquainted with online; she then deceived Husband into providing her money to pay the credit card bills by representing the amounts were for household expenses.

According to Wife,

> [A]t one point when–I think when I would go shopping and forget to ask you for a check to purchase things for the home or whatever, groceries, we decided to let me open an account and we just charged it throughout the month and paid it off at the end of the month. That's all I ever used that credit card for, was expenses like that, marital, gas, whatever."

As to the credit card, however, Husband asserted that he "didn't even know [she] had it." The trial court inquired of Wife as follows:

THE COURT: Did you give $39,000 to somebody else?

> THE WITNESS: I do not recall the specific amount I gave this one time, or I just - yes, I gave money online one time, but specific times, amounts, I don't – I'm sorry your Honor, I don't know how to answer these questions.
>
> THE COURT: Just with the truth. That's what we would like to hear.
>
> * * *
>
> A: I know we kept cash on hand, and I've spent and spent and spent the last few years that you were sick trying to feel better. I can't tell you any specifics. I - sir, yes, I spent and blew a bunch of money. I - I know that and I admit that.

Husband alleges that the trial court became agitated with his inartful questioning and accused him of lying about not being able to afford an attorney. During Husband's cross-examination of Wife, his second question was her job title when she began working for him. The trial court stated: "By the way, I don't want to cut you off. I haven't said much yet, but it's 2:30 almost. If we're just going to ask about job titles and stuff, we're not going to get done today, and I'm not going to be here tomorrow. I don't know about you." According to Husband, he was unaware that the hearing would not continue the next day. The court quickly related: "I'll stay as long as you want…. But it won't be tomorrow. It will be today." Later, as the cross-examination continued, the court declared:

> THE COURT: "I don't have time to explain everything to you. I just don't have time. It's now 5:20. I'm just going to tell you this. If you are not done with her in the next 15 minutes, you're done with her in the next 15 minutes. Do you understand that? So you better get your best stuff … on the target; all right, and shoot at it, because I'm not waiting any longer."

The court further related to Husband, "[Y]our time is about to run out." Husband responded that he didn't know he had a time limit, to which the court replied, "You do now." When Husband verbally observed, "Now I do," the court stated, "You didn't to start with."

Another exchange between the court and Husband related to Husband's self-representation:

> THE COURT: You said that the property in the household was worth about, I don't know, maybe $2,000. So why would I even care? I really don't care. You've got all that property. She hasn't got nothing; right?
>
> MR. HARRIS: I earned all that property.

THE COURT: You think you earned everything we're talking about here, but that is a misconception on your part. Don't look at me like that.

MR. HARRIS: The question, I don't know why.

THE COURT: I'm not going to explain it to you either. That's why you should have hired a lawyer.

MR. HARRIS: I don't have the money.

THE COURT: I don't believe you. I believe you're too hard to get along with and no lawyer wants your case or you just don't want to spend the money, and I don't understand that. And here's what I also don't understand. You're in here telling me - obviously you said you were 70 at some point in time. You're over 70 now; right?

MR. HARRIS: Almost 80.

THE COURT: You're almost 80, okay. You've got a disease that's going to kill you in the near term, not the long term; right? …

MR. HARRIS: I had to sell part of my property to pay her.

THE COURT: Part of it, part of it; right? So my question, when you tell me you don't have any money is, if you're about to die and you don't have any money, why are you in here arguing about money?

MR. HARRIS: Because I have children, and my children - I have one daughter who died, and I have another son, and I have the two younger kids. The two younger kids don't really - well, the youngest doesn't get along with her at all.

THE COURT: That don't matter.

MR. HARRIS: Okay. So because I'm old I shouldn't be concerned with what somebody is trying to take from me.

THE COURT: You said you don't have any money.

MR. HARRIS: I have property.

* * *

MR. HARRIS: And, yeah, I could have sold the property.

THE COURT: There you go.

MR. HARRIS: And then be out that money because I'm not going to get it back. I have to pay an attorney and I can't get it back.… Where I was raised you didn't let anybody run over you. I don't care how old you were or how young you were. Nobody ran over you. And you don't let them do that. What's she asking for she's not entitled to. It's all—it was kept as separate property.…

At the conclusion of the hearing, the trial court found that Wife brought minimal assets into the marriage whereas Husband held substantial assets in the form of real estate and a profitable business. As the court stated: "[T]he estate of each of the parties at the time they married ... was a goose egg for Mrs. Harris ... and substantial for Mr. Harris with the real estate that he owned and the business that he had developed." The stipulated proof was that as of the date of the marriage, the Property had a fair market value of $653,000. At that time, the Property was used for commercial purposes. The marital residence that had been constructed on the Property was valued at $200,000 on the date of the divorce, and the total value of all the Property on the date of the divorce was $1,070,000. The total contributory increase in the value of the Property during the marriage, therefore, is $417,000. Earlier in the course of the divorce proceeding, before the first appeal, Husband was ordered to pay Wife $152,500. Husband prevailed on appeal and the case was remanded; however, the court denied Husband's request for relief from paying the $152,500 until this matter was concluded. Accordingly, Husband is entitled to a credit of $152,500 against whatever amount, if any, is awarded to Wife. The court found that Husband proved by a preponderance of the evidence that Wife engaged in dissipation of "marital assets by multiple thousands of dollars ...." In an effort to account for the dissipation of assets by Wife, the trial court determined that Husband could keep the $54,000 in personal property that was his, rather than taking the total value of personal property of $60,000 and dividing it 50/50.

II. ISSUES

The issues raised on appeal by Husband are as follows:

1. Whether the trial court's division of the marital property was equitable.

2. Whether the trial court committed error by limiting Husband's cross-examination of Wife, in preventing Husband from testifying on direct examination, and in being emotionally abusive toward Husband to the point of casting doubt on the fairness of the entire proceeding.

III. STANDARD OF REVIEW

Review of a trial court's judgment following a non-jury trial is de novo upon the record, with a presumption of correctness as to the trial court's findings of fact unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 204 (Tenn. 2012). "In order for the evidence to preponderate against the trial court's findings of fact, the evidence must support another finding of fact with greater convincing effect." *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006). The trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Morrison v. Allen*, 338 S.W.3d 417, 426 (Tenn. 2011). A trial court's conclusions of law are reviewed de novo with no presumption of correctness. *Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011).

IV. DISCUSSION

A.

According to Husband, the Property along Callahan Road was separate property purchased by him before the marriage that he intended to remain separate. He argues that the marital residence should not be considered marital property because he built it from money that he kept separate in a safe deposit box. Thus, according to Husband, it was error for the trial court to find that the residence became marital property through the doctrines of commingling and/or transmutation. Wife argues that all of the assets acquired during the marriage are marital.

"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." *Eldridge v. Eldridge*, 137 S.W.3d 1, 12 (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.*

A recent decision of this court fully explained how courts classify particular property as either separate or marital. In *Booker v. Booker*, No. E2022-01228-COA-R3-CV, 2023 WL 7016215 (Tenn. Ct. App. Oct. 24, 2023) the panel, with Judge Davis delivering the opinion, provided as follows:

> During divorce, trial courts must classify parties' property as either separate or marital prior to dividing the property between them. *Eldridge v. Eldridge*, 137 S.W.3d 1, 13 (Tenn. Ct. App. 2002); *see also Owens v. Owens*, 241 S.W.3d 478, 485 (Tenn. Ct. App. 2007) ("Dividing a marital estate necessarily begins with the systematic identification of all of the parties' property interests." (citing 19 W. Walton Garrett, *Tennessee Practice:*

Tennessee Divorce, Alimony and Child Custody § 15:2, at 321 (rev. ed. 2004))). Only marital property is subject to property division, so "it is of primary importance for the trial court to classify property as separate or marital." *Eldridge*, 137 S.W.3d at 13 (citing Tenn. Code Ann. § 36-4-121(a) (2001)); *see also Brown v. Brown*, 913 S.W.2d 163, 166 (Tenn. Ct. App. 1994) ("The division of a marital estate necessarily begins with the classification of the parties' property as either marital or separate property."). Separate property is, *inter alia*, "[a]ll real and personal property owned by a spouse before marriage[.]" Tenn. Code Ann. § 36-4-121(b)(2)(A). Separate property also includes "[p]roperty acquired by a spouse at any time by gift, bequest, devise or descent." Tenn. Code Ann. § 36-4-121(b)(2)(D). Marital property is, *inter alia*, "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage[.]" *Id.* at 36-4-121(b)(1)(A). Generally, assets acquired prior to marriage are presumed separate, and assets acquired during the marriage are presumed marital. *Owens*, 241 S.W.3d at 485.

"Mar[ital] residences present unique and complex challenges, both financial and emotional, when it comes time to classify and divide the parties' marital property." *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at *5 (Tenn. Ct. App. Sept. 1, 2006). Marital homes

> should not be classified as marital property simply because the parties have lived in it. However, as a general matter, a marital residence acquired by the parties during the marriage and owned by the parties jointly should be classified as marital property. *See, e.g., Altman v. Altman*, 181 S.W.3d 676, 680-81 (Tenn. Ct. App. 2005). Even a marital residence that was separate property prior to the marriage or that was purchased using separate property should generally be classified as marital property if the parties owned it jointly because joint ownership gives rise to a rebuttable presumption that the property is marital, rather than separate, property.

Id. (citing *Eldridge*, 137 S.W.3d at 14). Moreover, separate property can become marital property through transmutation or commingling. Our Supreme Court has explained transmutation and commingling as follows:

> Separate 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.

Langschmidt v. Langschmidt, 81 S.W.3d 741, 747 (Tenn. 2002) (citing 2 Homer H. Clark, *The Law of Domestic Relations in the United States* § 16.2 at 185 (2d ed. 1987)) (brackets omitted). The doctrines of transmutation and commingling rest on the principle that separate property is not "indelibly separate," but rather can be "treated 'in such a way as to give evidence of an intention' that it is to become marital property." *Carter v. Browne*, No. W2019-00429-COA-R3-CV, 2019 WL 424201, at *9 (Tenn. Ct. App. Feb. 4, 2019) (quoting *Smith v. Smith*, 93 S.W.3d 871, 878 (Tenn. Ct. App. 2002)); *see also Eldridge*, 137 S.W.3d at 13 ("[S]eparate property can become part of the marital estate due to the parties' treatment of the separate property."). For example, transmutation often occurs when a spouse purchases real property prior to the marriage and the parties then use the property as the marital residence and undertake significant improvements to the property during the marriage. *See Dover v. Dover*, No. E2019-01891-COA-R3-CV, 2020 WL 7224368, at *5 (Tenn. Ct. App. Dec. 8, 2020) (collecting cases).

Likewise, when spouses construct a marital residence on an otherwise separate parcel of land using marital funds, the entire parcel may become marital property. *See Fox*, 2006 WL 2535407, at *5. In such cases, the operative question remains, with reference to the transmutation factors listed above, whether the parties treated the entire parcel as marital property. For example, in *Fox*, the wife came into the 1993 marriage with substantial assets, while the husband "brought minimal assets into the marriage." *Id.* at *1. The parties' first home was purchased entirely with the wife's separate assets and was titled in her name only. *Id.* The parties constructed a second house on land that the wife acquired prior to the marriage, and the wife "used her separate funds to pay for the construction of the house." *Id.* Although "[m]ost of the funds for the construction of the house came from [the wife's] separate property ... payments for the construction expenses were made from a joint account that also contained [the husband's] funds." *Id.* at *6. The parties divorced in 2004 following a bench trial, and the trial court determined that 75% of the value in both the first and second homes belonged to the wife, and that 25% of the homes' values belonged to the husband.

On appeal, this Court determined that "the trial court's methodology for classifying the parties' interests in these two pieces of property was flawed and that these properties should have been classified as marital property." *Id.* at *2. In addressing the second home, which was built on the wife's separate real property spanning 29 acres, this Court started from the presumption that the home was marital property because it was constructed during the marriage. We then analyzed the parties' treatment of the home, including 1) the use of joint assets to pay some of the construction expenses; 2) the use of joint assets to add a pool and other improvements; 3) the use of joint assets to pay taxes and insurance premiums; and 4) the husband's efforts to preserve and maintain the home. We ultimately concluded that "[w]hile the 29-acre tract was [the wife's] separate property when the [parties] married, it became marital property when they decided to construct their marital home on the property and then lived in the home for approximately six years before the divorce." *Id.* at *6.

This Court reached a similar conclusion in *Anderson v. Anderson*, No. M2018-01248-COA-R3-CV, 2019 WL 3854663 (Tenn. Ct. App. Aug. 16, 2019)…. In *Anderson*, the parties built their marital home on a large tract of land owned by the husband before the marriage. *Id.* at *1. When the parties divorced in 2018, the husband maintained that the tract was his separate property, while the wife urged that the tract "transformed into marital property during the marriage under the doctrine of transmutation" and, alternatively, that the "propert[y's] increase in value during the marriage was marital property" due to her contributions. *Id.* at *2. The trial court agreed with the husband, finding that the house itself was marital property but that the real property, which was 197 acres, remained the husband's separate property.

This Court reversed the trial court's decision, explaining that "the trial court should have focused its inquiry on the intention of the parties in deciding whether any or all of the 197 acres transmuted to marital property." *Id.* at *5. We again applied the well-established transmutation factors, noting that "'the ultimate test is how the property was treated by the parties.'" *Id.* (quoting *Strickland v. Strickland*, No. M2012-00603-COA-R3-CV, 2012 WL 6697296, at *17 (Tenn. Ct. App. Dec. 21, 2012)). We further explained that "buildings erected on land generally become part of the real property, and recogniz[ed] that the parties intended for the marital residence to be a family home[.]" *Id.* at *6. As such, "it [was] apparent the parties intended for the land, or at least that portion of the land used in conjunction with the marital residence, to be marital property." *Id.* Relying on a D.C. Court of Appeals case, we then recognized that "a trial court may treat separate

> property as 'transformed' when '(1) the two items of property came to be used as one property and (2) one or both properties would be destroyed or damaged or left with a gaping deficiency or defect if the properties were separated[.]'" *Id.* (quoting *Araya v. Keleta*, 65 A.3d 40, 56 (D.C. 2013)).
>
> Because the tract of real property at issue in *Anderson* was so large, we remanded the case to the trial court "so the trial court [could] identify the portion and value of the land that became a part of the marital residence and estate." *Id.* at *7. We expressed no opinion, however, on how much of the 197 acres transmuted to marital property.
>
> Finally, this Court most recently addressed a similar factual scenario in *Hill v. Hill*, No. E2021-00399-COA-R3-CV, 2023 WL 3675829, at *5 (Tenn. Ct. App. May 26, 2023), no perm. app. filed, in which the parties constructed their marital home on unimproved real property gifted to the husband by his parents prior to the marriage. In classifying the home as marital property, the trial court noted "that (1) the property was used as the parties' marital residence during the entirety of the marriage, (2) [the w]ife 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 [the w]ife left, and (4) [the h]usband had refused to place [the w]ife'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." *Id.* at *4. This Court affirmed on appeal, rejecting the husband's claim that his refusal to put the wife's name on the deed evidenced an intent to keep the home separate property. *Id.* at *11.
>
> Consequently, precedent shows that when dealing with a marital residence constructed on a parcel of land owned separately by one spouse, the proper analysis is application of the transmutation factors. *See Hill*, 2023 WL 3675829; *Anderson*, 2019 WL 3854663; *Fox*, 2006 WL 2535407.

Booker, 2023 WL 7016215, at *9-12 (footnote omitted).

In its final judgment of divorce entered December 13, 2022, the trial court in the instant case observed: "Wife's actions during the marriage constitute a substantial contribution to the increase in value of the property, that the parties treated this property as marital property, they ran a business together on the property, and built the marital home on the property with marital funds and paid taxes and upkeep from marital funds, over a period of 22 years." The court acknowledged that "even though [the Property] was owned separately prior to the marriage … the preponderance of the evidence is that [Husband] intended for that property to be marital property…." The court further noted: "This is a 22 year marriage and both substantially contributed to the value of this asset. In addition to

her work in the family business, Wife home schooled their children and did the family cooking, cleaning, laundry."

The record supports the trial court's factual findings and application of the doctrine of transmutation. "[T]he focus of the transmutation analysis is 'how the parties treated the property.'" *Lewis v. Lewis*, No. W2019-00542-COA-R3-CV, 2020 WL 4668091, at *5 (Tenn. Ct. App. Aug. 11, 2020). Wife was the main caretaker for the Property during the first 10 years of marriage while Husband was away for commercial landscaping work, and took control of the family business around 2006. She not only ran the business on the Property but also cared for the parties' children, maintained the residence, did the family's laundry, cooked, cleaned, and home-schooled the parties' children. The parties raised two children in the apartment built on the Property. Wife testified that while the parties were remodeling the apartment, she would assist him with gathering supplies for the apartment remodel, stained and sanded the floors, and performed other various woodworking tasks. She related that beginning around 2005, the parties began the planning and eventual construction of the permanent home on the Property. Wife stated that she, *inter alia*, would pick up materials and lunches for the laborers, sanded, stained, and painted woodwork. She testified that she assisted Husband with the crown molding in the home. Wife contends that she decorated the home. She also testified that she helped move the family from the apartment into the home when it was finished. Finally, she paid the property taxes on the Property from 2011 to 2015. Tennessee law "does not discount the contributions made by homemakers to property." *Richardson v. Richardson*, No. E2019-02108-COA-R3-CV, 2020 WL 7343028, at *4 (Tenn. Ct. App. Dec. 14, 2020). It is a mistake to disregard the longstanding policy recognizing "the equal dignity and importance of the contributions to the family of the homemaker and the breadwinner." *Shackelford v. Shackelford*, No. M2018-01170-COA-R3-CV, 2019 WL 2151684, at *12 (Tenn. Ct. App. May 16, 2019); *see also* Tenn. Code Ann. § 36-4-121(c)(5)(a) (providing that contributions of the homemaker and wage earner are given the same weight in the division of property if each party fulfills their role). "As the proponent of transmutation, Wife [had] the burden of establishing same." *Wright v. Wright*, No. W2018-02163-COA-R3-CV, 2020 WL 1079266, at *10 (Tenn. Ct. App. Mar. 6, 2020) (citing *Nesbitt v. Nesbitt*, No. M2006-02645-COA-R3-CV, 2009 WL 112538, at *9 (Tenn. Ct. App. Jan. 14, 2009)). Wife met her burden.

Although Husband never added Wife to the deed on the Property, that fact is not conclusive. *See Richardson*, 2020 WL 7343028, at *2 ("Whether title has been conveyed to the non-owner spouse is not determinative of whether the property is marital."). Husband treated the property as marital property during the vast majority of the marriage. The property had already become marital property under the doctrine of transmutation prior to the demise of the marriage well before the relationship deteriorated between Husband and Wife. *See Phipps v. Phipps*, No. E2014-00922-COA-R3-CV, 2015 WL 335843, at *5 (Tenn. Ct. App. Jan. 27, 2015). Because the trial court properly applied the doctrine of transmutation to the facts of the case and correctly concluded that the Property had become

marital property, the final judgment on this issue must be affirmed.

B.

"Trial courts have wide latitude in fashioning an equitable division of marital property." *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994) (citing *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983)). Once marital property has been valued, the trial court is to divide it in an equitable manner. Tenn. Code Ann. § 36-4-121(a)(1). A division of marital property does not require that it be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Courts are directed by statute to divide marital property equitably "without regard to marital fault in proportions as the court deems just." Tenn. Code Ann. § 36-4-121. A trial court's decision must be guided by the factors in Tennessee Code Annotated section 36-4-121(c), but the decision is not a mechanical one and is not rendered inequitable because it is not precisely equal, or because both parties did not receive a share of each piece of property. *Kinard v. Kinard*, 986 S.W.2d 220, 230 (Tenn. Ct. App. 1998).

The trial court concluded, "The property has a value of $1,070,000 and an equitable division in light of the factors set out in T.C.A. § 36-4-121 is 50% to each." Husband argues that "[i]f the factors articulated by the General Assembly in T.C.A. § 36-4-121 had been properly applied by the trial court, the equitable division of property would have been vastly different." According to Husband, rather than dividing the marital property on a 50-50 basis, an equitable division should have resulted in Husband receiving at least 75% of the marital property.

Husband also argues that although the trial court found that Wife had committed dissipation, it did not appear to consider that factor in making an equitable distribution of the marital estate. As we noted in *Booker*:

> Whether a party has dissipated assets is relevant to the equitable distribution of property:
>
> (c) In making equitable division of marital property, the court shall consider all relevant factors including:
>
> * * *
>
> (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[.]

Tenn. Code Ann. § 36-4-121(c)(5).

Regarding dissipation of assets, our Supreme Court has previously explained:

> Whether dissipation has occurred depends on the facts of the particular case. 24 Am. Jur. 2d Divorce and Separation § 526 (2009). The party alleging dissipation carries the initial burden of production and the burden of persuasion at trial. *Burden v. Burden*, 250 S.W.3d 899, 919 (Tenn. Ct. App. 2007), *perm. to app. denied*, (Tenn. Feb. 25, 2008). Dissipation of marital property occurs when one spouse wastes marital property and thereby reduces the marital property available for equitable distribution. *See Altman v. Altman*, 181 S.W.3d 676, 681–82 (Tenn. Ct. App. 2005), *perm. to app. denied*, (Tenn. Oct. 31, 2005). Dissipation "typically refers to the use of funds after a marriage is irretrievably broken," *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006), is made for a purpose unrelated to the marriage, and is often intended to "hide, deplete, or divert" marital property. *Altman*, 181 S.W.3d at 681–82. In determining whether dissipation has occurred, trial courts must distinguish between dissipation and discretionary spending. *Burden*, 250 S.W.3d at 919–20; 24 Am. Jur. 2d Divorce and Separation § 526 (2009). Discretionary spending might be ill-advised, but unlike dissipation, discretionary spending is typical of the parties' expenditures throughout the course of the marriage. *Burden*, 250 S.W.3d at 919–20.

Larsen-Ball v. Ball, 301 S.W.3d 228, 235 (Tenn. 2010). Whether dissipation has occurred is a fact-specific analysis, but the most common factors to consider include:

> (1) whether the expenditure benefitted the marriage or was made for a purpose entirely unrelated to the marriage; (2) whether the expenditure or transaction occurred when the parties were experiencing marital difficulties or were contemplating divorce; (3) whether the expenditure was excessive or de minimis; and (4) whether the dissipating party intended to hide, deplete, or divert a marital asset.

> *Altman*, 181 S.W.3d at 682 (footnote omitted) (citing *Halkiades v. Halkiades*, No. W2004-00226-COA-R3-CV, 2004 WL 3021092, at *4 (Tenn. Ct. App. Dec. 29, 2004)).

Booker, 2023 WL 7016215, at *13. Under the facts of this case, the dissipation of assets by Wife should be considered in equitably dividing the entire marital estate.

As to the age, physical and mental health, vocational skills, employability, earning capacity, estate, and the financial liabilities and financial needs of the parties, Husband is almost 80 and Wife is 26 years younger than her former spouse. Husband has leukemia and multiple myeloma but is still cognitively sharp. During the trial, Husband appeared to be managing his illnesses well, but he suffers from chemotherapy induced deafness. The record does not reflect that Wife has any physical or mental health issues. Husband possesses numerous skills but is unable to work any longer because of his age and the diseases from which he suffers. He receives approximately $2,000 a month in Social Security benefits. Wife served as the office manager for the family's business for many years, leased and operated the business when Husband retired, and is currently employed by a supermarket. Accordingly, Husband no longer possesses any earning capacity, while Wife does. Wife has already received a cash payment in this case of $152,500; she dissipated the marital estate in the amount of at least $39,000.

As to the economic circumstances of each party at the time the division of property is to become effective, Husband retains an interest in the Property. He was awarded two separate pieces of realty, an undeveloped farm property in Banner Springs, Fentress County, and a small house and lot on Lesa Lane in Knox County. Both properties were Husband's separate property prior to the marriage. Husband claims he is "land poor," as his cash has been eaten up by medical bills and supporting his children. The $225,000-$250,000 estate left to him by his mother was consumed in construction of the marital residence on the Property.

Upon considering all relevant statutory factors in Tennessee Code Annotated section 36-4-121(c) in making an equitable division of the marital property, we find that the percentage of distribution should be adjusted to 75% to Husband and 25% to Wife; therefore, the final judgment of divorce should be affirmed as modified.

C.

Husband contends that his cross examination was limited by the trial court. Additionally, he argues that he was prevented from testifying on direct examination.

As this court noted in *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003):

> Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe. …

(Citations omitted).

Husband was instructed by the trial court at the beginning of his case in chief, "I'll stay as long as you want." After nearly three hours of Husband cross-examining Wife, the trial court placed a time-limit on Husband's questioning. A review of the record reveals that this time limit was instituted by the trial court because Husband was asking Wife questions that were either irrelevant to the proceedings or had previously been asked either by Husband or Wife's counsel on direct examination.

At the conclusion of Wife's case in chief, the trial court asked Wife's counsel, "Do you have anymore witnesses?" Husband answered "I have one." Thereafter the trial court heard testimony from Norma Taylor. Once Ms. Taylor's testimony concluded, the trial court asked the Husband, "All right, what else?" Husband replied, "That's all I had, your Honor." As argued by Wife, at that moment, Husband concluded his case in chief and effectively waived his right to testify on direct examination.

Husband's choice to proceed pro se does not absolve him from abiding by the Tennessee Rules of Civil Procedure or the Tennessee Rules of Evidence. The trial court neither limited Husband's cross examination of Wife nor prevented Husband from testifying on direct examination. We find no error.

D.

Husband claims "the ferocity of the court's verbal attacks give rise to an appearance of impropriety." He cites examples of the trial court admonishing Husband throughout the pendency of the trial for disrespectful behavior and for not believing that Husband could afford new counsel throughout the pendency of the trial:

> THE COURT: So really I'm just going to tell you, I don't care except that, listen, listen to me. Do you want to go to jail today Mr. Harris?
>
> MR. HARRIS: No, I'm listening.
>
> THE COURT: You're disrespecting me.

MR. HARRIS: No, my back hurts.

THE COURT: No, you're disrespecting me and now you've come up with a reason to try to blame your disrespect, and it's not -- sit down. So listen to me.

MR. HARRIS: Okay.

The second incident was as follows:

THE COURT: It's almost impossible to testify and argue, argue about your own testimony without testifying some more and you can't. … [W]ill you stop looking at me like I've lost my mind?

MR. HARRIS: No, no, I'm trying to get it through my head exactly what you're saying. Okay. The improvements you say that were made were –

THE COURT: I'm not arguing with you about it. I'm telling you what one of my findings is; okay?

MR. HARRIS: Yes.

THE COURT: The preponderance of the evidence is that the -- I'm just telling you, I really can hardly stand for somebody to give me a look like I have lost –

MR. HARRIS: I'm not –

THE COURT: No, I'm talking. And when I'm talking I really can't stand for somebody else to talk when I'm sitting in this position, when I'm wearing this black robe. Do you understand that? The preponderance of the evidence, I find, supports the idea that the -- that's not the right way I'm wanting to say it. Golly, I swear you are just aggravating the fire out of me right now, and I probably can't even look at you while I deliver this opinion because you're going to make me mad because you're so questioning and disrespectful for every finding I make.

A core principle of our jurisprudence is that "all litigants have a right to have their cases heard by fair and impartial judges." *Kinard*, 986 S.W.2d at 228. A trial judge must not only be impartial in fact, but must also be perceived to be impartial. *Id.* However, "[j]udicial expressions of impatience, dissatisfaction, annoyance, and even anger towards counsel, the parties, or the case, will not ordinarily support a finding of bias or prejudice

unless they indicate partiality on the merits of the case." *Groves v. Ernst-Western Corp.*, No. M2016-01529-COA-T10B-CV, 2016 WL 5181687, at *5 (Tenn. Ct. App. Sept. 16, 2016) (citing *Alley v. State*, 882 S.W.2d 810, 822 (Tenn. Crim. App. 1994)). "All of a judge's comments and actions must be construed in the context of all surrounding facts and circumstances to determine whether a reasonable person would construe them as indicating partiality on the merits of the case." *Alley*, 882 S.W.2d at 822. In our view, the evidence on this issue does not rise to the level of demonstrating an impermissible pervasive bias sufficient to deny Husband a fair trial. *See McKenzie v. McKenzie*, No. M2014-00010-COA-T10B-CV, 2014 WL 575908, at *7 (Tenn. Ct. App. Feb. 11, 2014).

V. CONCLUSION

For the foregoing reasons, we modify the trial court's judgment to divide the marital property 75% to Husband and 25% to Wife. Husband is entitled to a credit of $152,500 against the amount awarded to Wife. We affirm the trial court's ruling in all other respects. Costs on appeal are taxed to the parties equally.

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JOHN W. MCCLARTY, JUDGE