IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 6, 2001 Session

ALLAN RUSSELL BURKE vs. MAUREEN JO BURKE

A Direct Appeal from the Chancery Court For Williamson County.
No. 25703 The Honorable Russ Heldman, Chancellor.

No. M2000-01111-COA-R3-CV - Filed August 7, 2001

This is a divorce and custody case. Following a bench trial conducted on November 9, 1999, the trial court took the parties' issues under advisement. On December 17, 1999, by Order of Divorce and Custody, the trial court granted a divorce to Ms. Burke based upon inappropriate marital conduct. The trial court further ordered the parents to have split custody of their two minor children with Mr. Burke designated as the primary residential custodian. Ms. Burke was awarded $1,367 in child support and $1,200 in rehabilitative alimony per month for three years. The trial court awarded Ms. Burke $10,000 attorney's fees as alimony *in solido*. Further the trial court ordered both parents to install an internet-based communication system in each home. In addition, the trial court found the entire equity in the Burke's residence was marital property. Ms. Burke appealed the Order of the trial court arguing that the trial court's order of split custody should not stand. Ms. Burke also contends that the trial court erred in ordering Mr. Burke to install the internet-based communication system on her computer and whether the trial court abused its discretion in failing to award her attorney's fees in the amount requested. By separate issue, Mr. Burke challenges the split custody determination. He also argues that the division of the marital property should be modified and the award of rehabilitative alimony and attorney's fees should be reversed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated in Part, Modified in Part and Affirmed in Part.

DON R. ASH, SP. J., delivered the opinion of the court, in which FARMER, J., and HIGHERS, J joined.

Michael W. Binkley, Nashville, Tennessee, for the appellant, Maureen Jo Burke.

Gregory D. Smith, Nashville, Tennessee, for the appellee, Allan Russell Burke.

OPINION

I.

The parties met in 1988 and dated through 1993. The parties were married on November 23, 1993. At the time of marriage Mr. Burke was 43 years of age and Ms. Burke was 36 years of

age. When the first child Joseph was born, Ms. Burke gave up her job as a design engineer earning $45,000 per year to become a full-time mother. Mr. Burke worked for the United States Government and earned $65,000 per year. The couple maintained separate residences during the first few months of their marriage. The child solely resided with the mother and the father visited primarily on weekends. Mr. Burke's job caused him to work late hours and the commute time allowed him little time with his family. They each testified the marriage was troubled from the beginning with both parties seeking counseling even prior to marriage. The marriage, as outlined by the trial courts facts, was turbulent including a history of physical, verbal and emotional abuse by Mr. Burke and at times Ms. Burke.

On December 6, 1995 the couple had a second child, Laura. Again the marriage proved to be turbulent and many attempts were made at counseling but the abuse continued. The couple then moved to Tennessee where Mr. Burke had taken a job with the Veteran's Administration. He maintained the family bank account and the budget of the marital household. The couple also used their individual (non-marital) assets, $40,000 from Ms. Burke and $159,000 in separate assets from Mr. Burke, to build a home valued at $285,000 with total equity at the time of divorce equaling approximately $192,000. Mr. Burke continued to work long hours and was not able to be with his children very often. Ms. Burke was the primary care giver to the children in the marital home. Again at least five attempts were made at counseling but the troubles continued. Both parties filed for divorce in September 1998 but the couple filed an agreed order of reconciliation a short time later. Again the couple sought counseling without success. The mother moved out of the marital residence with the children for the final time on March 12, 1999. The time the father spent with the children subsequently increased.

On December 7, 1999 the couple was divorced on the grounds of inappropriate marital conduct by Mr. Burke. The court awarded split custody of the children requiring residence with the father for six month plus one week and then with the mother for six months minus one week. However, the court noted that the father's residence would be considered the primary residence for school enrollment in Williamson County Schools. Further, Ms. Burke was ordered to allow Mr. Burke to install a point-to-point video telecommunication device on her computer.

On January 21, 2000, the court resolved the remaining issues by awarding the mother rehabilitative alimony in the amount of $1200 per month for a period of three (3) years and half of her attorney's fee equaling approximately $10,000. The court divided the equity in the marital home with the husband allowed to retain the house, but pay the mother her share of the equity over a three-year period. Ms. Burke was awarded the total stock in Microsoft and Intel, finding it to be a gift for Ms. Burke. Further, Ms. Burke was awarded one half of the value of Mr. Burke's pension equaling $18,546. The court also found Mr. Burke's savings plan had increased in value by $49,190 during the marriage and awarded Ms. Burke one half or $24,595 of the increase. Mr. Burke was awarded the 1998 Toyota Van and Ms. Burke the 1991 Toyota and the joint Schwab account. The personal property was divided in accordance with Mr. Burke's proposal. All the marital debt was to be assumed by Mr. Burke. Each party was awarded his/her deposit accounts. Ms. Burke's IRA or the appreciation thereof was not included in the marital estate.

Mr. Burke claims that the division of equity in the marital home was not figured correctly

in that he and his wife had agreed to invest money into the venture and agreed that they would subtract their respective amounts from the increased value of the house in the event of divorce.

II.

Parenting time and parenting modification proceedings are reviewed *de novo* with deference given to the findings of the trial judge. **Gotwald v. Gotwald**, 768 S.W.2d 689 (Tenn. Ct. App. 1988). Since the trial court is given substantial discretion in parenting time and parenting modification cases, the appeals court should not interfere with the trial courts decision unless there is a showing of "erroneous exercise of that discretion." **Mimms v. Mimms**, 780 S.W.2d 739 (Tenn. Ct. App. 1989).

When both parties are seeking primary residential parenting status, courts determine the children's best interest by utilizing a comparative fitness analysis of each parent. **Bah v. Bah**, 668 S.W.2d 663, 665-66 (Tenn. Ct. App. 1983). "There are literally thousands of things that must be taken into consideration in the lives of young children and these factors must be reviewed on a comparative approach." **Smith v. Smith**, 220 S.W.2d 627, 630 (1949). Therefore, the court must choose the parent they consider to be better fit to serve as the primary residential parent. **Edwards v. Edwards**, 501 S.W.2d 283, 290-91 (Tenn. App. 1973).

In making a decision on which parent will be the primary residential parent, the court must consider each factor in the children's best interest test. **Adelsperger v. Adelsperger**, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Often the determination of the children's best interest hinges on the facts of each case. **Holloway v. Bradley**, 230 S.W.2d 1003 (1950). Many of the children's best interest test factors are delineated in T.C.A. § 36-6-106. The court shall consider all relevant factors including the following where applicable:

(1) The love, affection and emotional ties existing between the parents and children;

(2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary care giver;

(3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided that where there is a finding, under, § 36-6-106(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a non-perpetrating parent has relocated in order to flee the perpetrating parent, that such relocation shall not weigh against an award of custody;

(4) The stability of the family unit of the parents;

(5) The mental and physical health of the parents;

(6) The home, school and community record of the child;

(7) The reasonable preference of the child if twelve (12) years of age or older. The court may hear preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided that where there are allegations that one (1) parent has committed child abuse, [as defined in § 39-15-401 or § 39-15-402], or child sexual abuse, [as defined in § 37-1-602], against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written find of all evidence, and all findings of facts connected hereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

Each parent's past and potential for future performance or parenting responsibilities, including willingness and ability of each of the parents to facilitate and encourage a close and continuing relationship between the child and the other parent, consistent with the best interest of the child.

First of all, it is abundantly obvious the trial court's determination of split custody must not stand. Both parties agree that the trial court decision to have split custody for six months out of each year in homes fifty miles apart is not appropriate in this particular case. When making a decision on the primary residential parent and fashioning a suitable plan that fits into the children's best interest, this court's job becomes increasingly more difficult when both parents are fit to take on the responsibility of being the primary residential parent. In fact, this is a case where both Mr. and Mrs. Burke are loving parents. Accordingly, the record before this court clearly indicates the two children are loved and deeply cared for by Mr. and Ms. Burke.

This court has come to the conclusion that most of the statutory factors in this case either favor both parents equally or are not in dispute. The record before this court indicates that when making a custody determination the trial court based it's decision primarily on statutory factors (2) and (10).

We agree with the trial court's assessment that Ms. Burke is and has been the primary caregiver for the children. Ms. Burke discontinued her career to become a stay at home mother and homemaker. She has nurtured and emotionally provided for these children exclusively for the better part of these children's lives. Although Mr. Burke provided for the family financially, his job often kept him from developing a strong relationship with the children before the separation. It was only after the separation did Mr. Burke receive his "wake up" call and begin to spend more time with the children and less time on his career. While we applaud Mr. Burke on his resurgence, we feel Ms. Burke has been the primary caregiver for the children and is more likely to ensure that the needs of the children are met on a daily basis. This factor clearly favors Ms. Burke.

The trial court in its determination found statutory factor (10), "the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent" in Mr. Burke's favor. The trial court gave considerable weight to this statutory factor. In its finding, the trial court determined Mr. Burke is more likely to encourage the affections of the children in favor of Ms. Burke than Ms. Burke is likely to do in favor of Mr. Burke. We disagree with this proposition. The record before the court indicates Ms. Burke complied with the Agreed Visitation Order and allowed Mr. Burke to exercise extra parenting time with the children on occasion. Based on this, we are not convinced that Ms. Burke will hinder the facilitation process between the children and Mr. Burke. Furthermore, on occasion Ms. Burke allowed Mr. Burke to exercise additional parenting time when there was an emergency. She also gave Mr. Burke the opportunity to exercise weekday visitation with the children in Shelbyville. Ms. Burke's testimony at the trial court indicates her willingness to promote a relationship between the children and Mr. Burke. The testimony between Ms. Burke and her attorney at the trial court level, Mr. J. L. Thompson provides:

Q. Does he love the children?

A. Yes, he loves the children.

Q. Do they love him?

A. Yes, they do.

Q. Do you foster that?

A. Yes, of course, I do.

Q. Do you intend to cooperate fully –

A. Yes.

Q. -- with his exercising visitation privileges?

A. Right. Regardless of those opinions, I do think they do need to have a relationship with their father.

Q. Have you, in fact, already cooperated with Mr. Burke with regard to his visiting the children?

A. Yes, I have.

Q. Have you allowed visitation as much as three weekends in a row?

A. Yes. There's been a couple of occasions that has happened.

Q. And you have accommodated his request for additional visitation? Rarely, but occasionally?

A. When he has requested it and it's worked out with our schedule, yes, he has exercised that.

Q. Have you refused visitation?

A. Well, there have been a couple of times, yes, when we had plans and he called up that day or a couple of days before and wanted to visit with them, and I said, I'm sorry we have got some plans.

Q. Okay. But, whatever this Court finally decides with regard to the divorce and custody, visitation, you are going to obey it absolutely are you not?

A. Yes, yes.

This testimony further shows the willingness of Ms. Burke to foster a relationship between Mr. Burke and his children. This court is not persuaded by the notion that Ms. Burke will hinder or deter a relationship between Mr. Burke and his children. In fact, we are convinced that both of these able parents will promote, encourage and facilitate a close and continuing relationship between the children and the other parent. Therefore, we are of the opinion this factor favors neither one party over the other.

When courts are entrusted with making parenting determinations, they attempt to fashion parental arrangements that promote and develop long lasting relationships between the children and both parents. These determinations are much harder to make when both parents are willing and able to provide care for the children. While we applaud Mr. Burke for restructuring his work schedule and providing more parenting time with his children, we are not convinced this is enough to trump Ms. Burke as the primary residential parent. We are not compelled to disrupt this arrangement. A comparative fitness analysis leaves little doubt that the children's best interest would be best served with Ms. Burke. We feel the children will be better suited to remain in the care of Ms. Burke as the primary residential parent with the Mr. Burke having liberal parenting time.

We find the evidence preponderates against the trial court's decision on split custody. We vacate paragraphs 4, 6, 7, and 9. In lieu of the vacated portions of the trial court's Order of Divorce, we substitute the following provisions for the vacated paragraphs:

PRIMARY RESIDENTIAL PARENT: The mother shall be designated as the primary residential parent. Ms. Burke will have the two minor children during the school year beginning with the third Sunday in August and ending on the second Sunday in June. Mr. Burke shall have parenting time from the second Sunday in June till the third Sunday in August.

WEEKENDS: Mr. Burke shall have parenting time with the children on alternating weekends, beginning on Friday at 6:00 p.m. until Sunday at 6:00 p.m. This parenting time will

be exercised between the third Sunday in August and the second Sunday in June. Ms. Burke shall have parenting time with the children on alternating weekends, beginning at 6:00 p.m. on Friday until Sunday at 6:00 p.m. Her parenting time shall be exercised between the second Sunday in June and the third Sunday in August. The parent exercising his or her time shall be responsible for transportation to effectuate said parenting time.

WEEKDAYS: Mr. Burke shall have parenting time with the children every Tuesday from 5:00 p.m. to 7:30 p.m. when the children are in the primary care of Ms. Burke. Mr. Burke will be responsible for picking the children up and dropping them off. This parenting time must be exercised in Shelbyville or any future residence Ms. Burke may have. Ms. Burke shall have parenting time with the children every Tuesday from 5:00 p.m. to 7:30 p.m. when the children are in the primary care of Mr. Burke. Ms. Burke will be responsible for picking the children up and dropping them off. This parenting time must be exercised in Franklin or any future residence Mr. Burke may have.

SUMMERS: Ms. Burke shall have the children on the second full week of July for vacationing purposes. She shall pick the children up at 6:00 p.m. on the Friday evening before the second full week in July and return the children by 6:00 p.m. the following Friday evening. Ms. Burke shall be responsible for transportation to effectuate said parenting time.

HOLIDAYS: Mr. Burke shall have parenting time with the children during the children's spring break every year from 6:00 p.m. the day school ends for break until 6:00 p.m. the day before school begins after the break.

Ms. Burke shall have parenting time with the children from the day school ends for Christmas holiday at 6:00 p.m. until December 25th at noon for every odd numbered year. Mr. Burke shall have parenting time from December 25th at noon until 6:00 p.m. the day before school begins after the holiday every odd numbered year. The following years will be alternated. For example, Mr. Burke will exercise his Christmas parenting time at 6:00 p.m. the day school ends for Christmas holiday until December 25th at noon for every even numbered year. Ms. Burke shall have parenting time with the children from December 25th at noon until the day before school begins after the holiday at 6:00 p.m. in every even numbered year.

Mr. Burke shall have parenting time from the Wednesday before Thanksgiving at 6:00 p.m. until the Sunday following Thanksgiving at 6:00 p.m. every odd numbered year. Ms. Burke shall exercise her parenting time during Thanksgiving every even numbered year from the Wednesday before Thanksgiving @ 6:00 p.m. until 6:00 p.m. the Sunday following Thanksgiving.

The children's birthdays will be alternated between the parents. Mr. Burke will have parenting time with the children on their birthdays in odd numbered years and Ms. Burke will exercise her parenting time in even numbered years. Paragraphs 8,10, and 11 of the Order of Divorce and Custody shall remain in full force.

All of the above mentioned holidays shall have priority over any other parenting time schedule. Furthermore, the parent exercising their holiday parenting time shall be responsible for transportation to effectuate said parenting time.

III.

CHILD SUPPORT: Mr. Burke is currently paying $1,367 per month in child support, however, since he will parent the children in excess of eighty days, he is entitled to a deviation in his child support obligation. In **Casteel v. Casteel**, 1997 WL 414401 at *1-3 (Tenn. Ct. App. July 24, 1997) (perm. app. denied), the custodial mother had parenting time with the children for 234 days per year, whereas the father had parenting time for 131 days of the year. The court in **Casteel** determined that this particular case justified a downward deviation from the Child Support Guidelines and established a formula for delineating the deviation. We feel Mr. Burke is entitled to a downward deviation pursuant to the formula enunciated in **Casteel**. The formula as it applies to this case is as follows:

> (1) Determine the annual amount of support under the Guidelines:
>
> **$1,367 per month x 12 months = $16,404 per year; $44.94 per day.**
>
> (2) Determine what proportion of that annual amount is attributable to the increased visitation, any amount over 80 days per year being considered excess:
>
> Here Mr. Burke will have approximately 118 days of parenting time. This consists of 38 days in excess.
>
> **38 days of excess @ $44.94 per day = $1,707.72 per year or $142.31 per month.**
>
> (3) Reduce the Guideline amount by the amount attributable to increased deviation:
>
> **$1,367 - $142.31 = $1,224.69 per month.**

Therefore, we find that the child support payment of $1,367 per month shall be reduced to $1,224.69 per month. The judgment will be modified to award Ms. Burke $1,224.69 child support effective immediately.

IV.

The second issue for consideration is whether an internet-based video communications system should be installed in Ms. Burke's home at Mr. Burke's expense. Tenn. Code Ann. § 36-6-301 authorizes the trial court to grant non-custodial visitation rights which are reasonable. In this case, the trial court found that each parent would be entitled to initiate three telephone

conversations or internet-based communications with the children each week at "reasonable times." Further, the trial court permitted the children to contact and communicate with the other parent whenever the children desire "for a reasonable duration."

We agree with the trial court that Mr. Burke's proposal of internet-based communications is a "unique, forward thinking and viable communication alternative." Furthermore, this "unique" alternative will give both parents the opportunity not only to speak to the children, but see them as well. However, while we do think the internet-based communication system will benefit the Burkes and their children, we are not convinced that Mr. Burke is the appropriate person to install and train Ms. Burke on the use of the system. Ms. Burke argues that her privacy interests will be impinged if Mr. Burke is allowed access to her computer for the installation of the of the internet-based system.

We agree with the mother on this contention. In a perfect world all parents would get along and act in a civilized manner, however, we recognize that some parents just are not able to avoid conflict with each other especially following drawn out divorce and custody proceedings. This court is concerned that additional unwarranted conflict between the parents could occur provided Mr. Burke is allowed to install and provide instruction concerning the internet-based communication system to Ms. Burke.

While we affirm the trial court regarding the use of the internet-based communication system, we are of the opinion that a disinterested third party would better serve Ms. Burke on the installation and instruction concerning the system. Additionally, from time to time even our most advanced technology has to be upgraded and repaired. When maintenance or upgrade problems arise, a disinterested third party must make the necessary repairs as they relate to the system installed in Ms. Burke's home. The reasonable installation, instruction, maintenance, upgrade or any other internet-based communication expenses are to be incurred by Mr. Burke.

V.

The next issue on appeal is the division of marital property. Mr. Burke specifically argues that the trial court erred in finding the entire equity in the home as marital property, erred in identifying stock as a gift to Ms. Burke, and an abuse of discretion in its allocation of marital property.

Mr. Burke also contends that the trial court erred in finding that the entire equity of the marital home was marital property. The trial court relied on the doctrine of transmutation in making its determination. In Tennessee, "transmutation occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property." **Batson v. Batson**, 769 S.W.2d 849, 858 (Tenn. Ct. App. 1988). Furthermore, when a spouse uses their separate property in a way that demonstrates an intention that it become part of the marital property there is a presumption that the spouse has made a gift to the marital estate. **Id.**

The root of this determination lies in whether there was an element of coercion that occurred prior to the closing of the marital home. Ms. Burke admits she had agreed that she and Mr. Burke would be entitled to take from the residence the separate assets or monies they put

into the residence. Ms. Burke claims she did this after being placed in a threatening situation by her husband. There was no dispute that the [3] Burkes contributed disproportionate sums of money toward a down payment into the marital residence. Although the parties contributed different amounts, Ms. Burke managed the entire construction process. The record shows Ms. Burke was on the home site on a daily basis, dealt with the contractors and realtors, and reviewed and analyzed the structural integrity of the home. While we cannot place a monetary value on the effort Ms. Burke put into the construction of the marital home, her contributions meant as much to the marital home as the additional money Mr. Burke used toward a down payment.

Ms. Burke contends that prior to the closing, Mr. Burke told her he would not go to the closing unless she agreed that there would be a pro-rata division of the home equity in accordance with amount each contributed as a down payment. This agreement was not specified in writing. Regardless of the oral agreement, we are of the opinion that Ms. Burke was under duress when she agreed to Mr. Burke's demand. Ms. Burke put much time and effort into the construction of the home. To only compensate Ms. Burke for her contribution of the down payment would be senseless. We are in agreement with the trial court's finding that Mr. Burke's last minute threats to Ms. Burke are not sufficient evidence to rebut the presumption of gift. We affirm the trial court and find that the separate monies contributed by Mr. And Ms. Burke as a down payment are transmuted and hereby become part of the marital property.

Regarding Ms. Burke's equity interest in the marital home, Mr. Burke can either pay the total sum of $100,000 within 90 days of this opinion's release or in the alternative follow the structure set forth by the trial court.[4] However, should Mr. Burke choose the structure delineated by the trial court, he will incur ten (10) percent interest per year on the remaining balance.

The next consideration for the court is whether the trial court erred in its division of the marital property. When determining the proper division of marital property, trial courts have broad discretion. **Kincaid v. Kincaid**, 912 S.W. 2d 140, 142 (Tenn. Ct. App. 1995). The trial court's allocation of marital property is entitled to great weight on appeal and should be presumed appropriate unless the evidence preponderates otherwise. **Edwards**, 501 S.W.2d at 288; **Lancaster v. Lancaster**, 671 S.W.2d 501, 502 (Tenn. Ct. App. 1984). Tenn. Code Ann. § 36-4-121(c) provides the trial court with a number of factors to determine an appropriate division of marital property.[5] However, the court only needs to obtain an equitable division of marital property not necessarily an equal one. **Batson**, 769 S.W.2d at 859.

From our review of the record, we find the evidence does not preponderate against the trial court's finding as to the division of marital property. After considering the relevant factors set forth in Tenn. Code Ann. § 36-4-121(c), we are of the opinion that the trial court reached an equitable division in its assessment of the marital assets and debts. The trial court's division of the marital property is affirmed.

In the trial court's order, the trial court determined that the Intel and Microsoft stock was a gift to Ms. Burke. However, both parties are in agreement that the Intel Stock and Microsoft Stock is clearly marital property. Thus, the original value of the stock and any increase in value, if any, will be split equally by Mr. and Ms. Burke.

VI.

The final issue for this court's consideration is whether the trial court erred in awarding Ms. Burke $10,000 in attorneys fees as alimony *in solido* and rehabilitative alimony in the amount of $1,200 per month for three years. The award of alimony and attorneys fees is a discretionary matter vested with the trial court. **Hanover v. Hanover**, 775 S.W.2d 612, 617 (Tenn. App. 1989). At the present time, Ms. Burke is a full-time mother and homemaker. Following their separation, Ms. Burke moved to Shelbyville, Tennessee because of family and lower cost of living. At this time Ms. Burke does not possess employment.

Ms. Burke's Income and Expense Statement reflects a monthly deficit of $1,209 per month when the children are in her care. We are of the opinion that the rehabilitative alimony awarded to Ms. Burke by the trial court is essential. However, Mr. Burke argues that Ms. Burke is a highly educated individual with high earning potential. We agree with this assessment. Ms. Burke is forty-two years of age with civil engineering degree and MBA. Prior to the marriage she earned approximately $43,500 per year. Upon the birth of their first child, Ms. Burke relinquished her job to become a full-time mother. Because of Ms. Burke's present situation of being out of work for a number of years, we are of the opinion the trial courts award of rehabilitative alimony for three years in the amount of $1,200 per month is adequate and can effectively rehabilitate Ms. Burke.

Additionally, we do not feel the trial court abused its discretion in granting Ms. Burke $10,000 as alimony *in solido* to help pay her attorney's fees. However, we are reluctant to raise that amount to $15,000. Accordingly, we reject Mr. Burke's argument that the trial court abused its discretion in awarding Ms. Burke her attorney's fees. Furthermore, we reject Ms. Burke's notion that the attorney's fees should be increased. The award of $10,000 in attomey's fees is hereby affirmed. Each party shall be responsible for their attorney fees on appeal.

VII.

This court would respectively submit Mr. and Ms. Burke should adopt the logic of Judge Haas of Walker, Minnesota, when raising children of divorce. Judge Haas states:

> Your children have come into this world because of the two of you. Perhaps you two made lousy choices as to whom you decided to be the other parent. If so, that is **your** problem and **your** fault.
>
> No matter what you think of the other party – or what your family thinks of the other party – those children are one half each of you. Remember that, because every time you tell your child what an idiot his father is, or what a fool his mother is, or how bad the absent parent is, or what terrible things that person has done, you are telling the child that half of **him** is bad.

> That is an unforgivable thing to do to a child. That is not love; it is possession. If you do that to your children, you will destroy them as surely as if you had cut them into pieces, because that is what you are doing to their emotions.
>
> I sincerely hope you don't do that to your children. Think more about your children and less of yourselves, and make yours a selfless kind of love, not foolish or selfish, or **they** will suffer. (emphasis added)

For the foregoing reasons the judgment of the Trial Court is affirmed in part, vacated in part, modified in part and remanded for proceedings not inconsistent with this opinion. Costs on appeal are split equally between the parties.

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DON R. ASH, SPECIAL JUDGE

OPINION FOOTNOTES

[1] The court can also consider several other factors outside of the statutory factors enunciated in § 36-6-106. W. Walton Garrett, *Tennessee Divorce, Alimony and Child Custody,* § 24-1 333, 2000 Edition.

[2] The costs incurred by Mr. Burke are those only as they relate to the communication system installed by the disinterested third party in the home of Ms. Burke. The costs also encompass any subsequent repair or upgrade to the internet-based communication system.