**HTI Memorial Hospital Corporation**

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 28, 2016 Session

# KATHRYN LYNN JONES v. GARY EDWARD JONES

**Appeal from the Chancery Court for Coffee County**
**No. 2011CV310 L. Craig Johnson, Chancellor**

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**No. M2015-00042-COA-R3-CV – Filed August 12, 2016**

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The parties to this appeal are a former Husband and Wife who each challenge the classification and division of certain assets upon their divorce. Additionally, Husband challenges the finding that $2,000 owed to the parties' son is a separate rather than a marital debt, and Wife challenges the failure to award her one-half of funds Husband withdrew from marital accounts during the pendency of the divorce. We modify the judgment to reflect that the $2,000 payment is a marital debt and affirm the order that Husband be responsible for it; 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**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Gerald L. Ewell, Jr., Tullahoma, Tennessee, for the appellant, Gary Edward Jones.

Christina Henley Duncan, Manchester, Tennessee, for the appellee, Kathryn Lynn Jones.

## OPINION

### I. FACTUAL AND PROCEDURAL HISTORY

Gary Jones ("Husband") and Kathryn Jones ("Wife") met in 1985 while working at National Pen and Pencil, a subsidiary of U.S. Tobacco. In addition to his employment at National Pen, Husband owned a printing business called Express Printing, which Wife

assisted him in setting up and operating. The parties began dating in 1987 and were married in October 1990; at the time of their marriage, Husband was 43 years old, and Wife was 25. Husband adopted Wife's child from a previous relationship, and over the course of the marriage, the parties had two children together, the youngest of which turned 18 in September 2013. Wife filed a Complaint for Divorce on September 7, 2011, and Husband filed an Answer and Counter-Complaint. The trial of the case, at which Wife and Husband testified and 192 exhibits were entered into evidence, was conducted over six days in February and March 2014.

By order entered on June 24, 2014 ("the final decree"), the Court, *inter alia*, declared the parties divorced, classified the couple's property as either marital or separate, and divided the property. Pertinent to this appeal, the court classified an investment account which it called the "regular Scottrade Account" as marital property and divided it equally between the parties; classified a different account, the "Scottrade IRA," as marital property and awarded 40 percent of the account to Wife and 60 percent to Husband; the court also required Husband to pay $2,000 to the parties' son "out of [Husband's] share of the marital estate." After a motion to alter or amend was filed by each party, the court entered an amended opinion and order on December 4, 2014, addressing the concerns raised in each party's motion. Ultimately, the court awarded Wife marital assets valued by the court at $228,325 and marital debts valued by the court at $35,045; Husband was awarded marital assets valued by the court at $270,559 and marital debts valued at $28,945.[1]

Husband appeals the classification of the Scottrade Regular account and the Scottrade IRA account as marital property and the division of both accounts, as well as the order that he pay $2,000 to the parties' son. Wife appeals the division of the Scottrade IRA account and also the failure of the court to award her one-half of the amount of funds Husband received from marital accounts during the pendency of the divorce.

## II. STANDARD OF REVIEW

Dividing marital property is a three-step process: first, the court must "identify and classify the parties' marital and separate property"; second, the court must "value the marital property (and, when appropriate, the separate property)"; third, the court must

[1] In the final decree, the court included a listing of marital assets, marital debts, and separate debts of each party, with a corresponding value for each. The figures listed are the totals of the marital assets and marital debts assigned to each party, taking into account the adjustment made by the court in its Amended Opinion and Order. In addition, the parties were each granted "one-half proceeds of sale of personal and business property"; "two banjos"; and "one-half or duplicates of children's photographs, mementos, etc.," to which no value was assigned. The parties do not dispute the values of the assets or debts.

"divide or apportion the marital property." *Melvin v. Johnson-Melvin*, No. M2004-02106-COA-R3-CV, 2006 WL 1132042, at *10 (Tenn. Ct. App. Apr. 27, 2006) (citing *Kinard v. Kinard*, 986 S.W.2d 220, 230 (Tenn. Ct. App. 1998)).

The Tennessee Supreme Court set forth our standard of review in cases involving the classification and division of marital property in *Snodgrass v. Snodgrass*, 295 S.W.3d 240, 245-46 (Tenn. 2009):

> The classification of particular property as either separate or marital is a question of fact to be determined in light of all relevant circumstances. *See Langford v. Langford*, . . . 421 S.W.2d 632, 634 ([Tenn.]1967); *Cutsinger v. Cutsinger*, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995). This Court gives great weight to a trial court's decisions regarding the division of marital assets, and we will not disturb the trial court's ruling unless the distribution lacks proper evidentiary support, misapplies statutory requirements or procedures, or results in some error of law. *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007). As to 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." *Id.* However, we accord no presumption of correctness to the trial court's conclusions of law. *Id.*

## III. ANALYSIS

### A. CLASSIFICATION

Tenn. Code Ann. § 36-4-121(b)(1)(A) defines marital property as "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce." Conversely, separate property is defined as "[a]ll real and personal property owned by a spouse before marriage." Tenn. Code Ann. § 36-4-121(b)(1)(A). "'Separate property' is not part of the marital estate, and is therefore not subject to division." *Snodgrass*, 295 S.W.3d at 246 (citing *Cutsinger*, 917 S.W. 2d at 241). Separate property can become marital property if inextricably mingled with marital property or with the separate property of the other spouse." *Snodgrass*, 295 S.W.3d at 263 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002)).

#### 1. The Scottrade Regular Account

The primary asset in the Scottrade Regular account is stock that was purchased

prior to and during the marriage, with purchases financed by loans which were repaid during the marriage; the account was held in Husband's name only. The Scottrade Regular account also contains monies originally from the parties' joint investment account at Ladenburg Thalmann, an investment firm, which was closed and deposited into Husband's investment account at Alex Brown, an investment firm. The Alex Brown account was a margin account, established in Husband's name, comprised of stock that was purchased during the marriage as a result of stock options granted through Husband's employment at National Pen; the stock secured the loan which financed its purchase.[2] The Alex Brown account was eventually closed and those funds deposited into the Scottrade Regular account.

The final decree contained the following findings relating to the Scottrade Regular account:

> At the time of the trial, the [Scottrade Regular] account had a value of Two Hundred Sixteen Thousand, Three Hundred Fifty-Nine Dollars and Eight Cents ($216,359.08), and a debt of Seventy-Three Thousand, Six Hundred Ninety Dollars and Two Cents ($73,690.02) for a net value of One Hundred Forty-Two Thousand, Six Hundred Sixty-Nine Dollars and Six Cents ($142,669.06) as of the time of the divorce. . . .
>
> The proof in this case established that the parties began residing together in 1987. The parties left their employment with National Pen at about the same time in 1988. The day after the parties left their employment with National Pen, Mr. Jones exercised his options to purchase Two Thousand, Four Hundred (2,400) shares of U.S. Tobacco stock. The original purchase was made with a loan from Traders National Bank in the amount of Forty-One Thousand, Six Hundred Sixty-Eight Dollars and Seventy-Five Cents ($41,668.75). The loan was renewed on many occasions during the marriage and was paid off in late 2008, years after the marriage of the parties and primarily with marital funds.

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[2] *Black's Law Dictionary* defines a margin account as follows:

> Security industry's method of extending credit to customers. Under such practice, customer purchases specified amount of stock from securities firm by advancing only portion of purchase price, with brokerage firm extending credit or making loan for balance due, and firm maintains such stock as collateral for loan and charges interest on balance of purchase price. Margin account requirements are specified by regulations of Federal Reserve Board."

*Margin Account*, Black's Law Dictionary (6th ed. 1990).

> In addition, the proof showed that the parties paid taxes out of marital funds on these stocks. . . . In addition, the parties paid income taxes out of marital funds on the dividends from all of the stock, including the initial purchase of Two Thousand, Four Hundred (2,400) shares.
>
> The proof also established that the parties commingled joint investment accounts with the Alex Brown account. The parties had an investment account with Landenburg Thalman [sic] that was established during the marriage in both names. The parties paid Forty-Eight Thousand, Four Hundred Seventy Dollars and 25 Cents ($48,470.25) from the Express Printing 9802 account into Landenburg Thalman [sic], and then in 2000, to this Alex Brown account.
>
> The Alex Brown account became D.B. Alex Brown, LLC, and then changed to Deutsche Bank. This account ultimately became part of the Scottrade Regular account. This clearly shows commingling with an intention of becoming marital property.

The court then held:

> Due to the above, the entire regular Scottrade account is a marital asset. In addition, Ms. Jones made a substantial contribution to the preservation and appreciation of the asset by paying the debts and taxes out of marital funds, and also by working in the business and caring for the home and the children.

Husband contends that the Scottrade Regular account is his separate property. As noted earlier, Husband opened the account in his name during the marriage and deposited 2,400 shares of stock he had purchased prior to the marriage using a loan from Traders Bank.[3] With respect to this account, Husband argues that "[a]t no time was [Wife] an owner of the stock certificates; obligated on the Note or an owner of the Scottrade Main Account." During the marriage, Husband also established the Alex Brown account with stock purchased pursuant to options he held prior to the marriage, the purchase of which was financed with a margin loan. The Alex Brown account was closed, and the assets and balance transferred to the Scottrade Regular account. With respect to the Alex Brown account, Husband argues "[t]hat debt, like the Traders debt, was paid with the

[3] Husband purchased 2,400 shares of U.S. Tobacco stock in 1988; at some point between 1988 and 2008, a stock split occurred. The record is not clear as to the details of the stock split. We refer to these shares purchased prior to the marriage as "the 2,400 shares" or "the initial shares."

stock dividends" and that "[Wife] was never an owner of this account." Husband also transferred the balance of the Ladenburg Thalmann account into the Alex Brown account, and asserts that Wife gifted her interest in the Ladenburg Thalmann account to him. Husband contends that his use of funds in the Alex Brown account to pay business and marital expenses and debt as well as the transfer of funds from marital bank accounts into the account did not constitute commingling.

As an initial matter, we address Husband's contention that Wife gifted her interest in the Ladenburg Thalmann account to him. Husband argues that the evidence shows that the transfer of the Ladenburg Thalmann account, comprised of $48,470.25 in marital funds, was a gift from Wife to the Alex Brown account. In support of this argument, Husband cites a letter to Alex Brown written by Husband and signed by both parties; the letter recites that "Kathy and I wish to transfer our joint account . . . at Landenburg Thalmamn [sic] to my personal account . . . there at Alex Brown as soon as possible." However, Husband's arguments and citation to the record do not support a finding that Wife intended to make a gift to the Alex Brown account by consenting to this transfer of marital funds.

The Tennessee Supreme Court has explained:

> Intention to give and delivery of the subject of the gift must clearly appear. Doubts must be resolved against the gift. There is no delivery unless the complete dominion and control of the gift is surrendered by the donor and acquired by the donee. The burden of proving that a gift was made is upon the donee.

*Figuers v. Sherrell*, 178 S.W.2d 629, 632 (Tenn. 1944); see also *Hansel v. Hansel*, 939 S.W.2d 110, 112 (Tenn. Ct. App. 1996) (holding that the legal elements of a gift are "the intention by the donor to make a present gift coupled with the delivery of the subject gift by which complete dominion and control of the property is surrendered by the donor"). The letter does not support a finding that Wife intended to make a gift of her interest in the Ladenburg Account to Husband by consenting to this transfer of marital funds. Neither does the letter establish the element of delivery.

To resolve the remaining contentions, in addition to the definition of marital property at Tenn. Code Ann. § 36-4-121(b)(1)(A) we examine § 36-4-121(b)(1)(B) which provides:

> "Marital property" includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its

> preservation and appreciation, and the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage.[4]

In interpreting this statute, the Tennessee Supreme Court has observed:

> Tennessee Code Annotated section 36-4-121(b)(1)(B) contains two *independent* definitions of marital property. The first clause refers to income from and appreciation on separate property that accrues during the marriage where "each party substantially contributed to [the separate property's] preservation and appreciation." Tenn. Code Ann. § 36-4-121(b)(1)(B). The second clause refers to "the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage." If the property at issue is deemed to fit within this second clause, then it is marital property without regard to "substantial contributions" by either spouse. *See Batson v. Batson*, 769 S.W.2d 849, 857 (Tenn. Ct. App. 1988) (recognizing that "[t]he pension provision is not modified by the 'substantial contribution' requirement preceding it" and that "pension benefits earned by a spouse during the marriage are marital property even though the other spouse did not contribute directly to their preservation or appreciation"). . . .
>
> If a contested piece of property fits within the second clause of (b)(1)(B), then the *entire* net increase in value of that property that accrues during the marriage, through whatever means or methods, is deemed marital, even if the property contains an element of separate property.

*Snodgrass*, 295 S.W.3d at 247-48 (emphasis in original).

The 2,400 shares of stock purchased prior to the marriage and the stock options held by Husband were separate property pursuant to Tenn. Code Ann. § 36-4-

[4] During the pendency of this case, Tenn. Code Ann. § 36-4-121 has been amended twice. The 2014 amendments did not alter the language of subsection (b)(1)(B) reproduced above, but the 2015 amendments did. However, neither of these amendments are applicable, as this divorce action was commenced on September 7, 2011, and the 2014 and 2015 enacting legislation provides that the amendments apply to divorce actions commenced on or after the respective effective dates of July 1, 2014, and July 1, 2015. *See* 2014 Tennessee Laws Pub. Ch. 786 (H.B. 1877); 2015 Tennessee Laws Pub. Ch. 202 (S.B. 161).

121(b)(2)(A). *Snodgrass*, 295 S.W.3d at 257. Upon the marriage, income from that stock became marital property pursuant to the first clause of § 36-4-121(b)(1)(B) and pursuant to the court's finding that Wife substantially contributed to the preservation and appreciation of the account.[5] The stock in the Alex Brown account was purchased during the marriage and, thus, is marital property. Tenn. Code Ann § 36-4-121(b)(1)(A). As discussed *infra*, separate property can become marital property through commingling or transmutation; consequently, we review the finding that various accounts maintained by the parties were commingled, such that the Scottrade Regular account became a marital asset.

The Tennessee Supreme Court has explained the doctrines of commingling and transmutation as follows:

> [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 became 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*, 81 S.W.3d at 747).

Husband argues that, despite proof of numerous transfers of funds from the couple's joint bank accounts into the Alex Brown account, the account remained his separate property because the funds in the account were used to "subsidize[] the marriage" and that "the transfers out almost doubled the transfers in." He relies on *Avery v. Avery*, No. M2000-00889-COA-R3-CV, 2001 WL 775604 (Tenn. Ct. App. July 11, 2001) for this proposition. In *Avery*, the husband used money from a sizeable personal account to supplement the couple's income; he did not transfer funds from marital

[5] Pursuant to the second clause of subsection (b)(1)(B), any increase in value of Husband's unexercised stock option rights became marital property upon the marriage. No issue is presented in this case involving the value of the stock option rights.

accounts into his personal account. This Court held that the funds transferred by Husband to the marital account were "transmuted into marital funds" but that "the remainder of the money in his personal account . . . was not transmuted into marital property" because the court found "no evidence of Husband's intent to gift the marital estate or Wife with the remainder of the money in his separate account, and no evidence that he commingled his separate account with jointly held property." 2001 WL 775604 at * 9.

The holding in *Avery* is not dispositive of this issue; the facts in this case are more analogous to those in *Eldridge v. Eldridge*, 137 S.W.3d 1 (Tenn. Ct. App. 2002). In that case, the husband maintained two large investment accounts, in his name only, and transferred funds between the purportedly separate accounts and the marital accounts. The husband argued that "the outflow of money toward marital expenses outweighed any deposits or earnings that could be classified as marital property, so the remaining funds must be his separate property." *Eldridge*, 137 S.W.3d at 18. This Court rejected the argument, holding:

> This argument fails to demonstrate that the funds were not commingled. Any argument based on tracing must be more certain. After Husband combined the marital and separate property, he had the obligation to establish that the two sources of funds were not inextricably commingled. Husband cannot accomplish this task by merely relying on the fact that the marital withdrawals outweighed the marital deposits.

*Id.* As in *Eldridge*, Husband relies on the fact that "the transfers out almost doubled the transfers in" to support his contention that the account was separate property; we rejected such argument in *Eldridge* and find no reason to do otherwise here.

It is not disputed that the stock which was purchased prior to the marriage were the first assets in the Scottrade Regular account. Also, the other assets in the Alex Brown account, which we have held is a marital asset, were added to the Scottrade Regular account. Husband did not introduce evidence to show that the initial shares of stock were intended to be separate or were otherwise segregated within the Scottrade Regular account when the funds from the Alex Brown account were added. Together with other evidence showing that funds in the Scottrade Regular account were used to pay business and marital expenses and that funds from marital banks accounts were deposited for various reasons into the accounts which became part of the Scottrade Regular account, there is proof to support a finding of commingling with respect to this account. *See Snodgrass*, 295 S.W.3d at 256.

Husband also contends that the initial 2,400 shares of stock in the Scottrade

Regular account remained his separate property because the debt incurred to purchase the stock was repaid using only the dividends received from the stock.[6] This is without merit. Husband testified that it took 20 years—from 1988 until 2008—using only the dividends to pay off the debt to Traders Bank; the parties were married for 18 of the 20 years. Due to Wife's substantial contributions to the preservation and appreciation of the stock dividends which were received during the marriage were marital property. *See* Tenn. Code Ann. § 36-4-121(b)(1)(B), (D). Thus, marital funds were used to pay the debt arising from the purchase of the stock.

To summarize, the evidence does not preponderate against the finding that Husband controlled all the accounts held by the parties. The evidence shows a pattern of Husband's transfers of funds between the marital accounts and the Scottrade Regular account. Husband does not distinguish the portion of the account he contends remained his separate property, and upon our review of the evidence to which he cites, none leads us to the conclusion that the evidence preponderates against the trial court's finding of commingling. Accordingly, we hold that the Scottrade Regular account was properly classified as marital property.

**2. Scottrade IRA account**

Husband contends that the Scottrade IRA account is his separate property because it was derived from an individual retirement account at Edward Jones he established prior to the marriage and funded with the proceeds from his surrender of an insurance policy from Reserve Life Insurance Company. He also asserts that only "nominal" contributions of marital funds have been made to this account.

The final decree contained the following findings relating to the account:

> Mr. Jones had a separate Scottrade IRA in the amount of Ten Thousand, Three Hundred Seventy-Six Dollars and Fifteen Cents ($10,376.15) at the time of the marriage.[7] It had increased in value at the time of the trial to Two Hundred Twenty-Two Thousand, Five Hundred Fifty-Eight Dollars and Forty-Six Cents ($222,558.46).
>
> The proof established that the parties made direct monetary contributions to Mr. Jones' IRA out of marital funds. In addition, Ms. Jones

[6] Wife disputes this and contends that marital funds other than the dividends were used to pay the debt.

[7] The evidence showed that Husband held an Edward Jones account, not a Scottrade IRA, in the amount of $10,376.15 at the time of the marriage; the testimony at trial established that the funds in the Edward Jones account were eventually deposited in the Scottrade IRA.

> substantially contributed to its preservation and appreciation by indirect contributions by working in the business, and caring for the children and the household. The increase in value has primarily resulted from market increases on both the separate and marital funds, which have been commingled.

The court then held: "[t]herefore, the Court finds that this account should be equitably split at Forty Percent (40%) to the wife and Sixty Percent (60%) to the husband."

Husband does not dispute that marital funds were deposited into the account over the course of the marriage. Citing his own testimony that the parties deposited less than $2,000 in marital funds into the account, he argues that the deposits should not result in a transmutation of the account into marital property.

The evidence shows that the account was set up in early 1990, prior to the marriage, and had a value of $10,376.15 at the time of the marriage. Because this account began prior to the marriage when Husband deposited proceeds from the surrender of a life insurance policy he held, the determination of whether the account is marital or separate property fits within the first clause of Tenn. Code Ann. § 36-4-121(b)(1)(B). Therefore, we must consider whether each party "substantially contributed to [the account's] preservation and appreciation." Tenn. Code Ann. § 36-4-121(b)(1)(B).

Husband testified that $539.08 was deposited into the account from marital funds to offset federal taxes that were withheld from a lump sum payment he took in 1991 from his former employer in lieu of receiving a monthly pension; that the parties made no other contributions until 1996, when a $75.25 check written on a marital account was deposited; that in 1996, the account was valued at $33,438.09; that in 1997, a contribution of $1,200.00 in marital funds was made and the account was valued at $41,130.82.

Wife testified, with supporting documentation, that more than $3,500 was deposited into the IRA account from the parties' joint accounts between 1991 and 2000. Wife also testified that the parties made a $6,000 contribution to the IRA each year in 2009, 2010, and 2011, and that the funds came from their joint Express Printing account. She also testified that during the time the account was growing, the parties did not take funds out of it, but instead took out other loans.

The foregoing testimony is direct evidence that marital funds were used to grow the account and supports the court's determination that this was a marital account. In addition, Husband does not contest the finding by the trial court that Wife contributed to

the preservation and appreciation of this account by working in the business and caring for the parties' children and home, which is, under Tenn. Code Ann. § 36-4-121(b)(1)(D),[8] to be recognized in the determination of a party's contribution.

We acknowledge that the evidence shows that the account had a value of $10,376.15 as of the date of the marriage in 1990. For the reasons set forth in the discussion of the commingling of marital and separate property with respect to the Scottrade Regular account, we hold that the entire value of the account is marital property and affirm the court's ruling to that effect.

## B. DIVISION

"Dividing a marital estate is not a mechanical process but rather is guided by considering the [eleven] factors in Tenn. Code Ann. § 36-4-121(c)."[9] *Kinard v. Kinard,*

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[8] Tenn. Code Ann. § 36-4-121(b)(1)(D) (2011) reads as follows:

> As used in this subsection (b), "substantial contribution" may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

[9] The factors found at Tenn. Code Ann. § 36-4-121(c) are:

> 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;

986 S.W.2d 220, 230 (Tenn. Ct. App. 1998). A division of marital property in an equitable manner does not require that the property be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). On review, "[a]n appellate court is 'disinclined to disturb the trial court's decision unless the distribution lacks proper evidentiary support or results from some error of law or misapplication of statutory requirements and procedures.'" *Watson v. Watson*, 309 S.W.3d 483, 495 (Tenn. Ct. App. 2009) (quoting *Martin v. Martin*, 155 S.W.3d 126, 129 (Tenn. Ct. App. 2004)).

We first address Wife's contentions with respect to Tenn. Code Ann. § 36-4-121(c)(5); Wife asserts that "the Court erred in failing to charge Husband's share of the property with $62,644.50," representing one-half of the amount he received during the separation. Wife argues that Husband's lack of accounting for his use of funds and inability to recall how certain marital funds were used during the pendency of the divorce supports a determination that Husband dissipated marital assets.[10]

In considering the division of the marital estate, trial courts are to consider, as necessary, the following sections of Tenn. Code Ann. § 36-4-121(c) pertinent to dissipation:

> (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). The court did not make a factual finding relating to

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> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
> (10) The amount of social security benefits available to each spouse; and
> (11) Such other factors as are necessary to consider the equities between the parties.

[10] Husband did not file a brief replying to this issue; at oral argument, his attorney stated that the court made no finding of dissipation, nor was there evidence in the record to establish that the money was spent for purposes unrelated to the marriage, as would be necessary to support an award of these funds to Wife.

dissipation or otherwise address this matter in its final decree.

Standing alone, a lack of recall or failure to account for spending is not sufficient to support a finding of dissipation, as it does not establish that Husband engaged in "wasteful expenditures" of marital funds "for a purpose contrary to the marriage." Tenn. Code Ann. § 36-4-121(c)(5)(B). "Simple mismanagement of family finances is not dissipation, nor is using marital funds to prop up a failing business." *Altman*, 181 S.W.3d at 683.

The evidence cited by Wife establishes the value of marital funds she claims were dissipated, but such evidence does not show dissipation. The testimony of Husband and bank statements that Wife has cited establishes the amount of funds she claims were dissipated. Standing alone, this evidence does not show dissipation. Husband also testified that he spent significant amounts of marital funds to support the parties' unprofitable printing business, to pay off some marital debts, and to repair the marital home. The entire evidence does not establish that Husband's expenditures were wasteful and for purposes contrary to the marriage, as contemplated by Tenn. Code Ann. § 36-4-121(c)(5)(B).

We next address Husband's contentions relative to the division of the two Scottrade accounts. First, he contends that the court erred in dividing the Scottrade Regular account one-half to each party. The argument section of his brief on this issue contains only a recitation of evidence as to factors (2), (4), (5), and (7) of Tenn. Code Ann. § 36-4-121(c), but no argument as to why those factors militate toward a different result. The evidence he cites is not contrary to any finding of the court. The court's decision is supported by evidence and is consistent with an application of the statutory requirements and procedures. There is no abuse of discretion in the division of the Scottrade Regular account. *See Keyt*, 244 S.W.3d at 327.

Husband next asserts that the Scottrade IRA should have been awarded 75 percent to Husband and 25 percent to Wife. Wife contends that the Scottrade IRA should have been divided equally between them due to the deposit of marital funds into the account and the fact that Wife "substantially contributed to its increase."

In the final decree, the court made extensive findings of fact with respect to factors (1), (2), (3), (4), (5), and (10) of Tenn. Code Ann. § 36-3-121(c). The parties do not contend that the evidence preponderates against any of these findings or the court's valuation of the assets, and in our review, we find that the preponderance of the evidence supports them.

The law does not require that an equitable division be an equal one. *Robertson*, 76

S.W.3d at 341. We are mindful that "it is not our role to tweak the manner in which a trial court has divided the marital property. *Owens v. Owens*, 241 S.W.3d 478, 490 (Tenn. Ct. App. 2007) (citing *Morton v. Morton*, 182 S.W.3d 821, 834 (Tenn. Ct. App. 2005)). Instead, we must "determine whether the trial court applied the correct legal standards, whether the manner in which the trial court weighed the factors in Tenn. Code Ann. § 36-4-121(c) is consistent with logic and reason, and whether the trial court's division of the marital property is equitable." *Id.* (citing *Jolly v. Jolly*, 130 S.W.3d 783, 785–86 (Tenn. 2004); *Gratton v. Gratton*, No. M2004-01964-COA-R3-CV, 2006 WL 794883, at *7 (Tenn. Ct. App. Mar. 28, 2006); *Kinard*, 986 S.W.2d at 231.

The court was called upon to divide the marital assets and debts accumulated over the course of a twenty-plus year marriage, including nine bank accounts and insurance policies, two retirement accounts, one home, four vehicles, various personal and business property, and thirteen debts. As to the debts, each party was ordered to pay one-half.[11] With the exception of the Scottrade IRA account, the court divided the marital assets substantially equally. In its amended order, the court addressed each matter raised by the parties.[12] The ruling of the court is consistent with the evidence; looking at the entire estate, the court made appropriate findings, considered the age and health of the parties as well as the $10,376.15 value of the Scottrade IRA account at the time of the marriage, and made a division of property in accordance with the statutory factors and proof presented. We have reviewed the division of all marital assets and debts, including the accounts at issue, and conclude that the court's division is supported by the evidence, is not inconsistent with an application of the factors at Tenn. Code Ann. § 36-3-121(c), and was equitable. We find no abuse of discretion and therefore affirm the division of the marital estate.

## C. THE $2,000 PAYMENT TO THE PARTIES' SON

Husband contends the court erred by requiring him to pay their son $2,000. In his brief on appeal, he recounts certain testimony and simply concludes that the order "should be reversed"; no authority or argument is presented. His brief does appear to

[11] In the final decree, the court ordered Wife to repay a $6,100 loan to her brother, Robert Kincaid; however, later in the decree, the court included the Kincaid loan as a marital debt and ordered each party to pay-one half. Husband, in his motion to alter or amend, stated, "The Court found that Mrs. Jones should repay the Robert Kincaid loan; yet, Mr. Jones is charged with one-half of the claimed amount." In its amended order, the court noted its mistake as to this debt and ruled that the final decree "should be altered accordingly." Neither party raises an issue with respect to this debt on appeal.

[12] There is no transcript or statement of the evidence from the hearing on the motion to alter or amend. In the absence of the same, "there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment." *Coakley v. Daniels*, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992).

challenge the sufficiency of the evidence to support the following finding:

> The proof established that there was a U.S. Bank Account Number 9469 (d/b/a Express Printing). The parties agree that this was a marital account. This is the account that the parties referred to as the payroll account. Mr. Jones wrote checks made payable to the parties' son, Aaron Jones, in the total amount of Two Thousand Dollars ($2,000.00) in November 2011 during the separation. Mr. Jones did not give the money to Aaron. He is ordered to pay this money to the child out of his share of the marital estate.

In the list of assets and debts, with accompanying values, included in the final decree the court listed "Reimbursement to Aaron Jones for checks written[:] $2,000" as a separate debt of Husband. In his motion to alter or amend, Husband asked that this payment be classified as a marital debt and divided equally between the parties as the check was written on the joint business account; the court declined to do so, ruling that "[t]o find that this is a marital debt would unjustly enrich Mr. Jones."

Wife testified that she had seen the checkbook and the bank statement for this particular account, which was the Express Printing Payroll Account; that she knew the specific amounts of the checks Husband usually wrote to himself and to her; that the four $500 checks were not written by her; that the parties were able to pay Aaron "up to $2,000 a year and [it would] be a tax deduction;" that the checks were written after she and Aaron had left the marital home, and that Aaron "never saw anything from that money." Husband cites to no proof that contradicts Wife's testimony, and in our review of the record, we find none.

"[T]he trial court's decision regarding the classification and division of marital property will be presumed correct unless the evidence preponderates otherwise." *Goulet v. Heede*, No. E2000-02535-COA-R3-CV, 2002 WL 126279, at *4 (Tenn. Ct. App. Jan. 31, 2002) (quoting *Corley v. Corley*, No. 01-A-01-9011-CH00415, 1991 WL 66447, at *5 (Tenn. Ct. App. May 1, 1991)). Our Supreme Court has held that "'marital debts' are all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing." *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn. 2003). On our review of the record, we hold that there is insufficient evidence to support the classification that the obligation owed to Aaron, as evidenced by the checks, was a separate debt. The checks were written on a marital account during the marriage. Husband, who controlled the business and the account, periodically made payments to himself, Wife, and their son from the account, but did not deliver these checks to Aaron or otherwise pay him the $2,000; thus the debt remains outstanding. There is no evidence that this was a separate debt of Husband. We therefore modify the ruling of the court to

reflect that the $2,000 payment is a marital debt.

Having determined that this is a marital debt, we must now consider how it should be allocated between Husband and Wife. We are guided by the Supreme Court's instruction in *Alford* that:

> Tennessee courts should use the four factors listed in *Mondelli* as guidelines in the equitable distribution of marital debt: (1) the debt's purpose; (2) which party incurred the debt; (3) which party benefitted from incurring the debt; and (4) which party is best able to repay the debt. *Mondelli [v. Howard]*, 780 S.W.2d [769,] at 773 (Tenn. Ct. App. 1989). A careful application of these factors will insure the fairest possible allocation of debt. It will also protect the spouse who did not incur the debt from bearing responsibility for debts that are the result of personal excesses of the other spouse.

*Alford*, 120 S.W.3d at 814. Applying these factors to the evidence before us, we affirm the portion of the final decree holding that Husband is responsible to repay the $2,000 to the parties' son. While the specific purpose of the $2,000 is not clear, Husband, who controlled the account and wrote the checks, failed to deliver them to Aaron, thereby incurring the debt. There is no proof that Wife benefitted from the $2,000, and Husband, who received a larger share of the marital assets, is best able to repay the debt.

## IV. CONCLUSION

For the foregoing reasons, we affirm the classification and division of the Scottrade Regular and IRA accounts; we modify the judgment to reflect that the $2,000 payment to the parties' son is a marital, rather than separate debt, for which Husband is responsible. In all other respects, the judgment is affirmed.

RICHARD H. DINKINS, JUDGE