COURT OF APPEALS OF VIRGINIA

UNPUBLISHED

Present: Judges Athey, Chaney and Raphael
Argued at Richmond, Virginia

ERIC LISANN

v. Record No. 0120-22-4

ELIZABETH LISANN

MEMORANDUM OPINION[*] BY
JUDGE VERNIDA R. CHANEY
AUGUST 8, 2023

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
David Bernhard, Judge

Samuel A. Leven (The Baldwin Law Firm, LLC, on briefs), for appellant.

Charles E. Powers (Alvin A. Lockerman, Jr.; Stiles Ewing Powers PC, on brief), for appellee.

Following a bench trial in the Fairfax County Circuit Court (trial court), Eric Lisann (husband) appeals from a final decree of divorce awarded to Elizabeth Lisann (wife) on the grounds that the parties lived separate and apart, continuously, without interruption and without cohabitation for over one year, since July 14, 2014.[1] Husband contends that the trial court erred in (1) awarding wife's home—acquired during the marriage—solely to wife, without first classifying it as marital, separate, or hybrid, and without valuing any marital part of the home, (2) classifying a specified annuity and a specified IRA as wife's separate property, (3) denying husband an award of spousal support, (4) failing to include in the final decree a reservation of

[*] This opinion is not designated for publication. *See* Code § 17.1-413(A).

[1] The divorce decree also includes orders for child support and health care coverage for a dependent child, which are uncontested in this appeal. Additionally, in September 2020, the trial court entered an agreed order incorporating the parties' custody and visitation settlement agreement, which is not at issue in this appeal.

husband's right to future spousal support, (5) excluding, as a discovery sanction, testimony of husband's witnesses relating to statutory equitable distribution factors and statutory spousal support factors, and (6) refusing to award attorney fees to husband.[2]

For the following reasons, in addition to the reasons stated in this Court's separate published opinion in this appeal, this Court vacates the trial court's judgment in part, reverses in part, affirms in part, and remands to the trial court for further proceedings and entry of a modified divorce decree consistent with this opinion. In addition, this Court denies wife's request for appellate attorney fees and costs.

BACKGROUND

On appeal, the evidence and all reasonable inferences therefrom are viewed in the light most favorable to wife as the prevailing party in the trial court. *See Dixon v. Dixon*, 71 Va. App. 709, 713 n.1 (2020).

I. THE PARTIES' EMPLOYMENT AND EARNINGS

Husband and wife married on May 8, 1993, and have two children born of the marriage. Husband was the higher-earning spouse during the first seven years of the parties' marriage. During that period, husband worked as a senior federal prosecutor in the United States Department of Justice Tax Division. When husband applied for a position in Paris, France, where he had family, wife investigated job opportunities in Paris with her employer, the United States Department of Energy.

[2] In a separate published opinion in this appeal, this Court addressed husband's additional assignments of error and held that the trial court did not err in finding that the parties' separation date was in July 2014 rather than December 2018—the date on which husband contends that he intended the separation to be permanent. *See Lisann v. Lisann*, ___ Va. App. ___, ___ (Aug. 8, 2023). Accordingly, we also held that the trial court did not err in relying on the 2014 separation date when making its equitable distribution award and denying husband's request for spousal support.

In 2000, with husband's agreement, wife accepted a new position in Paris. The parties later learned that husband did not get the Paris job he had sought. When the parties moved overseas, husband left his position as a federal prosecutor. Thereafter, husband did not consistently maintain gainful employment and wife was the primary earning spouse.

In addition to working full-time, wife did most of the cooking, cleaning, and shopping for the family. While the parties were in Paris, they had a full-time nanny who cared for the children while wife was at work.

A year after the parties relocated to Paris, husband got a job at the Organization for Economic Co-operation and Development, which he held for one year. Thereafter, husband did part-time consulting work and eventually started his own law firm, which was not financially successful.

In August 2007, wife's employment required her to return to the United States. Wife and the parties' then preschool-aged son returned to the United States while husband and the parties' then school-aged daughter remained in Paris so the daughter could complete school. In December 2007, the parties' daughter returned to the United States, but husband stayed in Paris and did not return until late August 2008.

From March 2009 through July 2014, husband "bl[e]w off many job opportunities that came his way." R. 824. Husband periodically returned to France to teach law, perform client-related legal work, and make television appearances as a legal commentator. For over 11 months in 2011, husband maintained a separate household in Paris while wife remained in the United States, working and caring for the parties' children.

In July 2016, husband's father had a stroke and husband became his father's primary caregiver. Husband considered this caregiving role "a full-time job in and of itself." R. 2095.

Wife's vocational expert testified at trial that husband had "no physical or mental limitations that affect his ability to work full-time" and husband was "employable and placeable in full-time gainful employment on a sustained basis." R. 901-02. The vocational expert added that husband was "underemployed and not reaching his full earning capacity." R. 902. Husband failed to provide the vocational expert with any information showing that he had attempted to obtain employment. The expert opined that within a reasonable degree of certainty, husband could expect to earn at least $150,000 per year with husband's skills and abilities. Instead, husband made around $12,000 a year as a self-employed attorney.

At the time of trial, wife's annual salary with the United States Department of Energy was $172,500. Because husband was not employed full-time, he paid his expenses using his savings, self-employment income, and money he received from his father. Husband received about $50,000 a year from his father. In addition, husband paid his substantial legal expenses directly from his father's accounts. Although husband characterized the disbursements from his father as loans, he testified that he did not expect to have to repay his father.

Wife testified at trial that the financial burden of spousal support would be "very, very difficult." R. 2583. Wife explained that she was already having difficulty supporting the children, paying the bulk of the daughter's college expenses, and paying the home mortgage.

II. THE PARTIES' PROPERTY

A. The Park Fairfax Property and Daniel Lewis Lane Property

When the parties married in 1993, they resided in a condominium (Park Fairfax property) that wife purchased before they married. Wife testified at trial that she paid the mortgage and condominium fee from her separate bank account. In December 1993, wife refinanced the Park Fairfax property mortgage to get a lower interest rate. In September 1995, the parties moved out of the Park Fairfax property and wife began renting it out. Wife testified at trial that the rent

money from her Park Fairfax tenants paid for the mortgage, condominium fee, and maintenance costs. The rent was deposited into wife's separate bank account, and the Park Fairfax mortgage was automatically paid from that account.

In March 2009, the parties moved to a rental home on Walden Drive in McLean, Virginia (Walden Drive rental home). The parties resided there until July 2014. During this period, husband and wife both played roles in managing the children's activities. Wife had expected husband to contribute his fair share to the $3,000 monthly rental payments, but he never did.

In September 2012, wife decided to sell her Park Fairfax property—still titled in her name only—and to use the proceeds to purchase another home for her family's residence, which would eliminate the expense of monthly rent for the Walden Drive rental home. Wife received net proceeds of just over $147,000 from the sale of the Park Fairfax property.

In October 2012, wife signed a contract to purchase a house on Daniel Lewis Lane in Vienna, Virginia (Daniel Lewis property) for $545,000. Wife's mortgage loan application for the Daniel Lewis property indicated that wife had intended the parties to occupy the Daniel Lewis property as their primary residence. The sale closed in December 2012 when wife paid $5,000 in an earnest money deposit and over $124,000 for the down payment and closing costs. Wife testified that she probably took money from her regular checking account to pay the $5,000 earnest money deposit, but subsequently clarified that she was not sure where the $5,000 came from. Wife also testified that she used the proceeds of the sale of the Park Fairfax property to pay the down payment for the Daniel Lewis property. Although the amount wife received from the sale of the Park Fairfax property was greater than the $124,000 down payment used to purchase the Daniel Lewis property, wife unexpectedly incurred an additional $30,000 capital gains tax liability from the sale. This unexpected tax bill resulted from husband's refusal to move to the Daniel Lewis property, thereby preventing wife from categorizing the Daniel Lewis

property as her primary residence. Because the net proceeds from the sale of the Park Fairfax property were no longer sufficient to pay the full down payment, wife supplemented those proceeds with a $15,000 loan from her Thrift Savings Plan (TSP) retirement account. Both parties' signatures are on the TSP loan document. The Daniel Lewis property was titled solely in wife's name, and wife was the only person named as grantee on the deed for this property.

Wife initially rented out the Daniel Lewis property because husband refused to reside there. While wife rented out the Daniel Lewis property, the parties continued to reside in the Walden Drive rental home. At that time, husband paid no portion of the $3,000 monthly Walden Drive rent. Wife froze some accounts to prevent husband's access to money needed to pay the Walden Drive rent. In July 2014, wife moved to the Daniel Lewis property with the intent to divorce husband and husband moved to a rented apartment. At the time of trial, the parties still resided in these separate residences.

B. Vanguard IRA and Nationwide Annuity

Prior to wife's federal employment and before the parties married, wife worked for seven years at Meridian Corporation—a consulting firm—and participated in its 401(k) and stock programs. After the company was sold multiple times, wife became concerned that she would lose track of her money since she hadn't worked for the company for 20 years. After wife arranged for a direct rollover of this money, about $86,000 was deposited in a Vanguard traditional IRA and about $175,000 was deposited in the Nationwide annuity. Wife testified at trial that all the money in the Vanguard IRA and the Nationwide annuity was from her premarital retirement accounts. During the marriage, wife never contributed anything to these accounts. Wife also testified at trial that she "never touched that money." R. 776.

III. TRIAL COURT FINDINGS AND RULINGS

In October 2019, wife filed a complaint for divorce on the grounds of having lived separate and apart from husband since July 14, 2014. Husband filed an answer and counterclaim for divorce on the grounds of adultery and desertion. Husband alleged that the parties' separation date was December 24, 2018. Husband also sought an award of spousal support and a reservation of the right to spousal support. The trial court granted wife a divorce from husband pursuant to Code § 20-91(A)(9), "based on the parties having lived separate and apart, continuously and uninterrupted, without any cohabitation, for more than one year, i.e. since July 14, 2014." R. 511.

During and following the eight-day trial, the trial court also decided the following:

A. Exclusion of Husband's Witnesses as Discovery Sanction

Before husband presented his case, wife advised the trial court that husband had identified no witnesses in response to wife's interrogatories asking husband to identify any witnesses whose anticipated testimony related to the spousal support factors under Code § 20-107.1 and the equitable distribution factors under Code § 20-107.3. To enforce the court's discovery scheduling order, the trial court ruled that the scope of husband's witnesses' testimony would be limited to exclude testimony relating to the statutory factors under Code §§ 20-107.1 and 20-107.3 unless such testimony overlapped husband's responses to other interrogatories where husband identified his witnesses. The trial court granted wife a continuing objection to testimony beyond the scope of this ruling. The court ruled that it would allow the testimony but would consider it only for purposes of the separation issue, not in relation to the statutory spousal support and equitable distribution factors. The trial court granted husband a continuing objection to this ruling. Husband called four witnesses whose testimony was subject to this ruling. Subsequently, husband decided to proffer two additional witnesses' testimony relating to the

statutory spousal support and equitable distribution factors instead of calling the witnesses to testify.

B. Spousal Support

In the final decree, the trial court ordered that "no spousal support shall be payable to or by either party." R. 513. The trial court stated that "[t]he Court has specifically considered all of the factors contained in Virginia Code §20-107.1[(E)], as amended and made written findings as set forth herein below." R. 513.

The trial court found that the parties were married for over 21 years and lived a middle-class lifestyle during their marriage. The trial court found that at the time of trial, wife, age 60, and husband, age 61, were both in relatively good health and neither suffered from any mental health condition. The trial court found that both parties made non-monetary contributions to the marriage.

The trial court found that wife was employed with the federal government and her gross monthly income was $14,375. Wife's debts included secured debt on a car, credit card debt, and the mortgage on the Daniel Lewis property. In 2020 and 2021 wife took distributions from her retirement accounts totaling $41,500. The trial court also found that wife continued to make significant contributions to her TSP retirement account.

The trial court found that husband's monthly gross income was $4,500 and that "[h]usband's financial resources are limited, largely because he has chosen not to work and instead care for his ailing father." R. 513. "Husband has spent down his separate assets to support himself and has been relying on monthly payments from his father to support himself. He has not drawn from his retirement accounts." R. 513. The trial court also found that husband's debt includes the secured debt on his vehicle and credit card debt.

The trial court further found that "Husband stopped making substantial meaningful monetary contributions to the marriage after the parties moved to France [in 2000], causing strain to the parties' finances and marital relationship." R. 515. The trial court also found that husband had been a successful state and federal prosecutor, but that he had "not sought out to leverage those skills to return to such a job or pursue serving as a criminal defense attorney." R. 515. The trial court further found that husband squandered the opportunities provided by wife's earnings to pursue his own employment opportunities and advance himself and instead "pursu[ed] largely unrealistic and financially unproductive endeavors" such as "his own law firm in international law." R. 515.

The trial court determined that "Husband could resume employment as a lawyer if he so chose and chooses to be involved in supporting his son's pursuit of a tennis career, but those two pursuits could coexist if the husband was so inclined to devote time to both endeavors." R. 514. The trial court also found that husband had chosen "to tend to and receive financial support from his ailing father" instead of obtaining gainful employment. R. 516. The trial court concluded that "[t]here is no reason why Husband cannot resume a career in criminal prosecution or pursue one in criminal defense, and be self-supporting." R. 515-16. In considering the factors that contributed to the dissolution of the marriage, as necessary to consider the equities between the parties, *see* Code § 20-107.1(E)(13), the trial court referred to its finding that husband's failure to make "substantial meaningful monetary contributions to the marriage after the parties moved to France, caus[ed] strain to the parties' finances and marital relationship." R. 515.

C. *Equitable Distribution of the Parties' Assets and Liabilities*

The trial court noted that "[*i*]*n making its decision as to the Equitable Distribution of property herein, the Court has specifically considered all of the factors contained in Code of Virginia §20-107.3, as amended, as well as the joint Stipulations of the parties*." R. 517.

1. Daniel Lewis Lane Property

The trial court ordered that the Daniel Lewis property, 9520 Daniel Lewis Lane, "shall be the sole and separate property of Wife" upon finding that this property was "titled solely in Wife's name." R. 517. With respect to wife's TSP loan of $15,000 that contributed to the down payment on the Daniel Lewis property, the trial court ordered:

> Wife shall remain solely responsible for the payment of the remaining balance on the TSP loan incurred during the marriage, and Husband shall be held harmless as to all financial responsibilities arising out of the loan.

R. 528.

2. Nationwide Annuity

Upon finding that the Nationwide annuity account "contain[ed] pre-marital retirement funds of Wife, to which no marital funds were contributed," the trial court ordered that "this account shall remain the sole and separate property of Wife, free of any claim or right on the part of Husband." R. 519.

3. Vanguard IRA

The trial court found that the Vanguard IRA account "contain[ed] pre-marital funds of Wife, to which no marital funds were contributed." Based on this finding, the trial court ordered that "this account shall remain the sole and separate property of Wife, free of any claim or right on the part of Husband." R. 521.

ANALYSIS

I. EQUITABLE DISTRIBUTION OF MARITAL PROPERTY

This Court will not overturn an equitable distribution award unless we find "an abuse of discretion, misapplication or wrongful application of the equitable distribution statute." *Dixon,* 71 Va. App. at 717-18 (quoting *Anthony v. Skolnick-Lozano,* 63 Va. App. 76, 83 (2014)). "A circuit court's classification of property or debt is a finding of fact that 'will not be reversed on

appeal unless it is plainly wrong or without evidence to support it.'" *Price v. Peek*, 72 Va. App. 640, 647 (2020) (quoting *Ranney v. Ranney*, 45 Va. App. 17, 31-32 (2005)). "[T]o the extent that the appeal requires an examination of the proper interpretation and application of Code § 20-107.3, it involves issues of law, which the Court reviews *de novo* on appeal." *Dixon*, 71 Va. App. at 718.

A. The Daniel Lewis Lane Property

Husband contends that the trial court erred in awarding the Daniel Lewis property—property acquired during the marriage—entirely to wife without first classifying it in accordance with Code § 20-107.3 and valuing alleged marital contributions to its acquisition. Wife acknowledges that the Daniel Lewis property was purchased—in part—with a $15,000 TSP loan from her marital retirement account and a $5,000 earnest money deposit of uncertain origin. However, wife contends that the Daniel Lewis property was purchased with the proceeds of the sale of the Park Fairfax property that wife owned prior to the marriage. Wife disputes that the $15,000 TSP loan constitutes marital funds. Wife testified that she does not recall the source of the $5,000 earnest money deposit. Nevertheless, wife contends that because the Daniel Lewis property was acquired with the proceeds of the sale of wife's separate Park Fairfax property, the trial court correctly classified the Daniel Lewis property as wife's separate property and awarded it solely to wife.

Husband counters that although the Park Fairfax property was wife's separate property before the marriage, husband and wife contributed to increasing the equity of the Park Fairfax property when they lived there for one and a half to two years before having their first child. Husband further avers that he made personal efforts to rent and manage the Park Fairfax property. Husband contends that those personal efforts make the rental income from the Park

Fairfax property at least part marital. Consequently, husband continues, any increase in equity of the Park Fairfax property obtained with that part-marital rental income is also part marital.

"On appeal, a trial court's equitable distribution award will not be overturned unless the Court finds 'an abuse of discretion, misapplication or wrongful application of the equitable distribution statute, or lack of evidence to support the award.'" *Wiencko v. Takayama,* 62 Va. App. 217, 229-30 (2013) (quoting *McIlwain v. McIlwain,* 52 Va. App. 644, 661 (2008)). "Equitable distribution does not mean equal distribution." *Budnick v. Budnick,* 42 Va. App. 823, 838 (2004). "In Virginia, there is no presumption that marital property should be equally divided." *Id.* (citing *Papuchis v. Papuchis,* 2 Va. App. 130, 132 (1986)). "We will not disturb the trial court's equitable distribution award merely because it is unequal in value between the parties, where the record reflects that the trial court has considered each of the factors set out in Code § 20-107.3(E), and where the evidence supports the trial court's conclusions." *Id.* (citing *Artis v. Artis*, 10 Va. App. 356, 362 (1990)). "Moreover, Code § 20-107.3(E)(5) authorizes the trial court to consider a spouse's negative behavior in determining equitable distribution, and justifies an award that favors one spouse over the other, when that behavior adversely affects the marriage." *Id.* at 838-39 (citing *Smith v. Smith,* 18 Va. App. 427, 431 (1994)). Code § 20-107.3(E)(5) expressly requires the court to consider "[t]he circumstances and factors which contributed to the dissolution of the marriage."

The trial court found that husband contributed to the dissolution of the marriage by failing to meaningfully contribute financially to the family from 2000 through the July 2014 separation date. That finding was supported by the evidence and was not clearly erroneous. Thus, the trial court was authorized to make an equitable distribution award that is *unequal in favor of wife*. *See Budnick,* 42 Va. App. at 838-39.

Because "the trial court's classification of property is a finding of fact, that classification will not be reversed on appeal unless it is plainly wrong or without evidence to support it." *David v. David*, 64 Va. App. 216, 221 (2015) (quoting *Ranney*, 45 Va. App. at 31-32). However, we review "pure questions of law concerning statutory interpretation . . . de novo." *Gilliam v. McGrady*, 279 Va. 703, 708 (2010).

Pursuant to Code § 20-107.3, when proceeding with an equitable distribution, a court must follow certain steps. Specifically, the court must (1) "first . . . classify the property," (2) "assign a value to the property," and then (3) "distribute[ ] the property to the parties, taking into consideration the factors presented in Code § 20-107.3(E)." *Fox v. Fox*, 61 Va. App. 185, 193 (2012) (quoting *Marion v. Marion*, 11 Va. App. 659, 665 (1991)).

Because the Daniel Lewis property was acquired during the marriage and before the 2014 separation date, it is marital property under Code § 20-107.3(A)(2) unless it is either separate property as defined by Code § 20-107.3(A)(1) or hybrid property as defined by Code § 20-107.3(A)(3). Hybrid property is a combination of "part marital property and part separate property." Code § 20-107.3(A)(3); *Rahbaran v. Rahbaran*, 26 Va. App. 195, 205 (1997) (characterizing part marital and part separate property as "hybrid property"). Code § 20-107.3 provides that property may be classified as "separate," "marital," or "part marital . . . and part separate." *See* Code § 20-107.3(A)(1)-(3). Marital property includes "all property titled in the names of both parties," "that part of any property classified as [part marital property and part separate property]," and "property . . . acquired by either spouse during the marriage" "in the absence of satisfactory evidence that it is separate property." Code § 20-107.3(A)(2). The definition of separate property includes "all property, real and personal, acquired by either party before the marriage" and "all property acquired during the marriage in exchange for or from the

proceeds of sale of separate property, provided that such property acquired during the marriage is maintained as separate property." Code § 20-107.3(A)(1)(i), (iii).

The trial court's equitable distribution appears to have awarded the Daniel Lewis property entirely to wife without expressly *classifying* the property and without making express factual findings critical to determining its statutory classification and any equitable interest in the Daniel Lewis property husband may have. In awarding the Daniel Lewis property to wife, the trial court stated:

> The Court finds that this property, titled solely in Wife's name, *shall be* the sole and separate property of Wife, such ownership to be free of any claim or right on the part of Husband.

R. 517.[3] In making this award, the trial court did not appear to classify the Daniel Lewis property in accordance with Code § 20-107.3, which requires that the trial court classify the property as separate, marital, or hybrid *before* distributing it. *See Fox*, 61 Va. App. at 193 (equitable distribution statute requires classification, valuation, and distribution *in that order*). The trial court's statement that the Daniel Lewis property is titled in wife's name is not a classification because a "court equitably classifies property based upon statutory guidelines, not according to which party holds legal title." *David v. David*, 287 Va. 231, 237 (2014) (citing *Robinson v. Robinson*, 46 Va. App. 652, 661 (2005) (en banc)). In stating that the Daniel Lewis property *shall* be wife's sole and separate property, the trial court appears to be referring to the status of the Daniel Lewis property as of the equitable distribution award and not to the trial court's *classification* of the Daniel Lewis property as separate prior to the distribution.

Wife argues that the trial court's statement that the Daniel Lewis property "shall be wife's sole and separate property"—a statement that the trial court characterized as a finding—should be interpreted as classifying the Daniel Lewis property as separate. However, the Daniel

[3] Final Order, p.12 (emphasis added).

Lewis property, purchased in 2012, *prior* to the July 2014 separation date, is *presumptively marital* unless separate as defined in Code § 20-107.3(A)(1). *See Rinaldi v. Rinaldi*, 53 Va. App. 61, 73 (2008); Code § 20-107.3(A)(2)(iii) (property acquired during the marriage is marital unless separate as defined in Code § 20-107.3(A)(1)). Code § 20-107.3(A)(1), in pertinent part, defines separate property to include "all property acquired during the marriage in exchange for or from the proceeds of sale of separate property, provided that such property acquired during the marriage is maintained as separate property." Code § 20-107.3(A)(1)(iii).

Thus, the Daniel Lewis property can be classified as separate only if it was acquired with either wife's separate property or with the proceeds of the sale of wife's separate property. The record supports a finding that the Daniel Lewis property was purchased with proceeds from the 2012 sale of the Park Fairfax property, an earnest money $5,000 deposit, and a $15,000 loan from wife's TSP retirement account. Wife contracted to purchase the Daniel Lewis property in October 2012 after completing the sale of the Park Fairfax property in September 2012. The trial court classified wife's TSP as part marital and part separate, in accordance with the parties' stipulation, but *entirely marital* prior to the July 2014 separation date and at the time of wife's 2012 TSP loan. The trial court, however, assigned the entire debt from the $15,000 TSP loan to wife, consistent with a finding that the TSP loan constituted the use of marital funds for the separate non-marital purpose of financing the purchase of separate property. *See* Code § 20-107.3(A)(5) (debt incurred during the marriage may be assigned as separate if the debt was incurred for a non-marital purpose). Wife initially testified that the $5,000 earnest money deposit was paid from her checking account, but subsequently clarified that she was not sure where the $5,000 came from. Wife's use of the marital TSP funds at least shows that the Daniel Lewis property was not purchased *entirely* with the proceeds from the sale of wife's Park Fairfax property. The proceeds from the sale of the Park Fairfax property were apparently sufficient to

cover the down payment for the Daniel Lewis property, but wife incurred an unexpected $30,000 capital-gains tax liability when husband refused to cooperate with wife to make the Daniel Lewis property their primary residence. Although the trial court may properly consider the tax consequences of husband's refusal to move to the Daniel Lewis property in fashioning an equitable distribution *award*, the classification of the Daniel Lewis property is based on statutory classification guidelines.

In addition to challenging the separate status of the Daniel Lewis property based on the TSP loan and the earnest money deposit, husband also challenges the separate status of the Park Fairfax property that was sold to finance the purchase of the Daniel Lewis property. The Park Fairfax property was wife's separate property because it was acquired by wife prior to the marriage. *See* Code § 20-107.3(A)(1)(i) ("Separate property is . . . all property, real and personal, acquired by either party before the marriage."). Although the Park Fairfax property, having been sold in 2012, was not property subject to equitable distribution on the 2014 separation date, classification of the Park Fairfax property is necessary to determine the classification of the Daniel Lewis property because the Daniel Lewis property was purportedly acquired primarily with proceeds from the sale of the Park Fairfax property. *See* Code § 20-107.3(A)(1)(iii) ("Separate property [includes] . . . all property acquired during the marriage . . . from the proceeds of sale of separate property . . . ."). Husband contends that the Park Fairfax property was part marital because of both (i) the use of marital funds to make mortgage payments during the one and a half years when wife and husband lived in the Park Fairfax property and (ii) husband's personal efforts to subsequently rent and maintain the Park Fairfax property during the marriage. Income received from separate property during the marriage is marital property *to the extent* that it is attributable to the efforts of either husband or wife. *See*

Code § 20-107.3(A)(3)(a). The trial court's equitable distribution award does not classify the Park Fairfax property or address potential marital contributions to the Park Fairfax property.

Even if the mortgage payments made during the time husband and wife lived in the Park Fairfax property for the first one and a half years of marriage contributed marital property to wife's separate property, those marital funds would have transmuted to wife's separate property absent proof by a preponderance of the evidence tracing those payments. Code § 20-107.3(A)(3)(d) provides:

> When marital property and separate property are commingled by contributing one category of property to another, resulting in the loss of identity of the contributed property, the classification of the contributed property shall be transmuted to the category of property receiving the contribution. However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, such contributed property shall retain its original classification.

Thus, absent evidence supporting a tracing of specific mortgage payments to marital funds, any marital property contributed to the mortgage of the Park Fairfax property during those first years of the marriage would be transmuted to wife's separate property and create no marital interest in the Park Fairfax property equity. If the mortgage payments were sufficiently traced to marital funds, however, those marital contributions to the Park Fairfax property equity would retain their marital character.

Husband also contends that the rental income from the Park Fairfax property is not wife's separate property because he made personal efforts to maintain and rent the Park Fairfax property after the couple relocated. Viewing the facts in the light most favorable to wife, the mortgage payments and other expenses of the Park Fairfax property were paid with the Park Fairfax property rental income. However, if husband or wife made personal efforts to rent and maintain the Park Fairfax property during the marriage, the rental income would be part marital to the extent that income is attributable to those efforts. To the extent that any part-marital rental

income was used to pay the mortgage and contribute to the equity in the Park Fairfax property, husband contends that he has an interest in that equity. Code § 20-107.3(A)(3)(a) provides that "In the case of income received from separate property during the marriage, such income shall be marital property only *to the extent* it is attributable to the personal efforts of either party." (Emphasis added). Husband bears "the burden of proving that . . . contributions of . . . personal effort were made." *Id.*

Husband further asserts an interest in the Park Fairfax property equity because Park Fairfax property mortgage payments as late as 2012 were made from wife's Energy Federal Credit Union account, an account titled solely in wife's name but also used by wife to deposit her marital income. However, depositing the Park Fairfax property rental income into an account containing wife's marital income before the rental income is used to pay Park Fairfax property expenses would not—by that fact alone—convert that rental income into marital income. Code § 20-107.3(A)(3)(d) provides:

> When marital property and separate property are commingled by contributing one category of property to another, resulting in the loss of identity of the contributed property, the classification of the contributed property shall be transmuted to the category of property receiving the contribution. *However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, such contributed property shall retain its original classification.*

(Emphasis added). Wife testified that the Park Fairfax property expenses, including the mortgage payments, were automatically paid with the Park Fairfax property rental income deposited into wife's Energy Federal Credit Union account.

On this record, it is evident that numerous factual issues must be resolved to determine the proper classification of the Daniel Lewis property and the valuation of the marital part of the Daniel Lewis property, if any. Therefore, we agree with husband that the trial court did not classify the Daniel Lewis property prior to distributing it to wife. Moreover, because the

classification of the Daniel Lewis property is a *factual* question, that classification must be determined by the trial court on remand.

However, we disagree with husband's assertion—stated in husband's third assignment of error—that "the record and the factors under Va. Code § 20-107.3 do not support [awarding the Daniel Lewis property 100% to wife]." Op. Br. 4-5. Nor do we agree with husband's assertion that "the award [of the Daniel Lewis property to wife] was indefensible." Op. Br. 15. In determining the equitable distribution, the trial court was *required* to consider the negative role husband played in the dissolution of the marriage. *See* Code § 20-107.3(E)(5). The trial court—having found that husband's failure to make meaningful financial contributions to the family from 2000 to the 2014 separation date contributed to the marital tensions that resulted in the dissolution of the marriage—was authorized to make an *unequal* equitable distribution in favor of wife. *Budnick*, 42 Va. App. at 838-39 (Code § 20-107.3(E)(5) authorizes an award favoring one spouse over the other where "a spouse's negative behavior . . . adversely affects the marriage").

Even if the record supports the trial court's award of the Daniel Lewis property to wife, the trial court was not authorized to distribute the Daniel Lewis property without first classifying it and assigning a value to any marital component of that property. Accordingly, this Court vacates the portion of the equitable distribution award relating to the Daniel Lewis property so that, on remand, the trial court may classify and assign value to the Daniel Lewis property in accordance with statutory guidelines before equitably distributing it.

B. The Nationwide Annuity and Vanguard IRA

Husband also assigns error to the trial court's classification of the Nationwide annuity and the Vanguard IRA as wife's separate property and the trial court's distribution of those accounts entirely to wife. The record clearly shows that both accounts were opened as direct

rollovers from other IRA accounts *after* the July 2014 separation date. Wife testified that the rollovers originated in an IRA funded from her pre-marital employment with Meridian Corporation. Wife further testified that she performed no transactions on that IRA during the marriage and prior to the July 2014 separation date. Husband's contention that the Nationwide annuity and Vanguard IRA are *presumptively* marital is predicated entirely on husband's contention that the accounts were opened during the marriage.[4] However, those accounts are only presumptively marital if they were acquired "during the marriage, *and before the last separation of the parties*." *See Price v. Price*, 4 Va. App. 224, 229-30 (1987) (quoting Code § 20-107.3(A)(2)). Because this Court affirms the trial court's judgment that the parties' separation occurred on July 14, 2014, the Nationwide annuity and Vanguard IRA accounts were not opened "before the last separation of the parties" and husband's argument that the accounts are presumptively marital is without merit.[5]

II. Denial of Spousal Support

On review of a trial court's spousal support determination, "[w]e view the facts in the light most favorable to the prevailing party below, granting to it the benefit of any reasonable inferences; we review issues of law *de novo*." *Wyatt v. Wyatt*, 70 Va. App. 716, 718 (2019). "The trial court has 'broad discretion in setting spousal support and its determination will not be disturbed except for a clear abuse of discretion.'" *Id.* at 719 (quoting *Giraldi v. Giraldi*, 64 Va. App. 676, 681 (2015)). "The court, in determining whether to award support and maintenance for a spouse, shall consider the circumstances and factors which contributed to the

[4] Husband conceded at oral argument that if this Court affirms the 2014 separation date, there is no error awarding the Nationwide annuity and Vanguard IRA to wife as her sole property. Oral Argument at 9:34-53.

[5] *See Lisann*, ___ Va. App. at ___ (affirming the trial court's finding that the separation date is July 14, 2014).

dissolution of the marriage . . . ." Code § 20-107.1(E). In determining the nature, amount and duration of a spousal support award, the court must also consider the thirteen factors enumerated in Code § 20-107.1(E). A court's spousal support determination must be "accompanied by written findings and conclusions of the court identifying the factors in [Code § 20-107.1(E)] which support the court's order." Code § 20-107.1(F). Although "[i]n exercising its discretion, the trial court must consider all the factors enumerated in Code § 20-107.1(E) when fashioning its award," the trial court is not "'required to quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors.'" *Miller v. Cox*, 44 Va. App. 674, 679 (2005) (quoting *Woolley v. Woolley*, 3 Va. App. 337, 345 (1986)).

In denying spousal support to the husband, the trial court considered all thirteen spousal-support factors enumerated in Code § 20-107.1(E) and made detailed written findings supporting its judgment. The trial court noted that husband is trained as a lawyer and was a successful state and federal prosecutor. Crediting the testimony of wife's vocational expert, the trial court further determined that husband, instead of leveraging his skills to pursue a legal career and be self-supporting, chose "instead to tend and to receive financial support from his ailing father." R. 516. The trial court also found that "[t]here is no reason why Husband cannot resume a career in criminal prosecution or pursue one in criminal defense, and be self-supporting." R. 515-16. In considering the circumstances and factors contributing to the dissolution of the marriage the trial court found:

> Husband stopped making substantial meaningful monetary contributions to the marriage after the parties moved to France [in 2000], *causing strain to the parties' finances and marital relationship*. Wife availed husband through her earnings of the opportunity to pursue employment opportunities and advance himself and instead Husband squandered that financial space he was given, pursuing largely unrealistic and financially unproductive endeavors.

R. 514.[6] These findings of the trial court are amply supported by the testimony of wife and wife's vocational expert.

Husband contends that the trial court erred in considering the monthly payments from husband's father because it is unreasonable to expect that these payments will continue long into the future given his father's age and poor health. The record discloses that husband, who had power of attorney for his father, made numerous disbursements to himself from his father's funds. Husband also paid his legal bills with his father's funds. Although husband characterized those disbursements and payments as loans, husband also stated that he did not expect to have to repay his father. On this record, the trial court properly considered the disbursements from husband's father as a financial resource of husband. Since the trial court also determined that husband could be self-supporting working as a prosecutor or a defense attorney—a finding supported by the testimony of wife's vocational expert—husband's contention that the trial court's denial of spousal support assumed an indefinite stream of disbursements from husband's father is incorrect.

Husband also contends that the trial court erroneously faulted husband for choosing to become his father's caregiver instead of seeking employment. Husband, relying on Code § 20-88, captioned "support of parents by children," claims that the legislative intent that children be caregivers for their ailing parents makes it improper for the trial court to consider husband's ability to earn income as an attorney when such employment would conflict with husband's care for his father. Husband's reliance on Code § 20-88 is misplaced. Code § 20-88 provides:

> It shall be the joint and several duty of all persons eighteen years of age or over, *of sufficient earning capacity or income, after reasonably providing for his or her own immediate family,* to assist in providing for the support and maintenance of his or her mother

[6] Final Order of Divorce, p. 9 (emphasis added).

> or father, he or she being then and there in necessitous circumstances.

(Emphasis added). Any *statutory* duty husband may have to care for his ailing father is plainly conditioned on husband having "sufficient earning capacity or income" and only after "reasonably providing for his . . . own immediate family." *See id.*

Contrary to husband's contention, Code § 20-88 does not evince any legislative intent that an adult child forgo his obligation to support himself or his family in order to care for an ailing parent. Moreover, Code § 20-107.1(E)(5) expressly *requires* the trial court to consider "[t]he extent to which the age, physical or mental condition or special circumstances of any *child of the parties* would make it appropriate that a party not seek employment outside of the home." (Emphasis added). By expressly identifying the need to care for a party's *child* as a proper factor in considering a party's inability to earn income, the legislature impliedly rejected any requirement to consider a party's need to care for a *parent* in considering a party's inability to earn income. *See Commonwealth, ex rel. Va. Dep't of Corr. v. Brown*, 259 Va. 697, 704-05 (2000) (In accordance with the statutory construction principle *expressio unius est exclusio alterius*, "where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute.").

Husband further contends that the trial court improperly disregarded—and did not even mention—the impact on husband's earning capacity of husband's involvement in his children's activities. Husband's claim is plainly contradicted by the trial court's express consideration of that issue in its discussion of the spousal support factor stated in Code § 20-107.1(E)(5):

> Husband could resume employment as a lawyer if he so chose and chooses to be involved in supporting his son's pursuit of a tennis career, but those two pursuits could coexist if the husband was so inclined to devote time to both endeavors.

R. 514. In view of this express finding, husband's contention that the trial court did not consider his involvement in his children's activities is incorrect.

Husband also asserts that the trial court did not consider the length of time husband has been absent from the job market, as required by Code § 20-107.1(E)(11), when concluding that husband could be a self-supporting attorney. We disagree. Code § 20-107.1(E)(11) requires the trial court to consider:

> The *decisions* regarding employment, career, economics, education and parenting arrangements *made by the parties* during the marriage and *their effect* on present and future earning potential, including the length of time one or both of the parties have been absent from the job market.

(Emphases added). This factor requires the trial court to consider the impact of decisions made together by husband and wife during the marriage that result in an absence from the job market that consequently affects earning potential. Husband does not support his contention by identifying a *decision* made together by husband and wife *during the marriage* that impacted or related to husband's absence from the job market. Husband's reliance on *deCamp v. deCamp*, 64 Va. App. 137 (2014), is misplaced. In *deCamp*, this Court affirmed a trial court's refusal to impute income to wife where "[by] *mutual agreement of the parties*, wife left her nursing career [over 20 years before the separation] and became a full-time homemaker and caregiver to their three children." 64 Va. App. at 153 (emphasis added).

Husband concedes that he was regularly employed as a defense attorney as recently as 2016, and well after the July 2014 separation date. The trial court, relying on the testimony of wife's vocational expert, found that husband presently has the skills to resume a career in criminal prosecution or defense. Moreover, the fact that husband is the owner of his own law firm shows that husband is holding himself out as *presently* competent to practice law. The trial court further found that "[t]here is no reason why Husband cannot resume a career in criminal

prosecution or pursue one in criminal defense, and be self-supporting." R. 515-16. Since this factor is considered in relation to husband's *present need* for spousal support, the trial court properly limited its consideration to husband's present ability to be self-supporting and found that husband had that ability. That finding is amply supported by the evidence and is not clearly erroneous.

Husband also disputes the trial court's finding that Code § 20-107.1(E)(12), which requires the court to consider the "extent to which either party has contributed to the attainment of education, training, career position or profession of the other party," was not addressed with relevant evidence. Husband contends that evidence that husband accompanied wife to France in 2000 is relevant because wife's career continued to advance subsequent to wife's work in France, while husband, as found by the trial court, did not resume his career as a successful prosecutor. Husband's argument misconstrues Code § 20-107.1(E)(12) by erroneously conflating a purported *detriment* to husband resulting from his accompanying his wife to France with a *contribution* that husband made to wife's attainment of her career position. Husband cites no evidence of any *contribution* of his that resulted in wife being offered a position in France in 2000. Nor does husband recite any evidence of any other *contributions* made to specifically further wife's career. Wife applied for a job in Paris only after—and only because—husband had applied for a position there. Wife was successful in getting the job she applied for, but husband was not. The trial court found that wife's move to France provided husband with the financial space to pursue career opportunities, but husband squandered that opportunity, pursuing unrealistic and unproductive endeavors instead. The trial court also found that the pressure placed on wife by husband's failure to make meaningful financial contributions to the family after moving to France in 2000 contributed to the breakdown of the marriage.

Husband also asserts that the trial court gave significant weight to improper factors when it denied spousal support based on husband's ability to be presently self-supporting as a prosecutor or criminal defense attorney. However, husband's disagreement with the trial court's ultimate spousal support determination does not convert the consideration of husband's present earning capacity into an *improper factor*. The trial court was required to consider husband's present ability to be self-supporting as a criminal defense attorney or prosecutor in making its spousal support determination. *See* Code § 20-107.1(E)(9) (requiring the trial court to consider the earning capacity and present employment opportunities of the parties). The record shows that husband is the present sole principal of his own law firm and regularly worked as a defense attorney as recently as 2016, two years after the July 2014 separation date. Husband also claims that there was no evidence to support a finding that he has employment opportunities because the trial court excluded evidence of available jobs submitted by wife's vocational expert. However, the trial court only excluded an untimely filed *supplemental* expert report submitted by wife's vocational expert. The trial court permitted testimony relating to at least seven jobs disclosed in the vocational expert's original report.

Husband, citing *Srinivasan v. Srinivasan*, 10 Va. App. 728 (1990), further contends that the trial court erred in failing to award spousal support to husband to provide husband with a reasonable time to secure employment and become self-supporting. Husband's reliance on *Srinivasan* is misplaced. In *Srinivasan*, this Court concluded that "the evidence did not support a finding that [wife] had unreasonably refused to accept employment as of the date of divorce and [wife] was thus entitled to a reasonable time to secure employment." 10 Va. App. at 735. In contrast, the record here shows that husband worked regularly as a criminal defense attorney in 2016—well after the 2014 separation date—but subsequently chose to tend to and receive

payments from his ailing father instead. The trial court's finding that husband was presently able to become self-supporting is supported by the evidence and is not clearly erroneous.

Finally, husband contends that the fact that wife earns more income than husband and the fact that husband has been spending down his savings, demonstrates that the trial court's denial of spousal support was a clear error in judgment. The cases relied on by husband to support his claim are inapposite. In *Ray v. Ray*, 4 Va. App. 509, 514 (1987), this Court reversed the trial court because the trial court failed to consider the statutory spousal support factors and erroneously categorized wife's equitable distribution award as income. In *Zipf v. Zipf*, 8 Va. App. 387 (1989), this Court held that the trial court erred by basing its spousal support determination on wife's equitable distribution award to the exclusion of other spousal support factors. *See id.* at 399. Neither *Ray* nor *Zipf* supports husband's claim that wife's greater income and husband's dissipation of his savings require that spousal support be awarded. In this case, the trial court considered all the statutory spousal support factors and the trial court's denial of spousal support did not focus on husband's ability to support himself by spending down his savings. In addition to the other statutory spousal support factors, the trial court properly considered husband's choice to tend to and receive payments from his ailing father instead of performing legal services.

Husband's various challenges to the trial court's spousal support determination appear to focus on the insufficiency of any one factor to justify the denial of husband's requested spousal support. However, the trial court's denial of the requested spousal support was properly based on its consideration of all the statutory factors. *See Miller*, 44 Va. App. at 679 (provided the trial court considers all of the spousal support factors, there is no need to quantify what weight or consideration was given to each of the factors).

On review, the trial court's findings related to the spousal support factors are supported by the evidence, and we find no abuse of discretion in the trial court's decision to deny spousal support to husband. However, because this Court is remanding to the trial court for reconsideration of the classification, valuation, and distribution of the Daniel Lewis property, and consideration of the equitable distribution award is a statutory spousal support factor, the trial court must determine whether changes in its equitable distribution of the Daniel Lewis property on remand, if any, require modification of its spousal support determination. *See Dixon*, 71 Va. App. at 723 (adjustments to equitable distribution require consideration of any necessary adjustments to spousal support in light of any changes to the equitable distribution); Code § 20-107.1(E)(8) (requiring consideration of the equitable distribution award as a factor in determining spousal support).

III. No Reservation of Spousal Support

Husband contends, and wife agrees, that the trial court erred in failing to include a requested reservation of the right to spousal support in the divorce decree. Husband requested a reservation of spousal support in his answer and counterclaim for divorce and in the defendant's objections to final order of divorce. "[W]here there is no bar to the right of spousal support, it is reversible error for the trial court, upon request of either party, to fail to make a reservation in the decree of the right to receive spousal support in the event of a change of circumstances." *Wyatt*, 70 Va. App. 720 (quoting *Bacon v. Bacon*, 3 Va. App. 484, 491 (1986)). "Code § 20-107.1(B) provides that 'no permanent maintenance and support shall be awarded from a spouse if there exists in such spouse's favor a ground of divorce under the provisions of subdivision A(1) of Code § 20-91, [adultery, sodomy or buggery].'" *Id.* (alteration in original). Wife did not allege or prove any of these grounds for divorce. Thus, there was no statutory bar to spousal support,

and the trial court erred in failing to include husband's requested reservation of the right to spousal support in the final divorce decree.

IV. Exclusion of Some Testimony from Husband's Witnesses

Husband contends that the trial court erred in prohibiting him from calling witnesses to testify on matters relating to the statutory factors for equitable distribution and spousal support. As a sanction for husband's failure to identify the witnesses in discovery—in violation of a consent order entered on December 23, 2019 (consent order)—the trial court prohibited husband from calling witnesses to testify on those matters at trial. Husband does not dispute that he identified no witnesses in response to wife's Plaintiff's Interrogatory 23, which requested that he identify witnesses to any facts related to the equitable distribution factors. Husband also does not dispute that he identified no witnesses in response to wife's Plaintiff's Interrogatory 10, which requested that he identify witnesses to any facts related to the spousal support and maintenance factors. Moreover, in reply to wife's plaintiff's motion for discovery sanctions, husband's response filed August 14, 2020, paragraph 2, told the trial court: "Defendant's answers to Interrogatories are *overwhelmingly complete*." (Emphasis added). R. 49.

Notwithstanding husband's conceded violation of the consent order by failing to disclose the names of any witnesses in response to Plaintiff's Interrogatories 10 and 23, husband contends that the trial court abused its discretion when it prohibited husband's witnesses from testifying about facts related to Code § 20-107.3 equitable distribution factors and Code § 20-107.1 spousal support factors. Husband asserts that the trial court's sanction was erroneous because (1) wife was not prejudiced by husband's discovery failure where the witnesses were disclosed in response to a different interrogatory relating to the parties' separation date and (2) the trial court's sanction prevented husband from impeaching wife's witnesses. Wife responds that she was entitled to assume that husband's interrogatory responses were complete and infer that

husband had no witnesses with testimony relating to the statutory equitable distribution and spousal support factors. Wife further notes that the trial court did not prohibit husband from offering the testimony of witnesses for the limited purpose of impeachment.

We hold that the trial court did not abuse its discretion in refusing to consider the testimony of husband's witnesses on the statutory equitable distribution and spousal support factors. "Pursuant to Rule 4:12(b)(2), a trial court may sanction a party for failing 'to obey an order to provide or permit discovery.'" *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011) (quoting Rule 4:12(b)(2)). Rule 4:12(b)(2)(B) authorizes the trial court to sanction a party by "prohibiting him from introducing designated matters in evidence." The trial court exercises broad discretion in determining the appropriate sanction. *See Landrum*, 282 Va. at 352. This Court reviews a trial court's decision to impose a discovery sanction for abuse of discretion. *Id.* A trial court's decision excluding evidence is also reviewed for abuse of discretion. *See Payne v. Commonwealth*, 292 Va. 855, 866 (2016) (citing *Lawlor v. Commonwealth*, 285 Va. 187, 229 (2013)). "The determination whether a trial court has abused its discretion is fact-specific." *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 92 (2012) (quoting *Walsh v. Bennett*, 260 Va. 171, 175 (2000)). This Court does not substitute its judgment for that of the trial court. *See id.* Rather, this Court looks to "whether the record fairly supports the trial court's action." *Id.* (quoting *AME Fin. Corp. v. Kiritsis*, 281 Va. 384, 393 (2011)).

Although husband correctly notes that the trial court's scheduling order, entered February 13, 2020 (scheduling order), and exhibit and witness list disclosure rule (disclosure rule) contain an impeachment and rebuttal exception, that rule does not supplant a party's obligation to respond to discovery requests. The disclosure rule states that any witnesses or exhibits not disclosed fifteen days before trial:

> [W]ill not be received in evidence, except in rebuttal or for impeachment or unless the admission of such exhibit or testimony

> of the witness would cause no surprise or prejudice to the opposing party and the failure to list the exhibit or witness was through inadvertence.

R. 29. Plainly, this disclosure rule and its qualified sanction is limited to the obligation to disclose witnesses and exhibits fifteen days before trial. It does not purport to limit other discovery rules. Even if a party has fully responded to discovery requests, this rule imposes an *additional* obligation to identify the witnesses and exhibits that a party intends to introduce at trial. The disclosure rule reasonably exempts pre-trial notice of the use of impeachment and rebuttal evidence because the need for impeachment or rebuttal evidence depends on the evidence actually presented by the opposing party at trial. Where—as in this case—the disclosure of witnesses is subject to a trial court's discovery order, the need to disclose those witnesses is compulsory. A party's failure to comply with its discovery obligations is not remedied by complying with the separate witness and exhibit list disclosure rule. Indeed, upon identifying a witness or exhibit that a party failed to provide in discovery, the disclosure rule permits the opposing party to *object* to the proposed witness or exhibit five days before trial on any legal basis. Such legal bases include, as here, a party's failure to identify the witness in response to an interrogatory after being ordered to do so. Thus, contrary to husband's contention, the scheduling order does not provide an independent authorization for introducing rebuttal evidence to overcome a discovery sanction excluding that evidence.

Although evidence excluded as a discovery sanction is also excluded for the purpose of rebuttal, Rule 4:12(b)(2)(B) does not appear to limit a party's use of evidence for the limited purpose of impeachment. Rule 4:12(b)(2)(B) authorizes

> [a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters *in evidence*.

(Emphasis added). Because the trial court's sanction was limited to excluding the testimony of witnesses on issues of the statutory equitable distribution and spousal support factors—the subject of the two interrogatories for which husband failed to disclose any witnesses—the trial court was authorized only to "[prohibit] [husband] from introducing designated matters *in evidence*." *See* Rule 4:12(b)(2)(B). Introducing matters for the limited purpose of impeachment bears only on witness credibility and does not introduce those matters in evidence on any fact touching the issue to be tried. *See Neblett v. Hunter*, 207 Va. 335, 340 (1966) (evidence admitted for the limited purpose of impeachment bears only on witness credibility and cannot be used to determine facts in issue).

Husband's contention that the trial court erred in preventing his witnesses from impeaching wife's evidence on the statutory equitable distribution and spousal support factors fails because the trial court made no such ruling. The portion of the record cited by husband records the trial court's ruling that the court would only consider the witnesses' testimony in relation to the issue of the separation date, the only issue disclosed for those witnesses in discovery. The trial court's discussion of *impeachment* testimony occurs in a part of the record not cited by husband:

> [HUSBAND'S COUNSEL]: Would Your Honor say that I'm not permitted to present evidence in refutation? . . . But I'm not going to . . . have the opportunity to present that their testimony is false?
>
> THE COURT: Isn't that rule about impeachment different though? You can - - can't you impeach?
>
> [HUSBAND'S COUNSEL]: Well, I think I can offer testimony to contradict.
>
> THE COURT: Yeah.
>
> [HUSBAND'S COUNSEL]: I'm not sure if that's the way you are using "impeachment," but, yes.

> [WIFE'S COUNSEL]: I think impeachment would be a specific - - more specifically contradict.
>
> THE COURT: Right.
>
> . . . .
>
> THE COURT: But - - but there's a difference between impeachment and just two witnesses having different points of view, right? I mean –
>
> . . . .
>
> THE COURT: - - you know - - and then the Court has to resolve the credibility at some point.
>
> [HUSBAND'S COUNSEL]: The reason . . . I don't want to use the word "impeachment" is because I think of that as being internal to the examination of a single witness.
>
> . . . .
>
> THE COURT: But . . . we could take it to the absurd. We could say - - you know, one side discloses no witnesses and the other side puts on testimony. And then if you have contradictory witnesses you can put those on because they contradict the testimony, as opposed to impeach the testimony, which are two different things.
>
> . . . .
>
> I think that there is a distinction between those two.

R. 1487-91. Through this colloquy the trial court made clear that it was not prohibiting husband from impeaching wife's witnesses. The trial court did, however, expressly reject husband's argument that any evidence that *contradicted* wife's evidence should be admitted because of its tendency to impeach wife's witnesses. The trial court correctly reasoned that such a rule would absurdly make it possible to provide no discovery whatsoever in advance of trial provided that all the evidence introduced at trial was *contrary* to some evidence introduced in the other party's case. Moreover, although credible evidence that *contradicts* witness testimony may make it less probable that a testified fact is true, *impeachment* requires that the witness knew that the testified

fact is false. *See Powell v. Commonwealth*, 13 Va. App. 17, 22 (1991) ("[A] witness may be impeached by showing that he has *knowingly* testified untruthfully about a material fact." (emphasis added)).

After this colloquy on impeachment, the trial court observed that because of the potential overlap between evidence on the issue of separation and evidence on other issues, such as equitable distribution, it would allow the overlapping testimony, but for the limited purpose of considering the separation issue:

> THE COURT: [Wife's counsel] is . . . entitled to have notice as to - - to which factors there's going to be evidence *because it's not just his witnesses being contradicted*. . . . So what I'm going to do is I will allow the evidence in but consider it only for purposes of separation, not for purposes of the factors in [equitable distribution and spousal support].
>
> . . . .
>
> Is that clear enough as to what I'm doing here?
>
> [WIFE'S COUNSEL]: Yes.
>
> [HUSBAND'S COUNSEL]: I think so.

R. 1816-17 (emphasis added). Husband contends that the trial court's omission of any mention of impeachment in its ruling supports his claim that the trial court failed to consider husband's evidence for impeachment purposes. In context, however, the trial court made clear that the limiting discovery sanction would not have any bearing on impeachment evidence, which the trial court correctly regarded as limited to determining witness credibility.

Husband also identifies no ruling in the record where the trial court prevented husband from offering evidence for the limited purpose of impeaching wife's witnesses. In addition, husband did not identify any witness who would be impeached or whose credibility would be undermined by his proffers. In view of the court's ruling on discovery sanctions, husband was

required—but failed—to offer excluded testimony for the limited purpose of impeachment to preserve any objection relating to impeachment evidence. In making his proffer, husband stated:

> [I]n light of the Court's ruling limiting the scope of Defendant's witnesses' testimony for the purpose of establishing a baseline in determining the separation of the parties, and not as evidence as to the factors set forth in Interrogatories 10 (spousal support) and 23 (equitable distribution), and submits the following proffer for Gladys Askienazay and Serge Askienazay, to preserve the record.

R. 502. Although the proffer describes the substance of the testimony of two witnesses, husband presents no argument specifically pointing out which witness statements should have been—but were not—considered for *impeachment* purposes. At trial, husband made no objection or proffer particularly pointing out how excluded testimony of husband's witnesses *impeached* the testimony of any of wife's witnesses. Moreover, because the proffered testimony consists almost entirely of viewpoint-based *opinion* testimony, it could not, in principle, be properly used to *impeach* wife's witnesses. Consequently, husband's proffer failed to preserve for this Court's review any trial court error relating to the exclusion of impeachment evidence. *See Graham v. Cook*, 278 Va. 233, 249 (2009) ("When trial testimony is excluded before it is delivered, an appellate court lacks a basis for reviewing a circuit court's evidentiary ruling unless the record reflects a proper proffer.").

V. Refusal to Award Attorney Fees to Husband

Husband contends that the trial court erred in not awarding husband attorney fees. "In Virginia, Code §§ 20-79(b) and 20-99(5) provide the statutory basis for the broad discretionary authority circuit courts have to award attorney's fees and other costs as the equities of a divorce case and its ancillary proceedings may require." *Tyszcenko v. Donatelli*, 53 Va. App. 209, 222 (2008). Under those code sections "[t]here is no prevailing-party entitlement to fees . . . ." *Allen v. Allen*, 66 Va. App. 586, 601 (2016).

Whether a party to a divorce action is entitled to an award of attorney fees is a matter entrusted to the discretion of the trial court and is reviewable on appeal only for an abuse of discretion. *See Joynes v. Payne*, 36 Va. App. 401, 429 (2001). "Given the unique equities of each case, our appellate review steers clear of inflexible rules and focuses instead on 'reasonableness under all the circumstances.'" *Rinaldi*, 53 Va. App. at 78 (quoting *Kane v. Szymczak*, 41 Va. App. 365, 375 (2003)). Factors to be considered may include a party's ability to pay a fee, *Cirrito v. Cirrito*, 44 Va. App. 287, 299-300 (2004), the party's degree of fault in bringing about the dissolution of the marriage, *Poliquin v. Poliquin*, 12 Va. App. 676, 682 (1991), and whether the party unnecessarily increased litigation costs through unjustified conduct calculated to delay resolution of the proceedings, *Northcutt v. Northcutt*, 39 Va. App. 192, 200-01 (2002). *See Rinaldi*, 53 Va. App. at 78.

The evidence showed that husband's attorney fees were paid by husband's father. Although husband testified that he regarded those payments as loans, husband also testified that he did not expect to be required to repay those loans. Husband also testified that although he was paying himself nearly $50,000 a year from his father's accounts, he was not reporting any of those payments on his tax returns. The evidence also showed that husband was trained as an attorney and could earn income as an attorney—being the sole principal of a law firm and having practiced criminal defense as recently as 2016, well after the 2014 separation date—but had chosen instead to tend to and receive payments from his father.

The trial court also found that husband's failure to meaningfully contribute financially to the marital partnership from 2000 through the July 2014 separation date caused tension that contributed to the breakdown of the marriage. Also, at trial, husband's failure to timely respond to discovery requests increased the cost of litigation by requiring entry of a consent order and,

after further failures and sanctions, litigation over the scope of the exclusion of husband's evidence both before the trial court and on appeal.

Under these circumstances, the trial court was entitled to reject husband's contention that wife's *greater income* obligated her to pay husband's attorney fees and decline to award husband's attorney fees based on (1) husband's discovery violations and consequent litigation relating to the scope of the resulting sanctions, (2) husband's legal expenses being paid by his father, and (3) husband's contribution to the dissolution of the marriage by creating financial tensions attributable to his failure to meaningfully contribute financially to the family from 2000 through the 2014 separation date.

VI. Wife's Request for an Award of Appellate Attorney Fees

Wife requests an award of appellate attorney fees. In support of this request, wife contends that apart from the undisputed issue of the trial court's failure to include a reservation of spousal support in the final award, the rest of husband's appeal is frivolous. However, this Court finds that it was not inappropriate for husband to seek appellate review based on the novel and substantial issue of whether Code § 20-91(A) requires that the intent to permanently separate be maintained continuously throughout the separation period. Also, it was not inappropriate for husband to seek appellate review of the trial court's allocation of the Daniel Lewis property given that the trial court did not expressly classify and value the marital portion, if any, of the Daniel Lewis property in accordance with statutory requirements. Additionally, although this Court disagrees with husband's contentions that the trial court erred in denying spousal support and in excluding witness testimony as a sanction for discovery violations, it was not inappropriate for husband to seek appellate review of these rulings. Wife does not contend that the disparate financial positions of the parties require husband to pay her legal fees. Thus, this Court declines to award appellate attorney fees and costs in this matter. *See Rinaldi*, 53 Va. App.

at 79 (declining to award appellate attorney fees where appeal addresses appropriate and substantial issues).

CONCLUSION

The trial court erred in omitting from the final decree husband's requested reservation of the right to receive spousal support in the future, pursuant to Code § 20-107.1(D). The trial court also erred in distributing to wife the Daniel Lewis property—which was acquired during the marriage—without first (i) determining any factual issues related to marital contributions associated with the acquisition of the Daniel Lewis property, and (ii) classifying the Daniel Lewis property in accordance with Code § 20-107.3, and in light of those findings. The trial court's judgment is affirmed in all other respects. Accordingly, this Court vacates the portion of the judgment of the trial court awarding the Daniel Lewis property to wife. Although finding no error in the trial court's spousal support award, this Court also vacates the trial court's spousal support award so that the trial court—on remand—may reconsider the equitable-distribution spousal support factor in light of any modification it may make to its award of the Daniel Lewis property. This Court reverses the portion of the trial court's judgment omitting husband's requested reservation of spousal support. Therefore, this Court remands this case to the trial court with instructions to enter a modified decree in accordance with this opinion and in accordance with the separate published opinion in this appeal.[7]

Affirmed in part, reversed in part, vacated in part, and remanded.

[7] *See Lisann*, ___ Va. App. ___.