MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.

IN THE

Court of Appeals of Indiana

In Re: The Marriage of:

Andrew Rumsey,

Appellant/Respondent

v.

Kayla Ellenwood,

Appellee/Petitioner

April 2, 2024

Court of Appeals Case No.
23A-DC-2395

Appeal from the Allen Circuit Court

The Honorable Heidi Koeneman, Judge *Pro Tempore*

Trial Court Cause No.
02C01-2210-DC-1217

Memorandum Decision by Judge Bradford

Chief Judge Altice and Judge Felix concur.

Bradford, Judge.

Case Summary

[1] In August of 2021, Kayla Ellenwood ("Mother") gave birth to L.R. ("Child"), whose father is Andrew Rumsey ("Father"). Mother and Father were married in May of 2022, and Mother petitioned for dissolution of their marriage in October of 2022. In May of 2023, the trial court issued preliminary orders granting Mother custody of Child and temporary possession of the marital residence, allowing Father two hours of supervised visitation per week, and ordering Father to pay child support.

[2] In June of 2023, the trial court conducted a final hearing on Mother's dissolution petition, at which it acknowledged evidence from a previous hearing and admitted additional evidence submitted by Mother. Father arrived late to the final hearing, and, although he did argue his case to the trial court, was not sworn in and did not give any evidence. The trial court issued its dissolution decree, in which it, *inter alia*, granted Father two hours of supervised visitation per week with Child and awarded Mother possession of the marital residence. Father contends that the trial court abused its discretion in requiring that his visitation be supervised, violated his rights by prejudging the case before hearing any evidence and preventing him from presenting evidence, and abused

its discretion in unequally dividing the marital estate without justification. We affirm.

Facts and Procedural History

[3] On August 25, 2021, Mother gave birth to Child, whose father is Father. Mother and Father were married on May 1, 2022, and Mother petitioned for dissolution of their marriage on October 14, 2022. On April 20, 2023, Mother requested that the trial court issue temporary orders regarding her possession of the marital residence, child support, and custody. On May 3, 2023, following a hearing (which has not been transcribed and at which Father did not appear), the trial court issued provisional orders that Mother have sole legal and primary physical custody of Child, Father's parenting time be supervised, and Mother have exclusive possession of the marital residence. The trial court based its preliminary visitation order on its finding that "[t]he exercise of unsupervised parenting time by Father would endanger the physical health of the child, or significantly impair the child's emotional development." Appellant's App. Vol. II pp. 9–10. The provisional orders provided that Father could have up to two hours of supervised visitation with Child per week, which, as it happens, he did not exercise.

[4] On June 23, 2023, the trial court held a final hearing on Mother's dissolution petition. The record indicates that, despite Father being properly served, he was not there for the scheduled start of the hearing, and it began eleven minutes late without him. Before hearing Mother's evidence, the trial court stated the following:

> [I]n light of the fact that evidence was presented at the provisional and that was the child-related provisions that were put in place-[…]-I'm happy to enter those as permanent-[…]-um, Orders of the Court, um, since there's no evidence, you know, that there's a reason why, um, those restrictions should be removed.

Tr. Vol. II p. 6. Mother testified that her marriage to Father had gone through an irretrievable breakdown and that Father had not been exercising his supervised visitation with Child. Mother also produced copies of various text-message exchanges she had had with Father, some excerpts of which bear reproducing at length.

[5] In an exchange in October of 2021, Father accused Mother of insufficiently feeding Child before going to work:

Father:	I told you all f[******] night he never had 1 full bottle and you feed him for five minutes and leave
Mother:	He might need to poop also
Father:	Like that was gonna be even close to what he needs He had not even 4 ozs before he napped before we went out and then had not even 3 and then you feed him not even for 5 f[******] minutes dude
Mother:	We got back from trick or treating at 7pm and he had 2 – 3oz bottles plus me breastfeeding.
Father:	Whatever dude I'll talk to you tomorrow
Mother:	Sorry you don't feel it was sufficient. Try 2ozs and let me know how he is.
Father:	You're f[******] annoying and selfish
Mother:	That's really not necessary.

Exhibit Vol. p. 3.

[6] On another occasion, the following exchange occurred:

Father:	You didn't f[******] feed him enough

Mother: There's some in freezer
Only give him 2 oz.
Father: Yeah I f[******] know I've been dealing with him the last hour
Mother: Then see how he is.
Father: I've told you that all night
Mother: Okay
Father: F[***] you
Least you could do was make sure he was f[******] fed before you went & did some middle school dumb a[**] s[***]
Mother: Okay there's milk in freezer
Mother: Do you need me to come back?
Father: No I just need you to do your job before you go and do some childish a[**] s[***]
Now I'm dealing with a screaming baby because you didn't F[******] listen and wanted to fed him a couple oz before you left because you're lazy
Mother: Okay drew if you'd like me to come home let me know
Father: No you just need to do your f[******] job
You have to F[******] feed him
Not F[******] be lazy and want to feed him for 2 minutes
Mother: Just only give him 2 oz and see how he is please
Father: I told you all f[******] night he never had 1 full bottle and you feed him for 5 minutes and leave

Exhibit Vol. pp. 4–5.

[7] On another occasion, Father complained regarding Child's crying:

Father: Did you bring a meal with you what do you want for dinner
Dude can you come home?
I fed him more and he's still screaming his f[******] head off

	I don't know what the f[***] is wrong but I'm about to throw my f[******] phone thr[ough] the wall
Mother:	What time did he eat We are almost done Please stay calm
Father:	He ate at 7 and just now again
Mother:	Does he need burped?
Father:	Nope already tried
Mother:	Play mat Does he want held He may be teething let him chew on your finger maybe
Father:	Kayla I've done all this s[***] it's been 3 f[******] hours He's in the room I'm done dude I can't listen to it anymore I can't do anything for him he's gonna have to cry it out I'm f[******] done
Mother:	We are packing up now.
Father:	Dude that's f[***]ed I'm going to burn this f[******] house down
Mother:	You seriously need to chill out.
Father:	F[***] off After 3 f[******] hours of constant screaming [Child] finally shut the f[***] up and went to bed. […] I'm feel like I'm going to blow my f[******] brains out. I'd rather blow my f[******] brains out

Exhibit Vol pp. 6–8.

[8] On November 4, 2022, approximately three weeks after Father and Mother separated, Father threatened to kill himself and, after Mother offered him help and indicated that she might have to call the authorities, threatened instead to kill any police who came to his residence:

Father:	Hey I just wanted to reach out one last time. I don't wanna argue or fight I just want to let you know that

	I'm going to kill myself tonight. I've had a 9mm for awhile and I've been debating it for night after night for months now. I don't want anything from you except to take care of the kids for me. Make sure they always know how much I cared about them. You'd think kids and your own would bring you out of this feeling but it doesn't. I'm sorry, I really am. I wish I could go back because everything about my being resents and regrets a lot of what I did. I'm sorry, I love you, [and Child]. I don't understand life without you guys. Everything I do is meaningless, and I'm not asking for things to be normal because they never will be.
Mother:	Hello? Please call me. You need to call or text one of us. This is serious. If you need help let us help you. But if you keep ignoring us we are going to have to call the police to find you and if you have a gun we don't want you to get in trouble for having that. Please let us help you.
Father:	Go f[***] yourself dude lol If cops show up at my place I will shoot at someone Think I'm joking? Call cops on me 5130 Winterburg way I will kill police so go ahead call them I have 15 9mm in a magazine that will be for Them Go ahead call them it'll be perfect timing whoever shows up will get killed I have a 15 mag 9mm with one locked and loaded I will shoot at anyone at my place and I will shoot until I'm Dead Go f[***] your self

Exhibit Vol. pp. 9–12. In November or December of 2022, Father texted Mother the following: "You are dead you stupid c[***.] If you don't give me the kids for Christmas I will f[******] murder you[.]" Exhibit Vol. p. 14.

[9] After Mother offered the transcribed text messages, the following exchange occurred:

> THE COURT: No, what, what I'm telling you is there was evidence submitted at the provisional to support supervised parenting time and you've already told me enough to show that it needs to continue to remain in place, so-
>
> [Mother]: OK.
>
> THE COURT: -um, so it, so it is. So I'm, I'm happy to, you know, um, supplement the record with whatever you believe is necessary but-
>
> [Mother]: OK.
>
> THE COURT: -um, you know, you don't have to[.]

Tr. Vol. II p. 9.

[10] Mother testified that Father's "mental health is a big concern" and that "it was just extremely concerning to me if he ever does have [Child]-um, because I don't know what he would do." Tr. Vol. II p. 7. Mother also requested that she be awarded the marital residence in the property division. Mother testified that she and Father had purchased the residence in September of 2020, Father's father had lent her and Father the entire downpayment, Father had made the loan payments until August of 2021, Father's father had made the loan payments from September of 2021 to August of 2022, and Mother had made the loan payments since then. According to Mother, she and Father's father had "[bought Father] out of the mortgage" when (1) Father's father had given

him $5000.00 when he had moved out of the residence and (2) she had bought Father a trailer for his business for $5000.00, which she estimated was approximately what he had paid toward the home loan. Tr. Vol. II p. 12.

[11] While Mother was still responding to the trial court's questions, Father arrived at the hearing.[1] Father argued that there was no evidence that he posed any kind of threat to Child and that he should be awarded whatever equity he had in the marital residence, which he claimed was $100,000.00. Father, however, did not ask to testify or be sworn in.

[12] Also on June 23, 2023, the trial court issued its decree of dissolution, which provided, in part, as follows:

> 3.1 The Court finds that exercise of unsupervised parenting time by Father would endanger the physical health of the child, or significantly impair the child's emotional development. The Court thus finds that it is in the best interest of the child that Father's parenting time be supervised.
>
> 3.2 Father shall have parenting time supervised by Family Connections […], located in Fort Wayne, Indiana, subject to Family Connections reasonable conditions and rules for supervised parenting time. Any fees for this supervision shall be pre-paid by Father. Both parties shall fully cooperate with the parenting time supervisor.
>
> [….]
>
> 8.1 The parties own real estate located at, and commonly known as: 4919 Stone Canyon Passage, Fort Wayne, Indiana 46808.

---

[1] Although the record does not indicate what time Father arrived, he arrived in time to cross-examine Mother, if he had so desired.

> 8.2 This real estate shall now be the sole and separate property of Mother.
>
> 8.3 Father [shall] execute a Quit-Claim deed and all other necessary documents transferring all right, title and interest in and to this real estate to Mother thereby extinguishing the interest of Father therein.
>
> 8.4 Mother shall refinance the mortgage within ninety (90) days of the date of this Order, thereby removing Father's name from the mortgage.
>
> [….]
>
> 10.1 This division of property and assignment of liabilities entered herein is an equal, just, reasonable, fair and equitable award thereof under the facts presented at trial, including the parties' agreement of the same.

Appellant's App. Vol. II pp. 13, 15, 16.

Discussion and Decision

I. Supervised Visitation with Child

[13] Father contends that the trial court abused its discretion in ordering that all of his visitation with Child be supervised. "Indiana has long recognized that the rights of parents to visit their children is a precious privilege that should be enjoyed by noncustodial parents." *Duncan v. Duncan*, 843 N.E.2d 966, 969 (Ind. Ct. App. 2006), *trans. denied*. "As a result a noncustodial parent is generally entitled to reasonable visitation rights." *Id*. (citing Ind. Code § 31-17-4-1). Indiana Code section 31-17-4-2 provides that:

> [t]he court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.

Despite the statute's use of the word "might," Indiana courts have interpreted it to require evidence that parenting time "'would' (not 'might') endanger or impair the physical or mental health of the child." *Perkinson v. Perkinson*, 989 N.E.2d 758, 763 (Ind. 2013) (quoting *Stewart v. Stewart*, 521 N.E.2d 956, 960 n.3 (Ind. Ct. App. 1988), *trans. denied*). "When reviewing the trial court's resolution of [a] visitation issue, we reverse only when the trial court manifestly abused its discretion. If the record reveals a rational basis supporting the trial court's determination, no abuse of discretion occurred. We will not reweigh evidence or reassess the credibility of witnesses." *Pennington v. Pennington*, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992) (citations omitted), *trans. denied*.

[14] Father contends that the record contains insufficient evidence to sustain the trial court's finding that "unsupervised parenting time by Father would endanger the physical health of the child, or significantly impair the child's emotional development." Appellant's App. Vol. II p. 13. As an initial matter, we think it worth noting that our ability to review Father's claim is hindered by his failure to submit a transcript of the evidentiary hearing that preceded the trial court's provisional orders. The record makes it clear that the trial court's dissolution order was based in large part on evidence presented at the provisional hearing, evidence that is not part of the record.

> [T]his court presumes that the trial court has correctly decided the questions presented below and [the] appellant has the burden of overcoming this presumption by clearly showing the trial court's error. A court of appeals will not presume anything in favor of appellant to sustain his alleged error. It is appellants' duty, furthermore, to present this court with a record which supports its

> alleged errors and which is sufficient to permit an intelligent decision of the issues.

State v. Kuespert, 425 N.E.2d 229, 232–33 (Ind. Ct. App. 1981) (citations and quotation marks omitted). In other words, we shall presume that the trial court correctly based its determination on sufficient evidence unless and until Father proves otherwise, which he has not done. *Id*.

[15] Even if we consider just the evidence presented at the final hearing, there is more than enough to support the trial court's ruling on visitation. Father's interactions with Mother can only be fairly described as abusive and disturbing and support reasonable inferences that Father struggles to control his temper and that insults and threats are his preferred method of bending others to his will. Perhaps the most disturbing interaction occurred when Father threatened suicide, ridiculed and insulted Mother when she expressed concern, and vowed to kill anybody who came to assist him. This evidence strongly suggests that Father is, at present, unable to control his temper. Other interactions demonstrate that Father is unable to perform even the most basic of parental responsibilities in a reasonable fashion.

[16] Father would have us dismiss the disturbing nature of many of his interactions with Mother as stemming from the shock of their separation. This argument, however, ignores the fact that many of the interactions occurred before the parties separated and is also based on the false premise that hurt feelings would somehow excuse this behavior. In the end, Father's argument in this regard is nothing more than an invitation to reweigh the evidence, which we will not do. We conclude that the evidence produced at the final hearing (even without

regard to the presumptively sufficient evidence produced at the provisional hearing) is sufficient to support a finding that unsupervised parenting time would endanger Child's health or impair his emotional development.

II. Whether the Trial Court Violated Father's Constitutional and Statutory Rights

[17] Father contends that the trial court violated his constitutional and statutory rights by allegedly deciding the case before considering any evidence and also failing to admit any evidence at the final hearing. Article 1, section 12, of the Indiana Constitution provides, that "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." We have concluded that implicit in the constitutional right to bring a civil action is the right to present one's claim to the trial court. *See Zimmerman v. Hanks*, 766 N.E.2d 752, 757 (Ind. Ct. App. 2002). In the marriage-dissolution context, Indiana Code section 31-15-2-15 provides, in relevant part, that "[a]t the final hearing on a petition for dissolution of marriage the court shall consider evidence, including agreements and verified pleadings filed with the court."

[18] Father's argument is based on the false premises that the trial court (1) had already determined its disposition of the case before hearing any evidence and (2) refused to allow him to present any evidence at the final hearing. As mentioned, the trial court clearly indicated at the final hearing that it was considering evidence that had been admitted at the provisional hearing, so, to

the extent that it may have had drawn preliminary conclusions regarding the case prior to the final hearing, they had been based on evidence.

[19] Father also notes that the trial court did not swear him in at the final hearing and cites this as further evidence that the trial court had prejudged the case. We think that a more reasonable characterization of the record is that Father (who was not represented by counsel at the final hearing) failed to properly make his record. "It is well settled that pro se litigants are held to the same legal standards as licensed attorneys[, which] means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so." *Basic v. Amouri*, 58 N.E.3d 980, 983–84 (Ind. Ct. App. 2016) (citation omitted). Father did make some factual assertions during his argument to the trial court and, to the extent that Father may have thought he was testifying, he must accept the consequences of his failure to understand the difference.

[20] The better practice would have been for the trial court to affirmatively ask Father if he wished to present evidence. That said, any error the trial court might have made in this regard can only be considered harmless. "Even if an evidentiary decision is an abuse of discretion, we will not reverse if the ruling constituted harmless error." *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 197 N.E.3d 316, 329 (Ind. Ct. App. 2022). "An error is harmless when the probable impact of the erroneously admitted or excluded evidence on the factfinder, in light of all the evidence present, is sufficiently minor so as not to affect a party's substantial rights." *Id*. In short, any error that might have occurred was

harmless because the nature of the evidence Father would have given was made clear in his arguments to the trial court. In fact, the bulk of the trial court's dialogue with Father was testimonial in nature, with the trial court asking him if he had been exercising his supervised visitation with Child and Father discussing various factual matters, including his claims that he posed no threat to Child, Mother had been unable to secure an order of protection against him, and his equity in the marital residence was $100,000.00. Despite not being sworn in, Father was able to get the essence of his proffered evidence before the trial court, which renders any error that might have occurred harmless.

[21] Father draws our attention to our decision in *Henderson v. Henderson*, 919 N.E.2d 1207 (Ind. Ct. App. 2010), a dissolution case in which we reversed the judgment of the trial court and remanded for a new evidentiary hearing. *Id*. at 1213. In that case, a panel of this court reversed the final judgment of the trial court because it had not heard any evidence at the final hearing and apparently had not allowed the father to present evidence regarding a claim that the parties' child had allegedly been abused while in the mother's care. *Id*. at 1213. While we acknowledge that the facts in *Henderson* are somewhat similar to those of this case, we nonetheless decline Father's invitation to reach the same result. *Henderson*'s holding is based on the panel's conclusion that Indiana Code section 31-15-2-15 requires a trial court to hear evidence at a final dissolution hearing, which occurred in this case. This is sufficient to remove this case from the scope of *Henderson*'s holding.

III. Whether the Trial Court Abused its Discretion in Dividing the Marital Estate

[22] Finally, Father contends that the trial court abused its discretion in dividing the marital estate. In dividing a marital estate, the trial court must first identify all property that is to be included in the marital estate, and second, the trial court must distribute the property just and reasonably, as provided in Indiana Code section 31-15-7-5. *O'Connell v. O'Connell*, 889 N.E.2d 1, 10–11 (Ind. Ct. App. 2008). "All marital property" consists of both assets, debts and encompasses any property acquired by a spouse before the marriage, during the marriage or by the parties jointly. *Roetter v. Roetter*, 182 N.E.3d 221, 227 (Ind. 2022).

[23] There is a presumption that an equal division of a marital estate is just and reasonable. Ind. Code § 31-15-7-5. Nevertheless, an unequal division of a marital estate may be just and reasonable when rebutted by a party who presents relevant evidence regarding the factors mentioned in Indiana Code section 31-15-7-5. If a court determines that an unequal division of a marital estate is just and reasonable, then the court must state the reasons why an equal division of the marital estate would not be just and reasonable. *In re Marriage of Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989). A reviewing court is not permitted to substitute its judgment for that of the trial court. *Roetter*, 182 N.E.3d at 228. "A reviewing court will not weigh evidence, but will consider the evidence in a light most favorable to the judgment." *Fobar v. Vonderahe*, 771 N.E.2d 57, 59 (Ind. 2002).

[24] Father's argues that the trial court failed to credit him with sufficient equity in the marital residence and, consequently, divided the marital estate unevenly without justification. The evidence most favorable to the judgment, however, indicates that Father had little, if any, equity in the marital residence because Mother and Father's father had "[bought Father] out of the mortgage" by buying him a trailer and giving him a lump sum of cash when he moved out of the marital residence, respectively. Tr. Vol. II p. 12. The trial court was under no obligation to credit Father's otherwise-unsupported assertion that he had $100,000.00 of equity in the marital residence, and did not. *See, e.g.*, *Fobar*, 771 N.E.2d at 59. Father has failed to establish that the trial court abused its discretion in valuing his interest in the marital residence or that it unequally divided the marital estate at all, much less that it did so without justification.

[25] The judgment of the trial court is affirmed.

Altice, C.J., and Felix, J., concur.

ATTORNEY FOR APPELLANT

Caryn E. Wallace
Chrzan Law, LLC
Fort Wayne, Indiana

APPELLEE *PRO SE*

Kayla Ellenwood
Fort Wayne, Indiana