19th Edition

Alimony Bench Book

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Family Law Section

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Foreword

It has been a "Terrible, Horrible, No Good, Very Bad Year" with COVID-19 bringing economic hardships to many families, business owners, and self-employed individuals![1]

This 19th Edition of the Alimony Bench Book recognizes and addresses special alimony considerations arising from the income, payments, or benefits from the Coronavirus Aid, Relief, and Economic Security (CARES) Act and the Coronavirus Response and Relief Supplemental Appropriations Act of 2021, including the Paycheck Protection Program. (See Chapter III).

It has been a relatively quiet year for caselaw, except for the Barton case addressing the pitfall of pledging LLC assets to secure alimony payments when the business is not a party to the lawsuit. (See discussions of Barton in Chapters I, VII, and VIII).

Our Tennessee General Assembly significantly amended Tenn. Code Ann. §28-3-110 to remove the 10-year statute of limitations on judgments or decrees in domestic relations matters which shall "be enforceable and remaining in effect from the date of entry until paid in full or otherwise discharged." 2019 Tenn. SB 2651. (Effective March 20, 2020). However, absent the application of Tenn. Code Ann. §28-3-110(e), attorneys will want to continue to advise their clients about the need to renew any judgment within ten years of the judgment's date. (See Chapter VII).

We also learn the importance of involving a Trust attorney early when the Trustee of a Trust is subject to "in personam" jurisdiction of a Tennessee Court and the Trustee's fiduciary duties to protect the Trust assets located in another state. (See Chapter V on Sekik v. Abdelnabi case).

We thank the authors and members of the Alimony Bench Book Committee. They continue to dedicate their time to researching, reading, digesting, and writing these chapters in the Alimony Bench Book to continue the mission of:

1) educating lawyers and Judges;

2) facilitating the rendering of more consistent and reliable trial court decisions;

3) increasing understanding of how the law applies to the facts through a thorough review of relevant case law, legal precedent, and new statutes; and

4) reducing attorney fees and costs, plus litigation expenses from appeals and remands, by providing the correct tools to evaluate, mediate and litigate cases.

Our authors include Judge Mary Wagner, Brenton Lankford, Gregory Smith, Michael Goode, Glen Watson, Mark Westlake, Kurt Myers, CPA, and Amy Amundsen. We thank Maresa Whaley, Sections, Committee & CLE Coordinator from the Tennessee Bar Association, who helps us ensure the Alimony Bench Book is made available to our Judges at their Spring Conference. We appreciate all of you. Co-Chairs, Amy J. Amundsen, and Siew-Ling Shea

[1] Credit is given to Judith Viorst and "Alexander and the Terrible, Horrible, No Good, Very Bad Day" for the inspiration for this Foreword, and that despite or inspite of problems in this unusual year, there are positives or solutions.

I. ALIMONY INTRODUCTION

The Courts in Tennessee have the authority to award alimony pursuant to T.C.A. § 36-5-121. [(codified on July 1, 2005) formerly T.C.A. § 36-5-101].

> (a) In any action for divorce, legal separation or separate maintenance, the court may award alimony to be paid by one spouse to or for the benefit of the other, or out of either spouse's property, according to the nature of the case and the circumstances of the parties. The court may fix some definite amount or amounts to be paid in monthly, semimonthly or weekly installments, or otherwise, as the circumstances may warrant. Such award, if not paid, may be enforced by any appropriate process of the court having jurisdiction including levy of execution. Further, the order or decree shall remain in the court's jurisdiction and control, and, upon application of either party, the court may award an increase or decrease or other modification of the award based upon a showing of a substantial and material change of circumstances; provided, that the award is subject to modification by the court based on the type of alimony awarded, the terms of the court's decree or the terms of the parties' agreement.

TENN. CODE ANN. § 36-5-121(a) (2019).

A. STATUTORY HISTORY OF ALIMONY

Alimony was originally "allowed in recognition of the husband's common law liability to support the wife." Rush v. Rush, 232 S.W.2d 333, 336 (Tenn. Ct. App. 1949).

In 1949, the legislature enacted two types of alimony: alimony *in futuro* and alimony *in solido*. T.C.A. § 36-820 (alimony *in futuro*) provided that upon the dissolution of the marriage or a court decreed separation:

> the court may make an order and decree for the suitable support and maintenance of the complainant by the respondent, or out of his or her property . . . according to the nature of the case and the circumstances of the parties, the order or decree to remain in the court's control; and, on application of either party, the court may decree an increase or decrease of such allowance on cause being shown.

See Aleshire v. Aleshire, 642 S.W.2d 729, 731-32 (Tenn. Ct. App. 1982).

T.C.A. § 36-821 (alimony *in solido*) provided that upon dissolution of the marriage or a court decreed separation, the court may award as alimony "such part of the other spouse's real and personal estate as it may think proper." See id. at 732.

A third class of spousal support was created by Chapter 243 of the 1993 Public Acts of Tennessee, which amended T.C.A. § 36-5-101(e), effective April 30, 1993, by the following:

> Rehabilitative support and maintenance is a separate class of spousal support as distinguished from alimony *in solido* and periodic alimony.

1993 Tenn. Pub. Act, Ch. 243, §1.

In 2003, the legislature enacted a fourth type of alimony transitional alimony, which is defined as follows:

> Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

TENN. CODE ANN. § 36-5-121(g)(1) (2019).

The legislature has also codified its public policy on spousal support:

> It is the public policy of this state to encourage and support marriage, and to encourage family arrangements that provide for the rearing of healthy and productive children who will become healthy and productive citizens of our state.

TENN. CODE ANN. § 36-5-121(c)(1) (2019).

The legislature recognized that:

> Spouses have traditionally strengthened the family unit through private arrangements whereby one (1) spouse focuses on nurturing the personal side of the marriage, including the care and nurturing of the children, while the other spouse focuses primarily on building the economic strength of the family unit. This arrangement often results in economic detriment to the spouse who subordinated such spouse's own personal career for the benefit of the marriage.

Id.

The General Assembly further found that:

> [W]here one (1) spouse suffers economic detriment for the benefit of the marriage, . . . the economically disadvantaged spouse's standard of living after the divorce should be reasonably comparable to the standard of living enjoyed during the marriage or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

TENN. CODE ANN. § 36-5-121(c)(2) (2019).

The legislature then defined "to be rehabilitated" to mean:

> [T]o achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

TENN. CODE ANN. § 36-5-121(d)(2) (2019).

The legislature also provided that:

> An award of alimony *in futuro* may be made, either in addition to an award of rehabilitative alimony, where a spouse may be only partially rehabilitated, or instead of an award of rehabilitative alimony, where rehabilitation is not feasible. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

TENN. CODE ANN. § 36-5-121(d)(4) (2019).

> Alimony *in solido* may be awarded in lieu of or in addition to any other alimony award, in order to provide support, including attorney fees, where appropriate.

TENN. CODE ANN. § 36-5-121(d)(5) (2019).

On July 1, 2005, the legislature made changes to the alimony statute by including "[a] specific provision that allows for concurrent awards of rehabilitative alimony and alimony *in futuro* in certain situations." Anderson v. Anderson, No. M2005-02029-COA-R3-CV, 2007 WL 957186, at *5, 2007 Tenn. App. LEXIS 175, at *16 (Tenn. Ct. App. Mar. 29, 2007).

B. GUIDANCE IN AWARDING ALIMONY

1. Standard of Review

The trial court is granted broad discretion to determine whether spousal support is required and if so, the nature, amount, and duration of such support. Broadbent v. Broadbent, 211 S.W.3d 216, 220 (Tenn. 2006); Bratton v. Bratton, 136 S.W.3d 595, 605 (Tenn. 2004). Equally well-established is the proposition that a trial court's decision regarding spousal support is factually driven and involves the careful balancing of many factors. Singla v. Singla, No. M2017-01278-COA-R3-CV, 2018 WL 6192232, at *22, 2018 Tenn. App. LEXIS 681, at *67 (Tenn. Ct. App. Nov. 27, 2018); Kinard v. Kinard, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998). Consequently, an appellate court is

not inclined to alter a trial court's spousal support decision absent an abuse of discretion. Mayfield v. Mayfield, 395 S.W. 3d 108, 115 (Tenn. 2012); Robertson v. Robertson, 76 S.W.3d 337, 343 (Tenn. 2002). The standard requires the appellate court to consider: (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. See BIF, Div. of Gen. Signal Controls, Inc. v. Serv. Constr. Co., No. 87-136-11, 1988 WL 72409 at *9, 1988 Tenn. App. LEXIS 430, at *9 (Tenn. Ct. App. July 13, 1988). An appellate court will give great weight to decisions based on the trial court's assessment of the credibility of the witnesses and will not reverse such an assessment absent clear and convincing evidence to the contrary. Broadbent, 211 S.W.3d at 220; Smith v. Smith, 93 S.W.3d 871, 875 (Tenn. Ct. App. 2002). As such, alimony awards are reviewed under an abuse of discretion standard. Broadbent, 211 S.W.3d at 220.

"The role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable." Id. An abuse of discretion occurs when the trial court causes an injustice by:

(1) applying an incorrect legal standard,

(2) reaching an illogical result,

(3) resolving the case on a clearly erroneous assessment of the evidence, or

(4) relying on reasoning that causes an injustice.

Gonsewski v. Gonsewski, 350 S.W. 3d99, 105 (Tenn. 2011) (citing Wright ex rel. Wright v. Wright, 337 S.W.3d 166, 176 (Tenn. 2011)).

This standard does not permit an appellate court to substitute its judgment for that of the trial court, but "'reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives,' and thus 'envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal.'" Henderson v. SAIA, Inc., 318 S.W.3d 328, 335 (Tenn. 2010) (quoting Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010)).

When reviewing a discretionary decision by the trial court, such as an alimony determination, the appellate court should **presume that the decision is correct** and should review

the evidence in the light most favorable to the decision. Gonsewski, 350 S.W.3d at 105-06; Wright, 337 S.W.3d at 176; Henderson, 318 S.W.3d at 335 (emphasis added). The Tennessee Supreme Court restated the standard of review to be applied in alimony cases, reiterating the deference to be provided to the trial court. Gonsewski, 350 S.W.3d at 105-06.

2. Determining the nature, amount, length and manner.

T.C.A. § 36-5-121(i) provides:

> In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, [Bettis v. Bettis, No. E2016-00156-COA-R3-CV, 2016 WL 6161559, (Tenn. Ct. App. Oct. 24, 2016), where the court of appeals remanded the case for the trial court to determine an amount of alimony instead of a percentage of bonus income,] the court shall consider all relevant factors, including:
>
> > (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
> >
> > (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
> >
> > (3) The duration of the marriage;
> >
> > (4) The age and mental condition of each party;
> >
> > (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
> >
> > (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
> >
> > (7) The separate assets of each party, both real and personal, tangible and intangible;
> >
> > (8) The provisions made with regard to the marital property as defined in § 36-4-121; [Tait v. Tait, 207 S.W.3d 270 (Tenn. Ct. App. 2006) (The Court did not find Wife in need of alimony, after considering the amount and the

> liquidity of the marital property she received and the additional retirement that would be forthcoming.)][Prestwood v. Prestwood, 397 S.W.3d 583, 593 (Tenn. Ct. App. 2012) (When debt is undisputedly incurred by both parties during the marriage, and equity would not be done by placing one spouse in a better financial position than the other, the court might award the one spouse alimony *in solido* as to balance their financial positions.)]
>
> (9) The standard of living of the parties established during the marriage;
>
> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
>
> (11) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and,
>
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

TENN. CODE ANN. § 36-5-121(i)(1)-(12) (2019).

Although each of these factors must be considered when relevant to the parties' circumstances, "the two that are considered the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay." Gonsewski, 350 S.W.3d at 110 (quoting Riggs v. Riggs, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007)); see also Bratton, 136 S.W.3d at 605; Robertson v. Robertson, 76 S.W.3d 337, 342 (Tenn. 2002); Burlew v. Burlew, 40 S.W.3d 465, 470 (Tenn. 2001). When considering these two factors, the primary consideration is the disadvantaged spouse's need. Riggs, 250 S.W.3d at 457 (citing Aaron v. Aaron, 909 S.W.2d 408, 410 (Tenn. 1995)). The amount of alimony should be determined so "that the party obtaining the divorce [is not] left in a worse financial situation than he or she had been before the opposite party's misconduct brought about the divorce." Broadbent, 211 S.W.3d at 222 (citing Aaron, 909 S.W.2d at 410-11). Fault is an essential consideration in determining whether to award alimony. See T.C.A. § 36-5-121(i)(11) (2019); Hoscheit v. Hoscheit, No. 01A01-9709-CH-00493, 1998 WL 440727, at *3, 1998 Tenn. App. LEXIS 539, at *8 (Tenn. Ct. App. Aug. 5, 1998) (citing Gilliam v. Gilliam, 776 S.W.2d 81 (Tenn. Ct. App. 1988)). However, fault must not be applied punitively against a guilty party. Tait v. Tait, 207 S.W.3d 270, 278 (Tenn. Ct.

App. 2006); see also Nicholson v. Nicholson, No. M2010-00042-COA-R3-CV, 2010 WL 4065605, at *8, 2010 Tenn. App. LEXIS 651, at *27 (Tenn. Ct. App. Oct. 15, 2010). In Nicholson, for example, the court of appeals vacated the trial court's denial of alimony as it appeared the trial court was referring to marital fault of Wife as the basis to deny alimony. Id. at *25-29. Fault is not the only relevant factor warranting consideration. Particularly, a trial court should carefully consider the two most important factors, the disadvantaged spouse's need and the obligor spouse's ability to pay. In Ellis v. Ellis, the trial court failed to make a specific finding concerning Wife's earning capacity, even when both parties' experts testified to the ranges of Wife's reasonably anticipated income. 2020 WL 5057406, 5 (Tenn. Ct. App. Aug, 27, 2020). 'After considering Wife's age, work experience, the number of years she has not worked outside the home, and the training wife will need to reenter the workforce, the Court of Appeals modified the award of alimony *in futuro* from $8,000 to $5,674 per month, subtracting her earning capacity from the Wife's needs.' Id. at 5 (internal citations omitted).

In deciding whether to award alimony to a disadvantaged spouse, the court must determine the obligor's ability to pay. In Buntyn v. Buntyn, the Court of Appeals held that the trial court did not properly conclude that Husband had the ability to pay alimony *in futuro* of $100/month. No. W2016-00398-COA-R3-CV, 2017 WL 781724, at *3, 2017 Tenn. App. LEXIS 146, at *9 (Tenn. Ct. App. Feb. 28, 2017). The Court of Appeals found that the trial court's award of alimony was "entirely conclusory," as its findings "anticipat[e] that Husband will have sufficient funds to pay." Id. *Anticipation* by the trial court that Husband *will* have sufficient funds provides no clear determination that the undefined "extra income" provides Husband the ability to pay $100/month of alimony. Id. For the stated reason, the Court of Appeals vacated award of alimony and remanded for the court's reconsideration of the type, duration, and amount, if any, that is to be awarded. There was no finding that economic rehabilitation is not feasible or that long term support is necessary or that Husband has the ability to pay support. Id. at *4. In Griffin v. Griffin, the Court of Appeals vacated the trial court's award of alimony because it failed to make findings of fact on the reasonableness of Husband's expenses and ascertain Husband's ability to pay alimony. 2020 WL 4873251, 13 (Tenn. Ct. App. Aug. 19, 2020).

C. REHABILITATIVE ALIMONY

1. STATUTORY LANGUAGE

The language in the statute discussing rehabilitative alimony is as follows:

(c)(1) Spouses have traditionally strengthened the family unit through private arrangements whereby one (1) spouse focuses on nurturing the personal side of the marriage, including the care and nurturing of the children, while the other spouse focuses primarily on building the economic strength of the family unit. This arrangement often results in economic detriment to the spouse who subordinated such spouse's own personal career for the benefit of the marriage. It is the public policy of this state to encourage and support marriage, and to encourage family arrangements that provide for the rearing of healthy and productive children who will become healthy and productive citizens of our state.

(2) The general assembly finds that the contributions to the marriage as homemaker or parent are of equal dignity and importance as economic contributions to the marriage. Further, where one (1) spouse suffers economic detriment for the benefit of the marriage, the general assembly finds that the economically disadvantaged spouse's standard of living after the divorce should be reasonably comparable to the standard of living enjoyed during the marriage or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

(d) . . .

(2) It is the intent of the general assembly that a spouse, who is economically disadvantaged relative to the other spouse, be rehabilitated, whenever possible, by the granting of an order for payment of rehabilitative alimony. To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantage spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

(3) Where there is relative economic disadvantage and rehabilitation is not feasible, in consideration of all relevant factors, including those set out in subsection (i), the court may grant an order for payment of support and maintenance on a long-term basis or until the death or remarriage of the recipient, except as other provided in subdivision (f)(2)(B).

(4) An award of alimony *in futuro* may be made, either in addition to an award of rehabilitative alimony, where a spouse may be only partially rehabilitated, or

instead an award of rehabilitative alimony, where rehabilitation is not feasible. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

(e)(1) Rehabilitative alimony is a separate class of spousal support, as distinguished from alimony *in solido*, alimony *in futuro*, and transitional alimony. To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

(2) An award of rehabilitative alimony shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of a substantial and material change in circumstances. For rehabilitative alimony to be extended beyond the term initially established by the court, or to be increased in amount, or both, the recipient of the rehabilitative alimony shall have the burden of proving that all reasonable efforts at rehabilitation have been made and have been unsuccessful.

(3) Rehabilitative alimony shall terminate upon the death of the recipient. Rehabilitative alimony shall also terminate upon the death of the payor, unless otherwise specifically stated.

TENN. CODE ANN. § 36-5-121(c)-(e) (2019) (emphasis added).

Pursuant to the statute that went into effect on June 11, 2003 [and later arranged and codified in T.C.A. § 36-5-121 effective July 1, 2005], the Court may award alimony *in futuro* either *in addition to* a rehabilitation award, where a spouse may be partially rehabilitated as defined above, or *instead of* a rehabilitation award, where rehabilitation is not feasible.

2. <u>Description of Rehabilitative Alimony</u>

T.C.A. § 36-5-121(d)(2) reflects a statutory preference favoring rehabilitative spousal support and transitional spousal support over long-term periodic spousal support. Gonsewski, 350 S.W.3d at 109. To be rehabilitated means that, with reasonable efforts, the disadvantaged spouse will be able to achieve "an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected

to be available to the other spouse." TENN. CODE ANN. §§ 36-5-121(d)(2), (e)(1) (2019); accord Andrews v. Andrews, 344 S.W.3d 321, 341-42 (Tenn. Ct. App. 2010); Wiser v. Wiser, 339 S.W.3d 1, 17-18 (Tenn. Ct. App. 2010); see also Gonsewski, 350 S.W.3d at 108. "Rehabilitative alimony serves the purpose of assisting the disadvantaged spouse in obtaining additional education, job skills, or training, as a way of becoming more self-sufficient following the divorce." Gonsewski, 350 S.W.3d at 108 (citing Robertson v. Robertson, 76 S.W.3d 337, 340-41 (Tenn. 2002)).

"In considering an award of rehabilitative alimony in accordance with T.C.A. 36-5-121(e)(1), the focus is on increasing the disadvantaged spouse's earning capacity; inherent in the statutory framework is the expectation that the disadvantaged spouse suffered a loss of earning capacity during the marriage and that, with training or education, the earning capacity of that spouse can be increased." Duke v. Duke, No. M2009-02401-COA-R3-CV, 2012 WL 1971144 *6, 2012 Tenn. App. LEXIS 367, at *19 (Tenn. Ct. App. 2012). Thus, in Duke, even though the Wife received $4.6 million of marital assets, the court still awarded her rehabilitative alimony of $8,000 per month for eight years. Id. The Court found that an award of marital property was "merely one of the several factors the court considers in making an award," but should not "undermine the purpose of an award of rehabilitative alimony." Id., at *18; see also TENN. CODE ANN. § 36-5-121(i)(7)-(8) (2019). Similarly, in Brown v. Brown, the court of appeals affirmed the trial court's award of rehabilitative alimony to Wife even though she received a "slightly larger share of the marital assets . . . ." No. E2017-01629-COA-R3-CV, 2018 WL 5307092, at *10, 2018 Tenn. App. LEXIS 622, at *27 (Tenn. Ct. App. Oct. 25, 2018). In Brown, Wife's marital property consisted of, primarily, non-liquid assets, she was unsure of what her salary would be following her future graduation due to her lack of work experience, and she was the primary residential parent of the children ages two and three which would impact Wife's employability. Id. at *10-11.

If the court finds that the recipient spouse can only be partially rehabilitated, it can award both rehabilitative alimony and alimony *in futuro*. See. Anderson v. Anderson, No. M2005-02029- COA-R3-CV, 2007 WL 957186, at *16, 2007 Tenn. App. LEXIS 175 *27 (Tenn. Ct. App. Mar. 29, 2007). In Anderson, the Court awarded both rehabilitative alimony and alimony *in futuro*, as Wife could only be partially rehabilitated and the parties had a disparity in their incomes. Id. at *19. The court found that even with the spousal support obligation, Husband was left with a monthly surplus and Wife with a monthly deficit.

If a spouse can be fully rehabilitated, an award of alimony *in futuro* is not appropriate. In Riggs v. Riggs, 250 S.W.3d 453 (Tenn. Ct. App. 2007), husband made approximately $70,000.00 per year and wife was unemployed but had a real estate license at the time of divorce. The Court of Appeals reversed the trial court's award of $1,200.00 per month in alimony *in futuro* because wife would, eventually, have the ability to support herself. Id. at 459. The "award of alimony *in futuro*" said the court, "robs her of any motivation to seek self- sufficiency." Id. The court thus reversed the award of alimony *in futuro*, and remanded "for determination of reasonably necessary rehabilitative alimony and/or transitional alimony." Id. at 460. In addition, lack of interest in rehabilitation on the part of the economically disadvantaged spouse does not alone entitle the spouse to alimony *in futuro*. Hallums v. Hallums, No. M2016-00396-COA-R3-CV, 2017 WL 2684605, at *5, 2017 Tenn. App. LEXIS 419, at *10 (Tenn. Ct. App. June 21, 2017). In Hallums, Wife presented no credible proof regard the cost to seek additional college to prepare for a CPA examination, so the Court vacated the alimony *in futuro* award because the trial court did not make adequate findings relative to whether rehabilitation was feasible and whether an award of rehabilitative and/or transitional alimony would be appropriate. Id. at *5.

A spouse may receive rehabilitative alimony if she "cannot achieve, with reasonable effort, an earning capacity that would permit her standard of living after the divorce to be reasonably comparable" to the standard she enjoyed during the marriage. Barnes v. Barnes, No. M2012-02085-COA-R3-CV, 2014 WL 1413931, * 30, 2014 Tenn. App. LEXIS 200, at *90-91 (Tenn Ct. App. Apr. 10, 2014). The court here determined that rehabilitative alimony includes consideration of whether a spouse may be rehabilitated to the standard of living she enjoyed during the marriage. Id. In Barnes, the court found Wife "is not able to be rehabilitated," that it is "unreasonable to believe that the Wife will be able to level the playing field to draw even with the Husband in education and training," and that she "will not be able to improve her earnings in such a way that she will keep pace with the Husband's ability to earn." Id. (reinstating Wife's alimony *in futuro* award of $6,000 per month). See also Barnes v. Barnes, No. M2018-01539-COA-R3-CV, 2019 WL 2452667, 2019 Tenn. App. LEXIS 297 (Tenn. Ct. App. June 12, 2019)(denying husband's petition to modify alimony *in futuro* due to husband failing "to prove that his disability had a significant impact on his ability to pay alimony."). However, in other instances, even if one spouse cannot achieve the same earning capacity as the other, the court may be hesitant to grant long-term alimony when the dependent spouse is able to enter the workforce.

In Santee v. Santee, Husband was a medical doctor earning $500,000 per year, and Wife, age 47, was a stay-at-home mother for twenty-six years with a high school education. No. E2016–02535–COA–R3–CV, 2018 WL 931107, at *4, 2017 Tenn. App. LEXIS 843, at *8-9 (Tenn. Ct. App. Feb. 15, 2018). The court observed Wife to be "in excellent health" and could be rehabilitated if she acted on her desire to earn a two-year medical assistant degree. Id. While there was "no question . . . the wife [was] economically disadvantaged," id., the court noted she "essentially triggered the divorce" after a twenty-six-year marriage and affirmed the trial court's determination that long-term alimony was inappropriate and awarded Wife $3,500 per month for 60 months. Id. at *8 (stating "rehabilitative rather than alimony *in futuro* or transitional alimony is necessary and appropriate."). However, in a separate opinion, Judge Susano states he believes the majority "misconstrues" the definition of "rehabilitation." Id. at *10 (Susano, J., concurring in part and dissenting in part). By relying on the definition of "rehabilitative alimony" in T.C.A. § 36-5-121(e)(1), Judge Susano concludes he would have awarded Wife alimony *in futuro* of $3,500 per month instead of rehabilitative. Id.

In Hopwood v. Hopwood, the court of appeals found awarding rehabilitative alimony for 15 years as excessive, when the parties were married for 14 years and Wife testified she would take 8 years to earn her degree attending class part-time. No. M2015-01010-COA-R3-CV, 2016 WL 3537467, 2016 Tenn. App. LEXIS 427 (Tenn. Ct. App. June 23, 2016).

In Adams v Adams, the Court of Appeals held that, "Husband's argument that Wife must have somehow already begun an educational program during the pending litigation [to be awarded rehabilitative alimony] is unavailing because rehabilitative alimony is for the purpose of Wife's rehabilitation *following* the divorce." 2020 WL 2062302, 9 (Tenn. Ct. App. April 29, 2020).

D. ALIMONY *IN FUTURO*

1. STATUTORY LANGUAGE

Alimony *in futuro* is discussed in the statute as follows:

> (f)(1) Alimony *in futuro*, also known as periodic alimony, is a payment of support and maintenance on a long-term basis or until death or remarriage of the recipient. Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that the disadvantaged spouse is unable to achieve, with reasonable effort, an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable

> to the standard of living enjoyed during the marriage, or to the post-divorce standard expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.
>
> (2)(A) An award of alimony *in futuro* shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended or otherwise modified, upon a showing of substantial and material change of circumstances.
>
> (B) In all cases where a person is receiving alimony *in futuro* and the alimony recipient lives with a third person, a rebuttable presumption is raised that:
>
> > (i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or
> > (ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.
>
> (3) An award for alimony *in futuro* shall terminate automatically and unconditionally upon the death or remarriage of the recipient. The recipient shall notify the obligor immediately upon the recipient's marriage. Failure of the recipient to timely give notice of the remarriage shall allow the obligor to recover all amounts paid as alimony *in futuro* to the recipient after the recipient's marriage. Alimony *in futuro* shall also terminate upon the death of the payor, unless otherwise specifically stated.

TENN. CODE ANN. § 36-5-121 (2019).

2. DESCRIPTION OF ALIMONY *IN FUTURO*

Alimony *in futuro* is intended to provide long-term support to an economically disadvantaged spouse who cannot be rehabilitated. Gonsewski, 350 S.W.3d at 107; see also Burlew v. Burlew, 40 S.W.3d 465, 471 (Tenn. 2001). In Oakes v. Oakes, 235 S.W.3d 152, 161 (Tenn. Ct. App. 2007), the Court of Appeals changed the trial court's award of rehabilitative alimony to an award of alimony *in futuro* because there was no evidence that the wife could be rehabilitated.

In Gonsewski, the Supreme Court reversed the Court of Appeals and affirmed the trial court's denial of alimony *in futuro* to wife. 350 S.W.3d at 99. The trial court denied Wife alimony *in futuro* explaining that she had a stable job, earned a good income, and that her share of the marital estate was sufficient to find another residence. Id. at 112. On appeal, the Court of Appeals

awarded her alimony *in futuro* in the amount of $1,250 per month. Id. at 110. The parties were both forty-three, had been married twenty-one years; both had college degrees and had worked throughout the marriage. Id. at 111. Husband earned $99,000 per year plus bonuses, which were expected to decrease and Wife worked for the State and earned $72,000 per year plus a relatively small longevity bonus. Id. The Supreme Court noted that there was little evidence as to the parties' standard of living during the marriage and Husband's expected standard of living after the marriage. Id. The Supreme Court affirmed the trial court's denial of alimony *in futuro*, finding that the record demonstrated that Wife could support herself and that both parties' standard of living after the divorce is likely to decline as two persons living separately incur more expenses than two persons living together. Id. at 112.

In Hayes v. Hayes, the court affirmed the trial court's award of alimony *in futuro*, as opposed to transitional alimony, because of Wife's need, Husband's greater earning capacity, Wife's increased standard of living while married, fault of Husband for the demise of the marriage, Husband's lack of credibility, and Husband's separate property. No. M2008-02007-COA-R3-CV, 2009 WL 1929244, at *4, 2009 Tenn. App. LEXIS 418, at *10 (Tenn. Ct. App. June 29, 2009). The parties were married only nine years, Husband was 63 years old and Wife was 64 years old at the time of the hearing, and the court found Husband able to work and Wife was disabled. Id. at *3. Likewise, in Stratienko v. Stratienko, the Court of Appeals found the trial court's award of alimony *in futuro* and alimony *in solido* were appropriate because of the significant income disparity that existed between the parties and to prevent Husband from voluntarily reducing his income. 529 S.W.3d 389, 405 (Tenn. Ct. App. 2017). Wife was educated, skilled and her work experience during the parties' 26-year marriage had been limited to the parties' businesses. Id. Husband did not present evidence of Wife's income or her capacity to become self-sufficient. Id. at 404. Thus, the Court reasoned that neither rehabilitative alimony nor transitional alimony would suffice to bridge the economic gap between the parties and awarded alimony *in futuro* of $5,000 per month and alimony *in solido* of $540,000 to be paid at a rate of $4,500 per month for 10 years. Id. Husband's average income was $600,000 per year and Wife's income was derived solely from the assets awarded in the divorce. Id. Both the actual wage gap and potential wage gap between spouses may be considered by the court when determining the award for alimony *in futuro*. Kanka v. Kanka, No. M2016-01807-COA-R3-CV, 2018 WL 565841, at *7, 2018 Tenn. App. LEXIS 37, at *20 (Tenn. Ct. App. 2018). The disparity of earning capacity to be considered should take into account whether one spouse is

"willfully underemployed" given his or her circumstances and skillset. Id. at *7-8 (stating, while Husband claimed the earning capacities were similar, Wife expected an annual income roughly $25,000, whereas Husband had the *capacity* to earn $84,000). Despite a potential wage gap and/or a disparity in education, if a spouse is healthy and able to work, a court may still deny alimony *in futuro*, See, e.g. Nisenbaum v. Nisenbaum, No. M2017-02330-COA-R3-CV, 2019 WL 2226059, 2019 Tenn. App. LEXIS 258 (Tenn. Ct. App. May 23, 2019)(affirming the denial of alimony *in futuro* for a 30 year marriage wherein wife's earning capacity was $50,000 per year and husband's income was $210,232 per year). In Nisenbaum, the parties were married for 30 years and wife was "able-bodied" and in "excellent health" at 57 years old with a high school education and an enjoyment for work, at *3. Wife received liquid assets of $650,000 as a result of the divorce and was "not in need of rehabilitation." Id. At * 4 -*5. Wife's request for alimony *in futuro* was denied despite husband being college educated and an earning capacity at least four times greater than wife's. Id. at *6.

Alimony *in futuro* is not, however, a guarantee that the recipient spouse will forever be able to enjoy a lifestyle equal to that of the obligor spouse. Gonsewski, 350 S.W.3d at 108. In many instances, the parties' assets and incomes simply will not permit them to achieve the same standard of living after the divorce as they enjoyed during the marriage. Robertson v. Robertson, 76 S.W.3d 337, 340 (Tenn. 2002). While enabling the spouse with less income "to maintain the pre-divorce lifestyle is a laudable goal," the reality is that "two persons living separately incur more expenses than two persons living together." Kinard v. Kinard, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998). Therefore, in most divorce cases it is unlikely that both parties will be able to maintain their pre-divorce lifestyle." Id. It is not surprising, therefore, that "[t]he prior concept of alimony as lifelong support enabling the disadvantaged spouse to maintain the standard of living established during the marriage has been superseded by the legislature's establishment of a preference for rehabilitative alimony." Robertson, 76 S.W.3d at 340. Gonsewski, 350 S.W.3d at 107-08.

Additionally, when the health of an economically disadvantaged spouse is at issue, the spouse should present clear proof that she is actually disabled or incapable of rehabilitation. See. Carter v. Browne, No. W2018-00429-COA-R3-CV, 2019 WL 424201, 2019 Tenn. App. LEXIS 63 (Tenn. Ct. App. Feb. 3, 2019). In Carter, the court affirmed the denial of alimony *in futuro* to the wife despite the fact wife was diagnosed with a connective tissue disorder. Id. at

*1, *8. The court noted the wife was never diagnosed as disabled, the husband's medical expert disputed many of wife's claims, and that despite her claims of disability, the wife lived a "somewhat normal life." Id. at *7(contrasting with Crocker v. Crocker, No. W2006-003530COA-R3-CV, 2006 WL 3613591, 2006 Tenn. App. LEXIS 777 (Tenn. Ct. App. Dec. 11, 2006)). Also weighing against alimony *in futuro* in Carter was the parties' relatively short marriage of seven years. Id. at *8.

Alimony *in futuro* is usually paid in regular intervals for an indeterminate period. Because it is modifiable by the court and will terminate on the death or remarriage of the recipient, the total amount that will be paid cannot be known. Because of this susceptibility to contingencies, alimony *in futuro* is said to lack "sum-certainty." Burlew, 40 S.W.3d at 471. "Alimony *in futuro* lacks a sum-certainty due to contingencies affecting the total amount of alimony to be paid." Waddey v. Waddey, 6 S.W.3d 230, 232 (Tenn. 1999). In Waddey the parties agreed to alimony *in futuro* of $1,000.00 per month until death or remarriage of the wife, or March 1, 1996, "whichever shall first occur." Id. at 231. Therefore, it is clear that the duration of an award of alimony *in futuro* may be affected by contingencies agreed upon by the parties or imposed by courts. See id. at 232.

"The purpose of alimony *in futuro* is to continue the support that was incident to the marriage relationship, and is appropriate when the spouse cannot be rehabilitated." JANET L. RICHARDS, RICHARDS ON TENNESSEE FAMILY LAW § 12.03(b) (3d ed. 2008 Supp.). Determining whether the spouse may be rehabilitated can be done implicitly if the court finds why the spouse cannot enter the workforce. Tooley v. Tooley, No. M2017-00610-COA-R3-CV, 2018 WL 1224946, at *6, 2018 Tenn. App. LEXIS 125, at *16-17 (Tenn. Ct. App. Mar. 8, 2018) (detailing Wife's inability to work outside of the home due to the need to care for the adult disabled child).

3. CLOSING IN MONEY

While alimony is not intended to provide a former spouse with relative financial ease, the court may award alimony in such a way that spouses approach equity. The award will not put the disadvantaged spouse in the same position in which she was prior to the divorce; it will provide her with "closing-in money," which will allow her to be enabled to closely approach her former economic position. Aaron v. Aaron, 909 S.W.2d 408, 411 (Tenn. 1995).

4. NOMINAL ALIMONY

The use of nominal alimony allows the trial court to retain jurisdiction to modify alimony if circumstances in the future should warrant it. Where husband's income was zero at the time of trial and wife demonstrated a significant need for spousal support, the court modified the trial court's award of transitional alimony and awarded Wife $50 per month as nominal alimony *in futuro*. Both parties were bound to give each other notice of any new employment or income within seven days of said event. Hernandez v. Hernandez, No. E2012-02056-COA-R3-CV, 2013 WL 5436752, 2013 Tenn. App. LEXIS 646 (Tenn. Ct. App. Sept. 27, 2013).

In the case of Justice v. Justice, the court awarded Mrs. Justice $50 per month as alimony *in futuro* during Dr. Justice's fellowship at Vanderbilt. No. M1998-00916-COA-R3-CV, 2001 WL 177060, 2001 Tenn. App. LEXIS 112 (Tenn. Ct. App. Feb. 23, 2001). The court found that Mrs. Justice was financially disadvantaged in comparison to Dr. Justice. Id. at *11. Even though she was a pharmacist, the court found that her earning capacity would certainly never approach the income that Dr. Justice could reasonably be expected to earn as a practicing physician. Id. at *4.

Another example of nominal alimony is the case of Griffin v. Griffin,
where the court awarded Mrs. Griffin $100 per month as alimony *in futuro*. No. 02A01-9807-CH-00177, 1999 WL 1097849, 1999 Tenn. App. LEXIS 751 (Tenn. Ct. App. Oct. 30, 1999). Although Mrs. Griffin had the present ability to earn a living as a real estate agent, the court awarded her alimony *in futuro* because her cancer was in remission. The court found "Wife is entitled to at least a nominal award of alimony *in futuro* which, in the event of a substantial and material change of circumstances, such as the recurrence of Wife's cancer, may be modified to reflect the changed positions of the parties." Id. at 21.

In the case of Eaves v. Eaves, the court granted Wife alimony *in futuro* in an amount of $10 per month. No. E2006-02185-COA-R3-CV, 2007 WL 4224715, at *10, 2007 Tenn. App. LEXIS 744, *28 (Tenn. Ct. App. Nov. 30, 2007). The trial court found that, at present, Husband did not have the ability to assist Wife due to his enormous debt burden and monthly expenses; however, if the husband had the ability to help support Wife, a more substantial amount would be awarded to her. Id. at *17. The court therefore retained jurisdiction to examine the amount of alimony, when the parties' circumstances changed. Id.

5. AUTOMATICALLY INCREASING ALIMONY

There has yet to be a Supreme Court decision on 'escalating clauses for alimony,'

however, here are several Court of Appeals cases where they are discussed.

Tennessee Courts have approved automatic increases in alimony in limited circumstances, such as when a minor child will soon reach majority and the obligor is no longer required to pay child support. See, Bloom v. Bloom, No. W1998-00365-COA-R3-CV, 2000 WL 34410140, *5, 2000 Tenn. App. LEXIS 630, *13 (Tenn. Ct. App. Sept. 14, 2000); Erwin v. Erwin,
No. W1998-00801-COA-R3-CV, 2000 WL 987339, 2000 Tenn. App. LEXIS 444 (Tenn. Ct. App. June 26, 2000).

In these unique cases, the Tennessee Court of Appeals reasoned that automatic modification was appropriate because a spouse's ability to pay alimony was directly affected by the termination of child support. See Erwin, 2000 Tenn. App. LEXIS 444, at *6. Additionally, automatic modification of alimony is appropriate where the modification is certain to occur in the near future. Id. at *1 (daughter was 17 at the time of divorce); see also Bloom 2000 Tenn. App. LEXIS 630, at *2 (son was 15 at time of trial). Thus, by including the automatic modification provision, the trial courts in those cases "spared the parties the additional expense and trouble that they would have otherwise incurred from having to re-open the question of alimony *so soon after the court's decree*." See Anderson v. Anderson, No. M2005-02029-COA-R3-CV, 2007 WL 957186 *8, 2007 Tenn. App. LEXIS 175, *26 (Tenn. Ct. App. Mar. 27, 2007) (emphasis added). However, except in cases involving unique circumstances that are expected to occur in the near future, automatic modifications are generally not appropriate. Id. In Anderson, the Court of Appeals vacated the trial court's judgment automatically increasing alimony when the parties' child reached majority because:

> the length of time before the increase is scheduled to go into effect, [almost 10 years], is so long that any predictive advantage is likely to be overcome by the effects of other events, at this point quite unpredictable, such as changes in the employment, income and health of either both parties.

Id. at *27. Thus, the Court distinguished Erwin and concluded that the statutory provisions for modification were the "most appropriate vehicle" for managing the uncertainty of future events and that using these provisions "relieve[d] the trial court from having to base its judgment on an act of clairvoyance. Id. (citing Crabtree v. Crabtree, 16 S.W.3d 356, 360 (Tenn. 2000)).

In Jenkins v. Jenkins, No. E2014-02234-COA-R3-CV, 2015 WL 5656451, 2015 Tenn.

App. LEXIS 776, (Tenn. Ct. App. Sept. 25, 2015), the Court of Appeals affirmed the trial court's award of $3,500 per month in alimony *in futuro* until Husband's child support obligation ends and $4,500 per month thereafter.

In Longstreth v. Longstreth, the Court of Appeals vacated the trial court's judgment that allowed for automatic increases or decreases of alimony in the event certain economic thresholds were met. No. M2014-02474-COA-R3-CV, 2016 WL 1621094, 2016 Tenn. App. LEXIS 271 (Tenn. Ct. App. Apr. 20, 2016). However, in McBroom v. McBroom, the Court of Appeals determined that Husband's upcoming retirement and ability to draw pension are "circumstances that are expected to occur in the near future," warranting the future automatic modification of alimony *in futuro* to Wife. No. W2016-01276-COA-R3-CV, 2017 WL 2672786 at *4, 2017 Tenn. App. LEXIS 412, at *11 (Tenn. Ct. App. June 21, 2017). The Court ordered $980 per month for three years or until Husband draws down his pension and then, the support is reduced to $720 per month, and alimony *in futuro* ceases when Wife receives social security benefits. Id. Because it was undisputed that Husband would retire and begin drawing pension three years after the final decree, the Court of Appeals found little uncertainty about what will happen with Husband's employment. Id. The Court of Appeals reasoned that allowing the future automatic modification would promote judicial economy and save both parties time and money. Id.

6. When Dealing with Military Retirement.

Since the United States Supreme Court has ruled in Howell v. Howell, that when a veteran elects to waive his military retirement to receive disability pay, it is impermissible for the veteran to reimburse or indemnify his or her ex-spouse for the reduced or eliminated retirement payment. 137 S.Ct. 1400, 1405-06, 197 L.Ed.781 (2017). Therefore, it is suggested that trial courts take into account the reduction in value of military retirement when it calculates the need of spousal support. The Court in Vlach v. Vlach, 556 S.W. 3d 219 (2017) found that Wife was not entitled to a share of Husband's waived retired pay but Wife was entitled to a percentage interest in Husband's disposable retired pay.

E. TRANSITIONAL ALIMONY

1. STATUTORY LANGUAGE

Transitional alimony is discussed in the statute as follows:

(g)(1) Transitional alimony means a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

(2) Transitional alimony shall be nonmodifiable unless:

(A) The parties otherwise agree in an agreement incorporated into the initial decree of divorce or legal separation, or order of protection;

(B) The court otherwise orders in the initial order of divorce, legal separation or order of protection; or

(C) The alimony recipient lives with a third person, in which case a rebuttable presumption is raised that:

(i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or

(ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

(3) Transitional alimony shall terminate upon the death of the recipient. Transitional alimony shall also terminate upon the death of the payor, unless otherwise specifically stated in the decree.

(4) The court may provide, at the time of entry of the order to pay transitional alimony, that the transitional alimony shall terminate upon the occurrence of other conditions, including, but not limited to, the remarriage of the party receiving transitional alimony.

TENN. CODE ANN. § 36-5-121(g) (2019).

2. **Description of Transitional Alimony**

Transitional alimony is paid for a definite duration when a court finds that "rehabilitation is not required but that the economically disadvantaged spouse needs financial assistance in adjusting to the economic consequences of divorce." Gonsewski, 350 S.W.3d at 109; see also Owens v. Owens, 241 S.W.3d 478, 493 n.13 (Tenn. Ct. App. 2007).

The purpose of transitional alimony is to aid the person in transition to the status of a single person. Gonsewski, 350 S.W.3d at 109; Matthews v. Matthews, No. M2009-00413-COA-R3-CV, 2010 WL 1712961, at *9, 2010 Tenn. App. LEXIS 298, at *24 (Tenn. Ct. App. Apr. 28, 2010). "[T]ransitional alimony is designed to aid a spouse who already possesses the capacity for self-sufficiency but needs financial assistance in adjusting to the economic consequences of establishing and maintaining a household without the benefit of the other spouse's income." Gonsewski, 350 S.W.3d at 109. In Matthews, the court of appeals found that "wife needs a substantial amount of transitional alimony so that she can pay off the rest of her debts and stabilize her finances." Matthews, 2010 WL 1712961 at *24. Further, long-term alimony is, generally, not appropriate when the dependent spouse has the ability to be self-sufficient. Finstad v. Finstad, No. E2017-01554-COA-R3-CV, 2018 WL 5115688, at *1, *5, 2018 Tenn. App. LEXIS 612, at *1, 14-15 (Tenn. Ct. App. Oct. 19, 2018) (holding because Wife has the ability to be self-sufficient, the trial court "abused its discretion in awarding wife alimony *in futuro*"); but see Santee, 2018 WL 931107, at *10 (Susano, J., concurring in part and dissenting in part) (stating whether a spouse can be "self-sufficient" is not the legislative standard of whether the spouse can be "economically rehabilitated").

In Hensley v. Hensley, the court affirmed the trial court's award of transitional alimony to wife because, although rehabilitation was not necessary, the wife needed spousal support in order to adjust to the economic consequences of the divorce. No. E2005-02735-COA-R3-CV, 2006 WL 2482970, at *8, 2006 Tenn. App. LEXIS 564, at *21-22 (Tenn. Ct. App. Aug. 29, 2006). In affirming the award, the court noted that wife must now "make significant adjustments to her future plans to adapt to the effects of the divorce." Id. at *19.

In Watson v. Watson, the court found that Wife will have a continued need of support beyond the transitional alimony awarded by the trial court, and therefore awarded Wife alimony *in futuro* upon the termination of transitional alimony. 309 S.W.3d 483 (Tenn. Ct. App. 2009). Similarly, in Henry v Henry, the Court of Appeals affirmed the trial court's award of transitional alimony for 30 months followed by alimony *in futuro.* 2020 WL 919248, 7 (Tenn. Ct. App. Feb. 26, 2020). In Hunt-Carden v. Carden, the court reasoned "that given Husband's superior earning capacity, until Wife can receive her interest in the marital assets, she should remain in the marital residence and Husband should continue to make the mortgage and utility payments on the home as transitional alimony. Once Wife received money from her interest in the marital residence [upon

sale of same], the alimony would end." 2020 WL 1026263, 11 (Tenn. Ct. App. March 3, 2020).

However, in Edwards v. Edwards, the court awarded transitional alimony and alimony *in futuro* simultaneously. No. W2011-02305-COA-R3-CV, 2012 WL 6197079, 2012 Tenn. App. LEXIS 854 (Tenn. Ct. App. 2012). Wife received $250 per month for three years as transitional alimony and $1,028 per month as alimony *in futuro*. Id. at *21. The court noted that part of the alimony *in futuro* award of $278 per month was Wife's portion of Husband's military pension that she could not receive directly from the military. Id. at *33.

In Zarecor v. Zarecor, the Court of Appeals affirmed the trial court's award of $1,000 per month for 3 years and then $650 per month for 4 years. No. W2014-01579-COA-R3-CV, 2015 WL 4126962, 2015 Tenn. App. LEXIS 536 (Tenn. Ct. App. July 9, 2015). Wife's age of 51 years, the 10-year marriage and the discrepancy in earnings (Wife made $19,000 per year and Husband earned $90,000 per year), made the award of transitional alimony appropriate. Id. at *4.

"Long term alimony in the form of alimony *in futuro* is to be awarded when rehabilitation is *not feasible* as compared to an award of transitional alimony where rehabilitation *is not necessary*." Green v. Green, No. M2008-0279-COA-R3-CV, 2010 WL 891897, *6, 2010 Tenn. App. LEXIS 197, at *13 (Tenn. Ct. App. Mar. 12, 2010); see also Singla, 2018 WL 6192232, at *22 (citing Bratton, 136 S.W.3d at 605). In Green, Ms. Green was awarded transitional alimony because she worked throughout the marriage and there was no evidence presented that Wife needed or desired further training or education. Id. at *6. Because Husband was obligated to pay a substantial portion of the marital debts, and the parties lived beyond their means, the amount of transitional alimony and length of transitional alimony was appropriate. Id. at *14. In Slocum v. Slocum, the Court of Appeals modified an alimony award from rehabilitative to transitional alimony. No. M2016-01881-COA-R3-CV, 2017 WL 4804553 at *9, 2017 Tenn. App. LEXIS 705, at *25-26 (Tenn. Ct. App. Oct. 24, 2017). Because Wife was well educated, trained and going back to school in order to get recertified as a teacher would take two years and it was not a viable option with children at home, the Court reasoned that awarding her spousal support to "allow time for [Wife] to get on her feet" would be appropriate. Id. The alimony award was $1,264 per month until May 31, 2025, and thus, characteristics of an award of transitional alimony. Id.

Similarly, in Chavez v. Chavez, the court found that Husband made over 4 times the income of Wife and Wife gave up her good job in Atlanta, moved to Memphis, and put Husband's career first; and thus, Wife was awarded transitional alimony and alimony *in solido*. No. M2010-

02123-COA-R3-CV, 2012 WL 1836888, 2012 Tenn. App. LEXIS 8 (Tenn. Ct. App. Jan. 5, 2012).

In Gonsewski, the trial court's denial of transitional alimony was affirmed as the Supreme Court found that "Wife has not demonstrated that she is in need of additional financial assistance in order to adjust to the economic consequences of divorce." 350 S.W.3d at 115. In so holding, the Court noted that Wife had a stable work history, she was young, in good health and educated, she had received $1,200 *pendente lite* alimony for sixteen months, and that Husband was ordered to pay one-half of the mortgage, insurance, and taxes for ninety days following the divorce. Id. The Court also noted that Wife had failed to specifically ask for transitional alimony. Id.

The Tennessee Supreme Court in Mayfield v. Mayfield, held that the trial court properly denied Husband's request for transitional alimony. 395 S.W.3d 108 (Tenn. 2012). Husband failed to prove that he needed support as there was no evidence regarding Husband's expenses. Id. at 120. The evidence showed that Husband was unsupportive of Wife's career as a pharmacist, was underemployed as a farmer, physically and verbally abusive towards Wife, and that Husband could maintain the same standard of living after the divorce that the parties enjoyed during the marriage. Id. at 111-14. The Court further stated that "[i]t would be patently unjust to force Wife to continue supporting the person who repeatedly beat her to the point that she feared for her life and fled her own home with her children and only the clothes they were wearing." Id. at 118.

Where the parties have exactly the same relative education and training and both show recent full-time employment, the court will likely affirm the denial of alimony to Husband. In Rogin v. Rogin, Husband had a good ivy league education, high earning potential and while separated, received alimony *pendente lite* to ease his transition from the marital home, as well as a larger portion of the marital property. No. W2012-01983-COA-R3-CV, 2013 WL 3486955, at *23, 2013 Tenn. App. LEXIS 448, at *72 (Tenn. Ct. App. July 10, 2013).

Comment and practical note:

Transitional alimony is designed to help the party adjust to the economic consequences of the divorce. In contrast, rehabilitative alimony is designed to increase an economically disadvantaged spouse's *capacity* for self-sufficiency. Kelly v. Kelly, No. E2012-02219-COA-R3-CV, 2013 WL 4007832, 2013 Tenn. App. LEXIS 514 (Tenn. Ct. App. Aug. 6, 2013), *rev'd*

on other grounds, 445 S.W.3d 685 (Tenn. 2014). Based on their differing purposes and statutory language that states "transitional alimony is awarded when the court finds rehabilitation is not necessary," see Tenn. Code Ann. §36-5-121(g)(1)(emphasis added), a court should not award both transitional alimony and rehabilitative alimony. See Diffe v. Diffe, No. M2018-00267-COA-R3-CV, 2019 WL 1785683, 2019 Tenn. App. LEXIS 191 (Tenn. Ct. App. Apr. 23, 2019)(referencing T.C.A. §36-5-121(g)(1) in stating "Wife may not receive both transitional alimony and rehabilitative alimony"). In Wright v. Wright, the Court of Appeals made clear that, "[T]he trial court's award of *both* rehabilitative and transitional alimony in this case was error." 2020 WL, 1079266, 22 (Tenn. Ct. App. March 6, 2020) (emphasis added). In so holding, the Court of Appeals quoted the Tennessee Supreme Court and reiterated that,

> In contrast to rehabilitative alimony, which is designed to increase an economically disadvantaged spouse's capacity for self-sufficiency, transitional alimony is designed to aid a spouse who already possesses the capacity for self-sufficiency, transitional alimony is designed to aid a spouse who already possesses the capacity for self-sufficiency but needs financial assistance in adjusting to the economic consequences of establishing and maintaining a household without the benefit of the other spouse's income. As such, transitional alimony is a form of short-term support.

Wright, 1079266 at 19. (quoting Gonsewski, 350 S.W.3d at 108).

A transitional alimony award allows the payor to be reassured that the alimony payments will last for a certain period, unless the court makes the award modifiable at the time of the divorce.

Two possible scenarios when transitional alimony is appropriate are the following:

(1) Where the marriage is of short duration and neither party suffered a detriment to their earning capacity during the marriage and neither party needs to be rehabilitated; however, when one spouse has taken off time from his or her career to care for a child, the court may award transitional alimony to "bridge the gap" from the time of the divorce to a certain time in the future.

(2) Where the marriage is of short duration and one spouse has given up certain assets or benefits in reliance on the continuation of the marriage, the court may award transitional alimony to assist that spouse to

adjust to the economic consequences of a divorce.

Where the parties were married for 3 years, the court awarded both alimony *in solido* and transitional alimony to compensate wife for the value of the assets she brought into the marriage (which Husband lost) and the balance of the loan made to her Husband and to adjust to the economic consequences of a divorce. Bird v. Bird, No. E2008-00269-COA-R3-CV, 2009 WL 2633030, 2009 Tenn. App. LEXIS 577 (Tenn. Ct. App. Aug. 27, 2009).

Practical Note: In Gonsewski v. Gonsewski, the Supreme Court noted that it "may be prudent for parties, to set forth in their pleadings exactly the types of alimony sought." 350 S.W.3d at 114 n. 11. In Gonsewski, Wife was appealing the trial court's denial of transitional alimony. The Supreme Court noted that Wife had not prayed for transitional alimony. Id.

F. ALIMONY *IN SOLIDO*

1. STATUTORY LANGUAGE

Alimony *in solido* is discussed in the statute as follows:

> (h)(1) Alimony *in solido*, also known as lump sum alimony, is a form of long term support, the total amount of which is calculable on the date the decree is entered, but which is not designated as transitional alimony. Alimony *in solido* may be paid in installments; provided, that the payments are ordered over a definite period of time and the sum of the alimony to be paid is ascertainable when awarded. The purpose of this form of alimony is to provide financial support to a spouse. In addition, alimony *in solido* may include attorney fees, where appropriate.
>
> (2) A final award of alimony *in solido* is not modifiable, except by agreement of the parties only.
>
> (3) Alimony *in solido* is not terminable upon the death or remarriage of the recipient or the payor.

TENN. CODE ANN. § 36-5-121(h) (2019).

2. DESCRIPTION OF ALIMONY *IN SOLIDO*

Alimony *in solido* is also a form of long-term support that is set on the date of divorce and is either paid in a lump sum payment of cash or property, or paid in installments for a definite term. Gonsewski, 350 S.W.3d at 108 (citing T.C.A. § 36-5-121(h)(1); Broadbent v.

Broadbent, 211 S.W.3d at 222). "Where possible, awards of alimony *in solido* are preferred to awards *in futuro*." Houghland v. Houghland, 844 S.W. 2d 619 (Tenn. Ct. App. 1992).

While alimony *in solido* may be used in some cases to adjust the division of the parties' marital property, the court in Clayton awarded alimony *in solido* based upon the demonstrated need of the wife and to supplement her retirement income. Clayton v. Clayton, No. E2000-014130-COA-R3-CV, 2001 WL 579048, 2001 Tenn. App. LEXIS 399; see also Burlew v. Burlew, 40 S.W.3d 465, 471 (Tenn. 2001).

In Barton v. Barton, the trial court ordered Husband to pay to Wife $8 million as alimony *in solido* over 10 years with installments and a lien placed against various parcels of real property owned by the LLCs to secure the payment of alimony *in solido*. 2020 WL 6580562, 3 (Tenn. Ct. App. Nov. 10, 2020). While Husband had a 100 percent ownership interest in the LLC, the LLCs that owned these parcels of real estate. Furthermore, as the LLCs were not parties to the case, "the court did not have jurisdiction over these entities and their assets. . . [therefore] the real property owned by the LLCs could not be subjected to a lien to guarantee payment of Husband's alimony obligation . . . ." Id.

Alimony *in solido* can be awarded to compensate a spouse for the decrease in the value of her separate property during the marriage when the other spouse's actions of investing the separate property in the stock market reduced the separate property to virtually nothing. Broadbent v. Broadbent, 211 S.W.3d 216, 217-18 (Tenn. 2006).

Especially in a marriage of short duration, trial courts attempt to place the parties as nearly as possible in the financial positions they occupied before the marriage took place. See Batson v. Batson, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). For example, the court in Broadbent said, "[g]iven the extremely short duration of the marriage in this case, the primary goal should be to place the parties in approximately the same position they were in before the marriage." Broadbent, 211 S.W.3d at 222. The trial court correctly attempted to restore the parties to their pre-marriage financial condition. "It is clear that the alimony awarded by the trial court was to compensate Ms. Langhi for the decrease in the value of her separate property during the marriage." Id.

The trial court may consider the relative fault of a spouse and "such other factors . . . as are necessary to consider the equities between the parties" in making a spousal support award.

TENN. CODE ANN. § 36-5-101(i)(11)(12) (2019). The Broadbent Court found that the:

> weight of the evidence shows that Mr. Broadbent is more responsible for the end of the parties' marriage than Ms. Langhi. The trial court awarded the divorce to Ms. Langhi and found that Mr. Broadbent's 'obsession with the stock market ruined [Ms. Langhi's] savings and left her with virtually nothing.' The trial court clearly considered Mr. Broadbent's relative fault when calculating the alimony award. We conclude that it was proper for the trial court to consider Mr. Broadbent's participation in the loss of Ms. Langhi's separate assets in awarding alimony. Moreover, the trial court's allocation of responsibility for this loss, although expressed in percentages of "comparative fault" rather than relative fault, was not error. Accordingly, we hold that the trial court did not abuse its discretion in awarding $51,500 in alimony *in solido* to Ms. Langhi.

Id. at 222-23.

When there are only debts to divide, the court may award alimony *in solido* to a spouse to allocate the debt in an equitable manner. Yattoni-Prestwood v. Prestwood, 387 S.W.3d 583, 592 (Tenn. Ct. App. 2012).

In another case where the parties were married for three (3) years, the court awarded both alimony *in solido* and transitional alimony to compensate wife for the value of the assets she brought into the marriage (which Husband lost) and the balance of the loan made to her Husband and to adjust to the economic consequences of a divorce. Bird v. Bird, No. E2008-00269-COA-R3-CV, 2009 WL 2633030, 2009 Tenn. App. LEXIS 577 (Tenn. Ct. App. Aug. 27, 2009).

If the economically disadvantaged spouse proves entitled to such an award, a court may award a spouse both alimony *in futuro* and alimony *in solido*. See, Williams v. Williams, No. W2018-00800-COA-R3-CV, 2019 WL 1375218, at *5, 2019 Tenn. App. LEXIS 148, at *17 (Tenn. Ct. App. Mar. 26, 2019)(stating wife's alimony *in futuro* award will only cover her living expenses and that she "lacks sufficient funds to pay her legal expenses absent depletion of her limited resources").

3. ALIMONY *IN SOLIDO* MAY BE AWARDED OUT OF PRESENT AND/OR FUTURE ESTATE

Alimony *in solido* has generally been considered payable out of the present estate of the obligor spouse. Aleshire v. Aleshire, 642 S.W.2d 729, 733 (Tenn. Ct. App. 1981). For instance, in the case of Denton v. Denton, the Court awarded Wife twenty-five percent (25%) of Husband's fifty percent (50%) interest in the residence when the home sold as alimony *in solido*. 902 S.W.2d 930, 931 (Tenn. Ct. App. 1995). Wife was allowed to live in the house until the child reached the

age of eighteen (18) years. Id. The house would then be sold, with seventy-five percent (75%) of the proceeds payable to Wife and twenty-five percent (25%) of the proceeds payable to Husband. Id.

In Stratienko v. Stratienko, the trial court reasoned that an award of alimony *in solido* was necessary to prevent Husband from voluntarily reducing his income in order to thwart Wife's ability to collect spousal support. 529 S.W.3d 389, 407 (Tenn. Ct. App. Mar. 31, 2017); see, e.g., Coke v. Coke, No. 02A01-9210-CV-00279, 1993 WL 477016, at *4, 1993 Tenn. App. LEXIS 704, at *10 (Tenn. Ct. App. Nov. 15, 1993) (affirming an award of alimony *in solido* when the court determined that the divorce had not been "amicable," that the husband was "uncooperative and [held] little respect for the judicial system," and that the course of the litigation demonstrated that the husband did not intend to pay alimony). During the divorce proceeding, Husband not only significantly removed Wife's access to marital funds, he repeatedly deducted amounts from her temporary alimony payments, which behavior the court deemed contemptuous. Stratienko, 529 S.W.3d at 407. Based on these findings, the Court of Appeals held that the trial court did not abuse its discretion in rendering an award of alimony *in solido*. Id.

Courts in Tennessee have classified trusts and business interests as an estate out of which an award of alimony *in solido* is proper. In Houghland v. Houghland, the court said that husband's yearly net income of $18,000.00 from a trust established by his father was an estate for purposes of awarding alimony *in solido*. 844 S.W.2d 619 (Tenn. Ct. App. 1992). Similarly, in Hall v. Hall, the court affirmed an award of alimony *in solido* from husband's profit sharing interest in a business, because his "anticipated share of profits in future years constituted an anticipated estate out of which alimony *in solido* and/or alimony *in futuro* might properly be ordered." 772 S.W.2d 432, 438 (Tenn. Ct. App. 1989).

In the case of Tippens-Florea v. Florea, the Court while citing Andrews v. Andrews, 344 S.W.3d 321, 344-45 (Tenn. Ct. App. 2010), and Tenn. Code Ann. § 36-5-121(i), held that alimony *in solido* can be awarded out of future earnings of a spouse, and the requirement that alimony *in solido* can only be awarded out of the obligor spouse's portion of the marital estate is no longer good law. No. M2011-00408-COA-R3-CV, 2012 WL 1965593, 2012 Tenn. App. LEXIS 361 (Tenn. Ct. App. May 31, 2012).

CAREFUL: The Supreme Court has not yet taken a definitive position on whether alimony *in solido* can be awarded out of future earnings of a spouse.

4. EXAMPLES WHEN ALIMONY *IN SOLIDO* IS AWARDED OUT OF FUTURE EARNINGS

An example of a situation where alimony *in solido* can be awarded from future earnings is a situation where a spouse intentionally disposes of his or her assets or the marital estate to deprive the other spouse of alimony *in solido*. Such was the case in Robinson v. Robinson, No. W2003-01836-COA-R3-CV, 2005 WL 1105188, 2005 Tenn. App. LEXIS 277 (Tenn. Ct. App. May 9, 2005). There, the court clarified the Aleshire baseline rule but added that "in circumstances such as this, where a spouse dissipated marital assets by failing to preserve them, the award is calculated based on what the marital estate would have been absent the dissipation" and the court can therefore order the alimony *in solido* to be paid out of future earnings. Id. at *54-55. Another example is the situation where it is shown that a spouse entered into the marriage solely to have his or her spouse work and provide him or her with an education. Aleshire, 642 S.W.2d at 733.

The court in a later case awarded wife alimony *in solido* out of future earnings when wife went into debt to rehabilitate herself. See Day v. Day, 931 S.W.2d 936, 939 (Tenn. Ct. App. 1996). The court reasoned that Mrs. Day should be reimbursed for the debts she incurred to educate herself in order to provide for her own support; had she not have done so before the hearing, Mrs. Day would have been entitled to rehabilitative alimony. Id.

5. ATTORNEY'S FEES ARE AWARDED AS ALIMONY *IN SOLIDO*

In a divorce case, attorney fee awards are treated as alimony *in solido*. Owens v. Owens, 241 S.W.3d 478, 496 (Tenn. Ct. App. 2007); Herrera v. Herrera, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996); see also Kinard v. Kinard, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998). "Such awards are appropriate when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses . . . or the spouse would be required to deplete his or her resources in order to pay his or her legal expenses." Gonsewski, 350 S.W.3d at 113 (citing Houghland v. Houghland, 844 S.W.2d 619, 623 (Tenn. Ct. App. 1992); Harwell v. Harwell, 612 S.W.2d 182, 185 (Tenn. Ct. App. 1980)). "Attorney fees are usually due and payable upon the completion of a case, so it is appropriate to award such fees where the obligee spouse does not have a sufficient amount of liquid assets to pay the attorney." Matthews v. Matthews, No. M2009-00413-COA-R3-CV, 2010 WL 1712961, at *25, 2010 Tenn. App. LEXIS 298, at *25(Tenn. Ct. App. Apr. 28,

2010)(citing Umstot v. Umstot, 968 S.W. 2d 819, 824 (Tenn. Ct. App. 1997); Duncan v. Duncan, 686 S.W.2d 568, 573 (Tenn. Ct. App. 1984) In Dalili v. Dalili, the Court of Appeals held that the failure to include a request for attorney's fees in the sections of the briefs containing the issues presented for review, constitutes a waiver of the issue on appeal. 2020 WL 6285526, 4 (Tenn. Ct. App. Feb. 10, 2020).

The parties may be entitled to an additional award for their legal expenses if they demonstrate that they lack sufficient funds to pay their legal expenses or that they would be required to deplete other needed assets to do so. Brown v. Brown, 913 S.W.2d 163, 170 (Tenn. Ct. App. 1994). The obligor's ability to pay is a factor in determining whether to award attorney fees. See Jirjis v. Jirjis, No. M2013-00512-COA-R3-CV, 2014 WL 1778258, 2014 Tenn. App. LEXIS 260, at *27 (Tenn. Ct. App. Apr. 30, 2014).

Statutory Authorities.

TENN. CODE ANN. § 36-5-121:

> (b) The court may, in its discretion, at any time pending the final hearing, upon motion and after notice and hearing, make any order that may be proper to compel a spouse to pay any sums necessary for the support and maintenance of the other spouse, to enable such spouse to prosecute or defend the suit of the parties and to make other orders as it deems appropriate.

TENN. CODE ANN. § 36-5-121(b) (2019).

Effective July 1, 2018 legislature also amended T.C.A. § 36-5-103 to read:

> (c) A *prevailing party* may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, *from the non-prevailing party* in any criminal or civil contempt action or other *proceeding to enforce, alter, change, or modify any decree of alimony*, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.
>
> TENN. CODE ANN. § 36-5-103(c) (2019) (emphasis added).

a. Analysis in determining whether to award attorney fees.

In determining whether to award attorney's fees, the trial court should consider the relevant factors in T.C.A. § 36-5-121(i)(1-12). Houghland v. Houghland, 844 S.W.2d 619 (Tenn. Ct. App. 1992). Where the wife demonstrates that she is financially unable to afford counsel, and where the husband has the ability to pay, the court may properly order the husband to pay the wife's attorney's fees. Harwell v. Harwell, 612 S.W.2d 182, 185 (Tenn. Ct. App.

1988). Trial courts are inclined to award attorney fees as alimony *in solido* if the economically disadvantaged spouse would be forced to deplete assets to pay the fees. Owens v. Owens, 241 S.W.3d 478, 496 (Tenn. Ct. App. 2007). Accordingly, "a party need not be required to pay legal expenses out of funds and assets awarded by the trial court and intended to provide future support and income." Id. The Owens court relied on this rationale to award wife attorney's fees even though she was already receiving rehabilitative alimony.

A party's decision to engage in litigation tactics calculated to produce delay and increase costs is a factor to be considered in connection with an award of attorney fees. In Gonsewski, the Supreme Court affirmed the trial court's denial of attorney fees, in part, based upon the parties' unnecessary contentiousness in the divorce case which included harassing behavior, litigating over a ski trip, emails from a home computer, husband's access to his hunting equipment, whether certain pleadings should be stricken, the disqualification of Wife's attorney, and a dispute over who should pay a $17.29 lawn service bill. Gonsewski, 350 S.W.3d at 113-14; see also Singla, 2018 WL 6192232, at *19, *25 (stating by Husband "materially misleading and [providing] incomplete statements in response to interrogatories, and fail[ing] to produce documents" attorney's fees were awarded to Wife); Kanski v. Kanski, No. M2017-01913-COA-R3-CV, 2018 WL 5435402, at *11, 2018 Tenn. App. LEXIS 630, at *30 (Tenn. Ct. App. Sept. 5, 2018) (affirming the grant of attorney's fees to Wife after Husband "intentionally prolong[ed] litigation"); Beyer v. Beyer, 428 S.W.3d 59, 85 (Tenn. Ct. App. 2013) (affirming the trial court's ruling that $81,000 paid to an attorney was dissipation of the marital estate when Father was unable to refute Mother's position that these funds were used to develop a civil suit against mother for parental alienation syndrome and affirming trial court's finding that Father's actions caused him to incur an unnecessary and excessive amount of attorney's fees that he paid with marital funds); Smarsh v. Smarsh, No. E2011-01767-COA-R3-CV, 2012 WL 1390663, 2012 Tenn. App. LEXIS 260, * 20 (Tenn. Ct. App. Apr. 23, 2012) (affirming the trial court's award of $10,000 towards Wife's attorney fees because Husband failed to provide discovery in a timely manner and Husband's obvious desire to avoid paying alimony necessitated the trial); May v. May, No. E2010-01026-COA-R3-CV, 2011 WL 5925076, 2011 Tenn. App. LEXIS 635, at *42 (Tenn. Ct. App. Nov. 29, 2011) (affirming trial court's award of attorney's fees finding Wife has inability to pay, would be required to deplete assets, and that Wife was required to incur such fees based upon Husband's "harassing and contemptuous conduct"); Fox v. Fox, No. M2009-02341-

COA-R3-CV, 2011 WL 1087865, 2011 Tenn. App. LEXIS 145, at *17 (Tenn. Ct. App. Mar. 24, 2011) (affirming denial of attorney's fees to Wife due to Wife's delay of litigation), Hallums v. Hallums, No. M2016-00396-COA-R3-CV, 2017 WL 2684605, 2017 Tenn. App. LEXIS 419 (Tenn. Ct. App. June 21, 2017) (affirming award of attorney's fees for Husband's failed attempt to mislead the court at trial and for perjured testimony at his deposition). In Abner v. Abner, the trial court erred in awarding attorney's fees to husband for Wife's conduct, as "[t]he Trial Court did not have a legal basis upon which to award attorneys fees in this matter as they were neither alimony nor appropriate sanctions under Rule 11, [so] we reverse the Trial Court's award of attorney's fees to Husband." Id. 2020 WL 5587411, 11 (Tenn. Ct. App. Sept. 18, 2020).

These awards are within the sound discretion of the court, and unless the evidence preponderates against the award, it will not be disturbed on appeal. Broadbent, 211 S.W.3d at 220; Lyon v. Lyon, 765 S.W.2d 759, 762-63 (Tenn. Ct. App. 1988).

b. The correct legal standard in setting an amount of attorney fees.

"The Tennessee Supreme Court has directed that trial courts are to consider the guidelines as delineated in Conners v. Conners, 594 S.W.2d 672 (Tenn. 1980), and the factors listed in Supreme Court Rule 8, RPC 1.5." Keith v. Howerton, 165 S.W.3d 248, 251 (Tenn. Ct. App. 2004). The reasonableness of an attorney's fees will depend upon the particular circumstances of the individual case as considered in light of the relevant guidelines. Stockman v. Stockman, No. M2009-00992-COA-R3-CV, 2010 WL 623724, 2010 Tenn. App. LEXIS 131, at *28. (Tenn. Ct. App. Feb. 22, 2010).

G. PENDENTE LITE SUPPORT

1. STATUTORY LANGUAGE

TENN. CODE ANN. § 36-5-121(b):

> The court may, in its discretion, at any time pending the final hearing, upon motion and after notice and hearing, make any order that may be proper to compel a spouse to pay any sums necessary for the support and maintenance of the other spouse, to enable such spouse to prosecute or defend the suit of the parties and to make other orders as it deems appropriate. Further, the court may award such sum as may be necessary to enable a spouse to pay the expenses for job training and education. In making any order under this subsection (b), the court shall consider the financial needs of each spouse and the children, and the financial ability of each spouse to meet those needs and to prosecute or defend the suit.

TENN. CODE ANN. § 36-5-121(b) (2019).

2. EXAMPLES OF PENDENTE LITE SUPPORT AWARDS

Pendente Lite Support is the payment of expenses for the support and maintenance of a spouse pending the final decree of divorce. Expenses may include but are not limited to "funds being used for car payments, insurance premiums, and other expenses related to [the support of wife]." Demontbreun v. Demontbreun, No. 01A01-9703-GS-00129, 1997 WL764530, at *5, 1997 Tenn. App. LEXIS 892, at *13 (Tenn. Ct. App. Dec. 12, 1997).

In the case of McGregor v. McGregor, the court found that even though wife took monies out of the bank account before the divorce was filed, those monies went to pay on marital debt for a child's field trip, and to establish a new residence for wife and child, and thus, the monies were considered alimony *pendente lite* support and not marital property to divide. No. E1999-00877-COA-R3-CV, 2000 WL 1424928, at *7, 2000 Tenn. App. LEXIS 645, *20-21 (Tenn. Ct. App. Sept. 26, 2000).

Temporary alimony in a divorce action "is an incident of such suit . . . and does not exist apart from the action." 27B C.J.S. § Divorce 315 (1986). Thus, "alimony *pendente lite* support cannot be granted after the principal action is dismissed." Vermillion v. Vermillion, No. 03A01-9206CV211, 1992 WL 311001, 1992 Tenn. App. LEXIS 888 (Tenn. Ct. App. Oct. 28, 1992). The court vacated the trial court's award of alimony *pendente lite* since the trial court had already dismissed the complaint for divorce. See id. at *1.

If a case is on appeal, however, the courts have awarded temporary support during the pendency of an appeal. In the case of Wade v. Wade, the court pursuant to Tenn. R. Civ. P. 62.03 "has discretion to grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal." 897 S.W.2d 702, 719 (1994). Mrs. Wade was granted temporary alimony *pendente lite* necessary for her support because the appeal effectively stayed the division of the property and because Mr. Wade earned quite a bit more than Wife who was technically below the poverty line. See id.

In Brock v. Brock, the court found that payments of $176,000.00 voluntarily made by husband to wife during the pendency of the divorce to defray wife's living expenses were temporary *pendente lite* support payments and should not be considered as part of the division of property. 941 S.W.2d 896, 903 (Tenn. Ct. App. 1996). Likewise, in the case of Scarbrough v. Scarbrough, the court ruled that "*pendente lite* awards are not deducted from permanent

alimony awards." No. W1998-00167-COA-R3-CV, 1997 WL 1567097, at *5, 1999 Tenn. App. LEXIS 860, at *14 (Tenn. Ct. App. Dec. 14, 1999). However, in Finstad, the appellate court directed the trial court to ascertain, for how many months, Husband has been paying Wife alimony in any form, and then deduct that number from the ordered months of 60 months and Husband will pay his spousal support for the remaining months. 2018 WL 5115688, at *8, 2018 Tenn. App. LEXIS 612, at *1, *14-15.

"A party cannot be 'in arrears' of payment of temporary alimony (also known as alimony *pendente lite*) when no order awarding temporary alimony has been entered." Jones v. Jones, No. M2004-02687-COA-R3CV, 2006 WL 568260, at *16-17, 2006 Tenn. App. LEXIS 165 (Tenn. Ct. App. Mar. 8, 2006). In Jones, the court found that the arrearage amount was appropriately awarded after considering all of the factors; however, the award is classified as a lump sum spousal award or alimony *in solido*. Id. at *17.

3. AN INTERIM ORDER ADJUDICATES AN ISSUE PRELIMINARILY.

In In re Estate of George H. Steil, II, the Court found that an interim temporary support obligation does not survive the final order unless it is incorporated into the final order. No. M2011-00701-COA-R3-CV,2012 WL 1794979, 2012 Tenn. App. LEXIS 315, at *21-22 (Tenn. Ct. App., May 16, 2012). Wife's temporary support award of $500 per month for three years did not survive the Final Decree of Divorce. Id. Husband and Wife signed a Marital Dissolution Agreement where Husband agreed to pay $500 per month until Wife's remarriage. Id. The Court found Husband's alimony obligation under the final order was alimony *in futuro*, which terminates upon Husband's death. Id.

4. TEMPORARY ALIMONY WHILE APPEAL IS PENDING

The Court of Appeals affirmed the award of temporary support to Wife while Husband's appeal was pending because the trial court granted a stay on the judgment and wife did not have the liquid funds to provide for her needs and maintain the property awarded to her. St. John-Parker v. Parker, No. E2014-01338-COA-R3-CV, 2016 WL 2936834, 2016 Tenn. App. LEXIS 335 (Tenn. Ct. App. May 17, 2016).

H. DIVORCE DECREE DICTATES

"If a divorce decree does not award alimony, alimony may not be awarded later, unless a later right to alimony is afforded by statute." Sellers v. Sellers, 221 S.W.3d 43, 47 (Tenn. Ct.

App. 2006) (citing Davenport v. Davenport, 160 S.W.2d 406 (Tenn. 1942)). The decree failed to award Wife alimony; yet, it awarded her a portion of Husband's retirement benefits from the United States military. Id. After the divorce, Mr. Sellers's military payments reduced, as he became disabled and his disability payments increased. Ms. Sellers's retirement payments went from $900 to $90 per month. "Husband's disability payments [from the Department of Defense] were not available to Wife because federal law prohibits the division of disability benefits as marital property in a divorce proceeding." Sellers, 221 S.W.3d at 45 (citing Mansell v. Mansell, 490 U.S. 581 (1989)).

I. RESERVE JURISDICTION TO SET ALIMONY

The court may reserve jurisdiction to set alimony, but it should be done sparingly and only in unique factual situations. Vinson v. Vinson, No. W2012-01378-COA-R3-CV, 2013 WL 4856777, 2013 Tenn. App. LEXIS 593, at *39-40 (Tenn. Ct. App. Sept. 11, 2013) (trial court reserved an alimony award because it could not conclusively determine whether Husband would convert his bankruptcy filing and possibly avert paying the court ordered debt); Walton v. Walton, No. W2004-02474-COA-R3-CV, 2005 WL 1922565, 2005 Tenn. App. LEXIS 470, at *16 n.2 (Tenn. Ct. App. Aug. 10, 2005) (where the court reserved jurisdiction to evaluate and review an award of alimony after 18 months while the wife sought disability benefits); Perry v. Perry, No. W2001-01350-COA-R3-CV, 2002 WL 1751407, 2002 Tenn. App. LEXIS 219, at *6 (Tenn. Ct. App. May 21, 2002) (Farmer, J., concurring in part and dissenting in part); Lawson v. Lawson, No. 03A01-9709-CH-00406, 1998 WL 252757, 1998 Tenn. App. LEXIS 339, at *3 (Tenn. Ct. App. May 20, 1998) (the court reserved alimony for a future determination in the event that the wife's employment with the husband's family's business was terminated without cause after the divorce); Robinette v. Robinette, 726 S.W.2d 524, 525 (Tenn. Ct. App. 1986) (the trial court correctly reserved judgment on the issue of alimony in light of wife's health condition which was likely to deteriorate).

The general rule is that "where a decree of divorce is final and the decree does not award alimony, the spouse may not be awarded alimony at any subsequent time." Robinette, 726 S.W.2d 524 at 525 (citing Davenport v. Davenport, 178 Tenn. 517, 160 S.W.2d 406 (1942)). "However, [t]he general rule and near universal exception to this rule is that alimony may be awarded after a decree of absolute divorce has become final where the right is afforded by statute

or reserved in the divorce decree." Id. at *4 (citing 27A C.J.S. *Divorce* § 231b; 24 Am. Jur. 2d *Divorce and Separation* § 689(1983)).

J. ALIMONY FACTORS USED IN CONSERVATORSHIP PROCEEDING

Alimony factors are not only used in divorce cases. In In re King, the Court of Appeals affirmed the trial court's award of $9,010 per month in spousal support for the wife of the ward in connection with a conservatorship proceeding pursuant to T.C.A. § 34-3-109 which authorizes a court to "establish the amount of financial support to which the spouse . . . [is] entitled No. M2014-01207- COA-R3-CV, 2015 WL 474610, at *1-2, 2015 Tenn. App. LEXIS 638, at *1 (Tenn. Ct. App. Aug. 6, 2015). The ward's son and stepson from a previous marriage initiated the conservatorship proceeding. Id. at *2-3. The ward's wife opposed the petition, but a conservator of the person and of the estate were appointed. Id. at *3-4. The Master adjudicated the conservatorship proceeding, determined the amount of support the ward's wife was to receive by relying on the alimony factors, and denied wife attorney's fees. Id. at *4-9. The Chancellor adopted the Master's report. Id. at *9. On appeal, after noting that T.C.A. § 34-3-109 does not identify factors that a court must consider in determining the amount and type of support the spouse was to receive, the court turned to the alimony factors located in "the area of law where spousal support, in one form or another, has been a part of our legal system for centuries." Id. at *17 (citing Gonsewski v. Gonsewski, 350 S.W.3d 99, 106 (Tenn. 2011)). The court noted that the alimony factors "should be considered" even though the ward and his wife's marriage remain intact and that "there is no expectation that it will be dissolved by any court." Id. at *22.

II. MODIFICATION OR TERMINATION OF ALIMONY

A. WHICH ALIMONY AWARDS CAN BE MODIFIED/TERMINATED AND WHEN CAN THE AWARDS BE MODIFIED/TERMINATED?

As described below, modification of alimony depends first on the form of alimony awarded, and then on the specific facts applicable to each case. Three of the four forms of alimony may be modified under certain circumstances: alimony *in futuro*, rehabilitative alimony and transitional alimony. One form cannot be modified under any circumstances, except by the agreement of the parties: alimony *in solido*. Tenn. Code Ann. § 36-5-121(h)(2).

The standard for review on appeal is the same in all cases involving modification of alimony awards. Knowing the standard of review on appeal at the outset is worthwhile because it provides the context in which alimony awards may in fact be modified. That standard is well-described in Lane v. Lane, 2009 Tenn. App. Lexis 769 (Tenn. Ct. App. 2009):

> Modification of a spousal support award is factually driven. Perry v. Perry, 114 S.W.3d 465, 466 (Tenn. 2003) (citing Watters v. Watters, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). Thus, a trial court's decision concerning modification is "given wide latitude within the trial court's range of discretion." Id. at 466-67 (citing Watters, 22 S.W.3d at 821).
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> "The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives." Bronson v. Umphries, 138 S.W.3d 844, 851(Tenn. Ct. App. 2003) (citing State ex rel. Vaughn v. Kaatrude, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000)). "[W]e will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or if it is contrary to the governing law[.]" Id. However, "we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative." Id.
>
> We accord great deference to a trial court's determinations on matters of witness credibility and will not re-evaluate such determinations absent clear and convincing evidence to the contrary. Wells v. Tenn. Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted). We review a trial court's conclusions of law under a de novo standard upon the record with no presumption of correctness. Union Carbide Corp. v. Huddleston, 854 S.W.2d

> 87, 91 (Tenn. 1993) (citing Estate of Adkins v. White Consol. Indus., Inc., 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

These standards have been recently succinctly explained as follows:

> [W]e review the trial court's determination in accordance with Rule 13(d) of the Tennessee Rules of Appellate Procedure, presuming the trial court's findings of fact to be correct unless the evidence preponderates otherwise. Id. We give substantial deference to the trial court's determination, particularly when it is based on its assessment of witness credibility. Id.

Flynn v. Flynn, 2012 Tenn. App. LEXIS 55 (Tenn. Ct. App. 2012) (involving a voluntary underemployment claim) (citing Richardson v. Spanos, 189 S.W.3d 720 (Tenn. App. 2005)).

Equally significant is that appellate courts have applied the Gonsewski standards for reviewing a trial court's original alimony awards to the review of orders regarding modifications of alimony. See Gonsewski v. Gonsewski, 350 S.W.3d 99 (Tenn. 2011); See, e.g., the concurring opinion by Judge Frank Clement in Gorman v. Gorman, in which Judge Clement neatly summarizes the court's application of Gonsewski to the case of Jekot v. Jekot, 2011 Tenn. App. LEXIS 581 (Tenn. Ct. App. 2011):

> We began our analysis, as Gonsewski directs, with the presumption that the trial court's decision to reduce alimony was the correct decision. Jekot, 2011 Tenn. App. LEXIS 581 at *3 (citing Gonsewski v. Gonsewski, 350 S.W.3d 99 (Tenn. 2011)). Then we examined the factual basis of the wife's contention that the trial court erred in determining that a substantial and material change had occurred, which warranted a change in alimony.
>
> Upon review of the Jekot record it became apparent that the trial court had erroneously focused its attention on one source of the husband's income, the income from his medical practice as an orthopedic surgeon, which had decreased, and that the facts preponderated against the trial court's finding that the husband's income from all sources had declined. See Jekot, 2011 Tenn App. LEXIS at *6 (citing Richardson v. Spanos, 189 S.W. 3d 720, 726 (Tenn. Ct. App. 2005)) (noting that determining a party's income is a question of fact that requires careful consideration of all the attendant circumstances). As we explained in Jekot:
>
> We acknowledge Husband's argument that income from his solo practice has decreased, and we agree it has decreased; however, *it is inappropriate to focus on one source of income when the party has multiple sources of income*. See Church v. Church, 346 S.W.3d 474, 486 (Tenn. Ct. App. 2010) (quoting Killian v. Killian, No.

> M2010–00238–COA–R3–CV, 2010 WL 3895515, at *4 (Tenn. Ct. App. Oct. 5, 2010)(stating the court "is not so much concerned with a reduction in income from one source as it is concerned with whether Petitioner has sustained a significant change in his income from all sources.")). For example, Husband's Schedule E income decreased from 2005, when it was $522,929, to $348,929 in 2009, and the trial court apparently focused on this to support its finding that Husband's income has decreased. We, however, believe the trial court erred as a matter of law by limiting its examination of Husband's ability to pay alimony to Husband's Schedule E income instead of considering Husband's total income from all sources to determine whether there had been a substantial and material reduction in Husband's ability to pay alimony. See Church, 346 S.W.3d at 486; Killian, 2010 WL 3895515, at *4; Jekot, 2011 WL 5115542, at *5 (emphasis added).

Gorman v. Gorman, 2011 Tenn. App. LEXIS 624, *30-33 (Tenn. Ct. App. 2011) (concurring opinion).

After some additional discussion of the standards applied by the trial court, Judge Clement noted that:

> Unlike Jekot, the evidence in this record does not preponderate against the findings of fact upon which the trial court based its alimony determination. Furthermore, we find no abuse of the trial court's discretion because the record reveals that the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable. See Gonsewski, 350 S.W. 3d 99.. Accordingly, it is our duty to affirm the alimony award.

Gorman, 2011 Tenn. App. LEXIS 624 at *34..

Notwithstanding the Gonsewski presumption that the trial court got it right, the Court of Appeals retains its prerogative to overturn what it considers an erroneous decision by the trial judge. In Bordes v. Bordes, the Tennessee Court of Appeals noted that "a change in circumstances is 'substantial' when it significantly affects either the obligor's ability to pay or the obligee's need for support." 358 S. W. 3d 623 (Tenn. Ct. App. 2011) (quoting Bogan v. Bogan, 60 S. W.3d 721, 728 (Tenn. 2001) (citing Bowman v. Bowman, 836 S.W.2d 563, 568 (Tenn. Ct. App. 1991)). The Court also went on to state that "a change in circumstances is 'material' when the change occurs since the date the alimony was ordered, and the change was not within the contemplation of the parties when they entered into the property settlement." Id. (quoting Bogan, 60 S.W.3d at 728) (citing Watters v.Watters, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). The court in Bordes found that the severity of the ex-husband's health problems

was not necessarily anticipated at the time of the original divorce, and thus the trial court erred in failing to modify his alimony obligation.

There is ample reason to be cautious, however, in how one identifies an alimony award. In Averitte v. Averitte, 2013 Tenn. App. LEXIS 49 (Tenn. Ct. App. 2013), the parties' Marital Dissolution Agreement provided for the payment of "periodic" alimony over a seven year period, but had no contingencies for its modification or termination. Wife remarried. Husband sought to terminate his alimony obligation on the theory that the *in futuro* statute refers to "periodic" alimony, and thus his obligation should terminate upon Wife's remarriage. The trial court agreed, but the Court of Appeals did not, holding that the failure to include termination or modification language in the Marital Dissolution Agreement was controlling. It was "relevant" that the word "periodic" was used and that the word is used in the *in futuro* statute, but the Court of Appeals concluded that because Husband's alimony obligation was definite and calculable when awarded, with no contingencies, the "periodic alimony" referred to in the Marital Dissolution Agreement was alimony *in solido*, not alimony *in futuro*.

1. ALIMONY IN FUTURO

Alimony *in futuro* is modifiable upon a showing of a "substantial and material change of circumstances." Wright v. Quillen, 83 S.W.3d 768, 772 (Tenn. Ct. App. 2002), *appeal denied* (citing Tenn. Code Ann. § 36-5-101(a)(1) [now § 36-5-121(f)(2)(A)]);See also, Cook v. Iverson, 2015 Tenn. App. LEXIS 946 (Tenn. Ct. App. 2015) (The trial court improperly treated Mr. Iverson's alimony obligations as though they were contractual and, therefore, not modifiable. The Court of Appeals reversed.) The party seeking relief on the grounds of a substantial and material change in circumstances has the burden of proving such changed circumstances warranting an increase or decrease in the amount of the alimony obligation. Seal v. Seal, 802 S.W.2d 617, 620 (Tenn. Ct. App. 1990). In Bogan, 60 S.W.3d at 728, the Tennessee Supreme Court stated:

> [A] change in circumstances is considered to be "material" when the change (1) "occurred since the entry of the divorce decree ordering the payment of alimony." Watters v. Watters, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999), and (2) was not "anticipated or [within] the contemplation of the parties at the time they entered into the property settlement agreement."

Furthermore, a change in circumstances is considered to be "substantial" when it significantly affects either the obligor's ability to pay or the obligee's need for support. Bogan, 60 S.W.3d at 728 . When determining whether a modification of an alimony award is justified, the court must give equal weight to the need of the recipient spouse and the ability of the obligor spouse to pay. Bogan, 60 S.W.3d at 730.

The Court of Appeals further explained the differences and importance in considering both whether a change is "substantial" ***and*** "material" in Barnes v. Barnes, No. M2018-01539-COA-R3-CV, 2019 Tenn. App. LEXIS 297 (Tenn. Ct. App. June 12, 2019). This was the third appeal to address the issue of alimony between the parties. On the first trip to the Court of Appeals, the husband was required to pay $6,000.00 per month in alimony *in futuro*. Husband then sought termination/reduction of his alimony obligation due to a disability that prevented him from working. The trial court found a substantial and material change had occurred due to Husband's disability and reduced his alimony obligation from $6,000.00 to $3,900.00 per month. Wife appealed arguing that Husband maintained the ability to pay alimony at a rate of $6,000.00 per month despite his disability. The Court of Appeals agreed and reinstated Husband's $6,000.00 per month obligation.

Of note, the Court of Appeals in Barnes provided an excellent discussion of what constitutes a "material" and "substantial" change in circumstances:

> As the language of the statute reflects, for the first step, it is not enough to simply show a change of circumstances; the change must be both "material" and "substantial." Tenn. Code Ann. § 36-5-121(f)(2)(A); Woodard v. Woodard, No. E2017-00200-COAR3-CV, 2018 WL 3339754, at *3 (Tenn. Ct. App. July 9, 2018).
>
> In this context, a change in circumstances is deemed "material" if it has occurred since the entry of the decree awarding alimony and was not anticipated or within the contemplation of the parties when the decree was entered. Friesen v. Friesen, No. E2017-00775-COA-R3-CV, 2018 WL 5791954, at *2 (Tenn. Ct. App. Nov. 5, 2018). Here, Wife does not dispute that Husband's disability was a "material" change in circumstances, as an unanticipated change occurring since the entry of the decree awarding alimony.
>
> The issue, then, is whether his disability constituted a "substantial" change in circumstances. In an alimony modification case, "a change in circumstances is considered to be 'substantial' when it significantly affects either the obligor's ability to pay or the obligee's need for

> support." Friesen, 2018 WL 5791954, at *2. When deciding whether a change has significantly impacted an obligor's ability to pay, "it is inappropriate to focus on one source of income when the party has multiple sources of income." Jekot, 362 S.W.3d at 82. Instead, the trial court should examine the obligor's "total income from all sources to determine whether there ha[s] been a substantial and material reduction in [the obligor's] ability to pay alimony." Id. (emphasis in original); see, e.g., Harkleroad v. Harkleroad, No. E2012-01804-COA-R3-CV, 2013 WL 1933024, at *5 (Tenn. Ct. App. May 10, 2013) (finding no substantial and material change where a husband's "previously reported income was almost entirely replaced by his Social Security and retirement benefits"); Killian v. Killian, No. M2010-00238-COA-R3-CV, 2010 WL 3895515, at *3 (Tenn. Ct. App. Oct. 5, 2010) (concluding that a husband failed to prove that a medical condition had a substantial and significant impact on his "overall income" where he testified about his income from his law practice but presented no proof about his income from other sources).
>
> Moreover, a change in circumstances may not be deemed "substantial" if the obligor has assets from which he can continue to make alimony payments. Friesen, 2018 WL 5791954, at *2 (citing Osesek v. Osesek, No. M2011-00984-COA-R3-CV, 2012 WL 729880, at *3 (Tenn. Ct. App. Mar. 6, 2012)). In Siefker v. Siefker, No. M2001-01458-COA-R3-CV, 2002 WL 31443213, at *3 (Tenn. Ct. App. Nov. 1, 2002), this Court found no substantial change where the husband's income dropped by more than half but he "retained substantial assets that were untouched." Id. at *4. Similarly, in Osesek, we recognized that the husband had lost his job but nevertheless held that his "non-income assets" were available to satisfy his alimony obligation. 2012 WL 729880, at *5.

Id (citations omitted). Ultimately, applying this logic, the Court of Appeals found that the trial court had erred in finding there had been any real change in the Husband's ability to pay the $6,000.00 per month in alimony originally awarded to Wife, primarily because his after-tax income from his disability and social security payments was not significantly different from his after-tax income prior to his disability. As the Court of Appeals also noted, "The evidence presented by Husband simply does not establish that his disability has substantially affected his ability to fulfill his existing alimony obligation. To the contrary, the proof shows that Husband has continued to make substantial contributions to his personal investment account, financially support his parents, and purchase a larger home for himself and his current wife."

The Court of Appeals addressed a similar situation to Bogan in Wilhoit v. Wilhoit, No. M2016-00848-COA-R3-CV, 2016 Tenn. App. LEXIS 745 (Tenn. Ct. App. Sept. 30, 2016). In Wilhoit, the court of appeals heard the second appeal from a trial court decision which originally denied a petition to modify alimony, and then on remand reduced the alimony from $3,540 per month to $2,990 per month. The former husband appealed a second time. In this case, the court of appeals found that the trial court had abused its discretion in failing to reduce the former husband's alimony obligation far enough to allow him the ability to pay it over the long term:

> Using the figures determined by the trial court, Husband's monthly expenses, including his alimony obligation, total $6,662 per month. Husband has a monthly social security income of $2,060, resulting in a monthly deficit of $4,602. Although he retains assets, if Husband paid the alimony as ordered by the trial court, he would have depleted his assets before the end of 2015. In Bowman v. Bowman, 836 S.W.2d 563 (Tenn. Ct. App. 1991), this Court concluded that, where the husband-obligor was unable to work and was forced to liquidate all of his assets in order to pay spousal support, (such that he would soon have nothing from which to support himself,) the support obligation should terminate within one year. Id. at 568-69. However, in Bowman, the recipient-spouse was to receive a large tract of land, which could be sold in order to provide for her support. Id. at 569.
>
> Here, the parties' cumulative incomes and assets are not sufficient to cover their respective expenses long-term. In cases such as this, the parties must recognize that "[j]ust as a married couple may expect a reduction in income due to retirement, a divorced spouse cannot expect to receive the same high level of support after the supporting spouse retires." Bogan v. Bogan, 60 S.W.3d 721, 729 (Tenn. 2001) (quoting In re Marriage of Reynolds, 63 Cal. App. 4th 1373, 74 Cal. Rptr. 2d 636, 640 (Ct. App. 1998)).
>
> Like Mr. Bogan, Dr. Wilhoit, while able to provide some level of support, cannot continue to pay support at pre-retirement levels without accruing a substantial monthly deficit. From the totality of the circumstances, we conclude that the trial court's order awarding Wife alimony in futuro in the amount of $2,990 per month was not supported by the evidence. If left to stand, the trial court's decision will result in Husband liquidating all assets and

> accruing insurmountable debt. Accordingly, the ruling constitutes a clear abuse of discretion. See Gonsewski v. Gonsewski, 350 S.W.3d 99, 105 (Tenn. 2011). While we concede that Wife has need of alimony, the question remains what, if any, amount of support Husband has the ability to pay. We now turn to that question.
>
> As set out above, Husband has income of $2,060 per month and expenses of $3,672 per month, not including alimony. Wife has income of $956 and alleged expenses of $4,045.70, which exceeds Wife's expenses as found by this Court in Wilhoit I. We, therefore, modify the trial court's award of alimony in futuro from $2,990 per month to $500 per month, effective May 30, 2012. This revised award of alimony in futuro provides an equitable distribution of income between the parties such that both parties can retain enough assets to continue to support themselves for years to come.

Id. The Court of Appeals also remanded the case to the trial court to determine how to reimburse the former husband for the amounts he overpaid in alimony during the pendency of the case, pointing out that "While the need of the receiving spouse remains an important consideration in modification cases, the ability of the obligor to provide support must be given at least equal cconsideration." Bogan, 60 S.W.3d at 730.

In Harkleroad v. Harkleroad**,** 2013 Tenn. App. LEXIS 325 (Tenn. Ct. App. 2013), the Court of Appeals affirmed a decision by the trial court not to reduce or modify the Husband's alimony payments to Wife in spite of Husband's claims that he had made no money through his business for several years. The Court did affirm the termination of Husband's health insurance obligation except for payment of the cost of supplemental Medicare. While the trial court may have rejected the Husband's request to modify because it believed that Husband was borrowing money from his company instead of drawing a salary, the principal reason given by the courts for not modifying alimony is that Husband could still pay it from his assets, and Wife still needed it.

a. A court may not terminate an alimony *in futuro* obligation upon the recipient spouse's remarriage if the parties specifically agreed for the alimony not to terminate upon the recipient spouse's remarriage.

In Deluca v. Schumacher, the parties had entered into a Marital Dissolution Agreement at the time of divorce providing that the husband would pay the wife alimony *in futuro* even if she remarried that was approved by the trial court and incorporated into the parties' Final Decree of

Divorce. No. M2019-00601-COA-R3-CV, 2020 Tenn. App. LEXIS 102 (Ct. App. Mar. 6, 2020). The Court of Appeals reversed the trial court's termination of husband's alimony obligation reasoning that a spouse could agree to pay more alimony than he or she might be required to pay by statute and by explicitly stating in the MDA that husband would pay wife alimony even if she were to remarry, the parties effectively agreed that Tenn. Code Ann. § 36-5-121(f)(3) was not applicable to their MDA. Id. at *1. Lastly, the Court of Appeals found that the ex-husband's promise to pay the wife alimony *in futuro* after her remarriage did not violate the public policy of Tennessee. Id.

b. A court may not modify an alimony *in futuro* obligation which, by the terms of the parties' agreement, has already terminated.

A petition to modify an award of alimony *in futuro* must be filed prior to termination of the award of alimony by any of the contingencies upon which the award is based. Waddey v. Waddey, 6 S.W.3d 230, 234 (Tenn. 1999) "We hold that a trial court's ability to modify an award of alimony *in futuro* terminates upon the occurrence of a contingency when the award ceases to exist." Id. at 234. In Waddey, the parties agreed to alimony *in futuro* of $1,000/month until the death or remarriage of the wife, or March 1, 1996, "whichever event shall first occur." Id. at 231. The Wife filed to modify the award on March 29, 1996, which was after the occurrence of one of the contingencies listed in the agreement that caused the alimony obligation to terminate, thus depriving the court of jurisdiction to modify. Id.

c. Proof of a Third Party Residing with an Alimony *in Futuro* Recipient Raises a Presumption in Favor of Modification.

Tenn. Code Ann. § 36-5-121(f)(2)(B) provides a rebuttable presumption in all cases involving alimony *in futuro*, where the alimony recipient lives with a third person, either that:

> (i) The third person is contributing to the support of the alimony recipient and the alimony recipient therefore does not need the amount of support previously awarded, and the court therefore should suspend all or part of the alimony obligation of the former spouse; or
>
> (ii) The third person is receiving support from the alimony recipient and the alimony recipient therefore does not need the amount of alimony previously awarded and the court therefore should suspend all or part of the alimony obligation of the former spouse.

"Such cohabitation does not *automatically* end the right of the recipient to receive periodic or *in futuro* alimony." Wright, 83 S.W.3d at 775, (citing Isbell v. Isbell, 816 S.W.2d 735, 738 (Tenn.1991) (emphasis added)). "However, it raises a presumption that the alimony as previously ordered is no longer needed, and shifts the burden of proof to the recipient to show a continued need." Wright, 83 S.W. 3d at 775 *(*citing Azbill v. Azbill, 661 S.W.2d 682, 686 (Tenn. Ct. App. 1983)).

The trial court found that Mr. Quillen's cohabitation with Ms. Evans did not constitute a substantial and material change in circumstances which was unanticipated by the parties at the time of the divorce. Wright, 83 S.W. 3d at 775. The appellate court, however, stated that, "whether some future cohabitation could have been anticipated by the parties … is not determinative. Id. Rather, once cohabitation was proved, the burden shifted to [the recipient] to rebut the presumption that he was neither being supported by nor supporting [the third party], and to demonstrate that he still needs alimony." Id.

While it is tempting to seek to terminate alimony based on the cohabitation statute, the Court of Appeals for the Middle Section of Tennessee has twice emphasized that cohabitation allows for *suspension* of alimony obligations, not termination of such obligations. See, e.g., Thym v. Thym, 2006 Tenn. App. LEXIS 16 (Tenn. Ct. App. 2006):

> [T]his court has recently stated that "if the [statutory] presumptions of support and lack of need arise and are unrebutted, the court's remedy is to *'suspend* all or part of the alimony obligation,' not terminate the alimony." Evans v. Evans*,* 2004 Tenn. App. LEXIS 547 at *15 (Tenn. Ct. App. 2004)(emphasis in original). Pursuant to the clear statutory language of Tenn. Code Ann. 36-5-101(a)(3), now codified at Tenn. Code Ann. § 36-5-121(f)(2)(B), we modify the judgment of the trial court to suspend, rather than terminate, the monthly alimony payments due to Mr. Thym.

In another case, the Court of Appeals affirmed a trial court's ruling that language in the parties' Marital Dissolution Agreement which addressed the termination of the husband's alimony obligation in the event Wife "took up residence" with another individual was the same as a reference to cohabitation, but ultimately found that the Wife was not cohabitating with the third party. Rickman v. Rickman, 2009 Tenn. App. LEXIS 213 (Tenn. Ct. App. 2009). The Marital Dissolution Agreement in Rickman provided that "[t]he obligations of Husband … shall also terminate upon the earlier to occur of Husband's death, Wife's death or remarriage, or upon

Wife taking up residence with any male person, other than a blood relation, or upon any such male person taking up residence with Wife." Id. at *1. Husband argued that this language meant that his alimony should terminate since the Wife had rented her home, or a part of it, to an unrelated male. Id. at *5. The Court of Appeals disagreed. Id. at *8.

In Schrade v. Schrade, the ex-husband petitioned to reduce his MDA agreed-upon periodic alimony, citing changed economic conditions making him unable to pay alimony without applying separate assets. No. E2016-01105-COA-CV, 2017 Tenn. App. LEXIS 95 (Tenn. Ct. App. Feb. 13, 2017). He also argued ex-wife's adult children lived with her, so there was a rebuttable presumption that she did not need alimony. The Court of Appeals affirmed the trial court's finding that there had not been a material change and holding that market fluctuations were foreseeable. But the Court of Appeals vacated the trial court's finding that the rebuttable presumption did not apply and held instead that the statute provides for a suspension of obligation if the presumption is not rebutted, with the implication being that alimony resumes if cohabitation ceases. It was undisputed that the adult children lived with the ex-wife. It was unclear, and therefore remanded on this point, whether the services provided by the children contributed to her support and whether her need for alimony had changed. Regarding material change, the appellate court relied on Cooley v. Cooley for a recitation of the standard to modify alimony, namely that the party seeking to modify must prove that a substantial and material change in circumstances has occurred.

In Honeycutt v. Honeycutt, 152 S.W.3d 556 (Tenn. Ct. App. 2003), the Court of Appeals considered whether a wife "cohabitate[d] with a man not related to her" in violation of a marital dissolution agreement. The Court held that "cohabitation requires a 'living with' arrangement, thus contemplating a continued course of conduct." Id. at 566. "The term "cohabit," says 14 C.J.S., *Cohabit*, p. 1311, "imports a dwelling together for some period of time, and does not include mere visits or journeys…." Id. (quoting Jones v. State, 184 S.W.2d 167, 169 (Tenn. 1944)).

In Myrick v. Myrick, the parties entered into a marital dissolution agreement, which provided, *inter alia*, that the husband would pay the wife alimony *in futuro* until death, remarriage, or "until a third person not the Wife's child, moves into the Wife's residence." 2014 Tenn. App. LEXIS 354 (Tenn. Ct. App. 2014). Subsequent to the parties divorce, the wife's mother moved into the wife's home. Id. As a result, the husband filed a motion to terminate his

alimony obligation based upon a "third person not the Wife's child" moving in the wife's home. Id. The trial court agreed with the husband and terminated the alimony obligation finding that the marital dissolution agreement was contractual in nature and that the language required the support obligation to terminate upon the wife's mother moving into the wife's home. Id. On appeal, the wife argued that the trial court should have applied a rebuttable presumption outlined by Tenn. Code Ann. § 36-5-121(f)(2)(B). Id. The Court of Appeals disagreed and, relying on Honeycutt v. Honeycutt, held that the alimony statutes were not applicable where the parties had agreed in a marital dissolution agreement to terms different from those set out in the statute:

> In this particular case, we find Tenn. Code Ann. § 36-5-101(a)(3)(A) and (B) inapplicable. This is a case of contract interpretation. Our review is governed by the plain language of the parties' MDA. The MDA does not reference, cite, or incorporate this statute with regard to suspension or termination of Husband's alimony obligations. Rather, the MDA explicitly provides for the termination of these obligations upon Wife's death, remarriage, cohabitation with an unrelated male, her becoming qualified for receipt of Social Security benefits, or her reaching age 65, "whichever occurs first."

Id. at *11-12 (quoting Honeycutt, 152 S.W.3d at 564).

Applying the reasoning of Honeycutt, the Myrick case affirmed the termination and concluded that the language used, i.e., "until a third person not the Wife's child, moves into the Wife's residence," is not ambiguous and is binding upon the parties. Id. at *15.

In Mathews v. Mathews, the trial court directly addressed the issue of "cohabitation," as a means of terminating alimony. No. M2018-01886-COA-R3-CV, 2019 Tenn. App. LEXIS 453 (Tenn. Ct. App. Sept. 11, 2019). As the Court described in detail:

> Pursuant to the parties' MDA, Husband was obligated to pay Wife alimony in futuro in the amount of $10,000 per month, which obligation would "automatically terminate upon death of either party, or remarriage or cohabitation with a paramour of Wife." A marital dissolution agreement is a contract and is subject to the rules governing the construction of contracts. Barnes v. Barnes, 193 S.W.3d 495, 498 (Tenn. 2006). The interpretation of a contract is a matter of law, and our review of the trial court's decision regarding the enforcement of a contract is, therefore, de novo on the record with

no presumption of correction as to the trial court's conclusions of law. *Id*.

As the trial court correctly noted, although the parties' MDA specified cohabitation with a paramour of Wife as a ground for termination of Husband's alimony obligation, the term cohabitation is not defined in the MDA. The Tennessee Supreme Court was faced with a similar situation in Honeycutt v. Honeycutt, where the term cohabitation was not defined in the parties' MDA. See Honeycutt v. Honeycutt, 152 S.W.3d 556, 561-62 (Tenn. 2003). There, the Supreme Court set out to ascertain the plain, ordinary, and popular sense of that term:

"Cohabit" is defined as: 1: to live together as or as if as husband and wife (without formal marriage)[;] 2a: to live together or in company[;] b: to be intimately together or in company[.]

Webster's Third New International Dictionary 440 (1993). Another definition for "cohabitation" reads:

To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations. Black's Law Dictionary 236 (5th ed. 1979). Id. at 563. Additionally, the Honeycutt Court quoted another Tennessee Supreme Court decision, which discussed the word "cohabit" as follows:

Independent of the use of the word continue, the word cohabit, standing alone, connotes a fixed, rather than a transient, condition. The term "cohabit," says C.J.S., Cohabit, p. 1311, "imports a dwelling together for some period of time, and does not include mere visits or journeys" . . . . Id. at 566 (quoting Jones v. State, 184 S.W.2d 167, 169 (Tenn. 1944)).

This Court has reached a similar conclusion regarding the definition of "cohabitation." In Mabee v. Mabee, we concluded that the term cohabitation with another man requires more than an intimate or sexual relationship and more than spending the night on several occasions with another man. The term cohabitation with another man additionally requires something akin to the mutual assumption of duties and obligations that are customarily manifested by a married couple or life partners. Mabee v. Mabee, No. M2012-02430-COA-R3-CV, 2013 WL 3355236, at *3 (Tenn. Ct. App. June 27, 2013).

Mathews was interesting in part because the parties starting dating in 2010 and bought a home together in 2012, in which Ms. Mathews (now Ms. Leroy) resided. The trial court found that

> "[W]hile Wife and Mr. Leroy had dinner together more often than not, traveled and attended social events together, celebrated some holidays and special occasions together, and professed their love for one another, it was undisputed that they spent only one to two nights per week together and that at all times until the Leroys married in December 2017, Mr. Leroy maintained his own home . . . . Mr. Leroy's driver's license, voter's registration and tax returns all reflected his Allen Place address. Mr. Leroy did not keep clothing, toiletries, medications or other personal items at [Wife's] home. Mr. Leroy had a key to [Wife's] home, but was not permitted unfettered access. The only clothing Mr. Leroy kept at Hickory Valley were some slippers and a t-shirt."

Id. Accordingly, the court found that the parties, per Mabee and Honeycutt, were not cohabitating, and that there was no ground to terminate or modify Mr. Mathews' alimony obligation. As the Court of Appeals stated,

> In addition to its discussion of Tennessee Code Annotated section 36-5-121(f)(2)(B), the trial court—as Husband admits in his brief on appeal—provided definitions of "cohabitation" from seven different sources and discussed the findings of fact and conclusions of law from seven other cases in its attempt to ascertain the meaning of "cohabitation" as set forth in the parties' MDA.
>
> In doing so, the trial court considered the amount of days and nights Mr. Leroy spent with Wife, how often they ate and traveled together, the particular articles of clothing, toiletries, and medications Mr. Leroy kept at Wife's homes, the type of access Mr. Leroy enjoyed to Wife's homes, as well as several other pertinent considerations. To the extent Husband is arguing that the trial court did not consider enough aspects of Wife and Mr. Leroy's relationship in its determination of whether Wife and Mr. Leroy cohabited with one another, we disagree. Accordingly, we affirm the judgment of the trial court with respect to this issue.

Id. The Court of Appeals went on to also affirm the trial court's refusal to award attorneys' fees to the Wife, on the ground that the relevant portion of the parties' Marital Dissolution Agreement

only allowed for attorneys' fees to go to the party who *institutes* an action to enforce the MDA, and denied fees on appeal because (1) the Wife did not raise fees on appeal as an issue for the appellate court except in the "Relief" section of her appeal, and (2) the Husband did not prevail on the appeal.

In Covarrubias v. Baker, the Husband petitioned to reduce his alimony in futuro obligation, which arose from the parties' MDA. No. E2016-02316-COA-R3-CV, 2017 Tenn. App. LEXIS 791 (Tenn. Ct. App. Dec. 11, 2017). Wife argued that the obligation was non-modifiable and that there had been no material change in circumstances. The Court of Appeals held that the obligation was indeed modifiable but that no material change had occurred to justify a reduction in alimony. The MDA provided Husband would pay 50% of his gross income as alimony until the death of either party. An Agreed Order entered with the Final Decree of Divorce incorporating the MDA provided that in addition to the MDA alimony obligation of 50% of gross income, the Husband would pay 50% of all bonuses to Wife. The order provided that the alimony obligation was not terminable upon the remarriage of either party. Wife argued at trial that the Agreed Order entered at the same time as the Final Decree did not merge into the Final Decree, but the trial court disagreed. The Court of Appeals agreed on that point and then went on to review under the doctrines of contract law to address the issue of whether the alimony obligation was modifiable per the terms of the MDA. The Court of Appeals held that the very terms of the MDA provided for modifiability. But reviewing the statutory factors, the Court of Appeals noted that Husband's income had increased, Wife's income had stayed the same as the divorce, and Husband's claims of material changes did not demonstrate how his ability to pay was impacted negatively.

In Wiser v. Wiser, 2015 Tenn. App. LEXIS 293 (Tenn. Ct. App. 2015), the Husband filed a petition to reduce his alimony and child support payments due to a substantial material change of circumstances, alleging both that Ex-Wife was cohabiting with another person and that his own income had significantly decreased. The trial court partially denied Husband's petition and awarded Ex-Wife her attorney's fees. The trial court did find that Husband's income had decreased for a prior eight-month period, and therefore retroactively decreased the alimony obligation solely for that length of time. The Court of Appeals affirmed the trial court's judgment

in all respects. The Court of Appeals conducted a fact-intensive analysis of Ex-Wife's relationship with her boyfriend and found that she had not been cohabiting with him.

In Naylor v. Naylor, 2016 Tenn. App. LEXIS 494, *9 (Tenn. Ct. App2016), the trial court awarded wife $2,000.00 per month in alimony *in futuro*. The father appealed, arguing, among other things, that the trial court erred in calculating the wife's need for alimony where it failed to take into account her cohabitation with the parties' adult son. To support this argument he cited Tennessee Code Annotated section 36-5-121(f)(2)(B), i.e., "[i]n all cases where a person is receiving alimony *in futuro* and the alimony recipient lives with a third person, a rebuttable presumption is raised that . . . the third person is contributing to the support of the alimony recipient . . . or the third person is receiving support from the alimony recipient . . . ." See id. at *26. Wife argued that the above-referenced statute only applies in modification proceedings. The Court of Appeals disagreed with Wife's argument and explained that "while the above statute concerns only modification of an existing support award, 'the public policy expressed in the statute [is] relevant' to an initial alimony award." Id. at *27 (quoting Ezekiel v. Ezekiel, 2015 Tenn. App. LEXIS 656, *8 (Tenn. Ct. App. 2015) (internal quotations omitted.)Nevertheless, the Court of Appeals ultimately reduced the husband's alimony obligation to $1,644.00 per month because he did not have the ability to pay the $2,000.00 per month obligation and not because of the cohabitation issue. Naylor, 2016 Tenn. App. LEXIS 494 at *33-35. Additionally in this case, Husband argued that the trial court disregarded his anticipated retirement at age 65, just one year after the divorce, and improperly classified his alimony obligation as *in futuro.* The Court of Appeals disagreed with Husband's argument and stated that "Courts deal with the Present. They do not address future events that may or may not occur as anticipated or, indeed, may not occur at all." Id. at *36 (quoting Carter v. Carter, 2016 Tenn. App. LEXIS 130, *3 (Tenn. Ct. App. 2016)).

2. REHABILITATIVE ALIMONY

Rehabilitative alimony remains "in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances…. The recipient of the support and maintenance shall have the burden of proving that all reasonable efforts at rehabilitation have been made and have been unsuccessful." Tenn. Code Ann. § 36-5-121(e)(2).

In Perry v. Perry, the Supreme Court held that the statutory standard of "a substantial and material change of circumstances" applied even when the trial court specifically designated the rehabilitative award as temporary for a two-year period and ordered the parties to return to court before the end of that two-year period. 114 S.W.3d 465, 468 (Tenn. 2003).

Tenn. Code Ann. § 36-5-101(d)(2) was passed in 1993 (now Tenn. Code Ann. § 36-5-121(e)(2)). Pre-1993 awards of rehabilitative alimony were considered to be non-modifiable if the alimony was "established for a definite duration and a definite amount and not specifically subject to conditions" and were not subject to the statute if the recipient had a vested right at the time of the passage of the statute. Bryan v. Leach, 85 S.W.3d 136, 145, 147 (Tenn. Ct. App. 2001). Parties may continue to agree that rehabilitative alimony awards are non-modifiable — similar to transitional alimony — but it is unlikely that a court will award non-modifiable rehabilitative alimony.

Where [pre-1993] rehabilitative support is awarded, it may be made subject to conditions imposed by the court or agreed to by the parties. But where the rehabilitative award has been made for a fixed amount, the award must be considered non-modifiable, even if it is to be paid in installments and not in a lump sum. Id. at 147.

"If a dependent spouse does not satisfactorily strive for self-sufficiency, the Court may withdraw part or all of the support allocated to finance rehabilitation." Loria v. Loria, 952 S.W.2d 836, 838 (Tenn. Ct. App. 1997). The purpose of rehabilitative alimony is to provide an economically disadvantaged spouse temporary support for a period of time so that he or she may become self-sufficient. Id. at 838. It is also designed to encourage the recipient spouse to become and then remain self-sufficient. Burlew v. Burlew, 40 S.W.3d 465, 470-71 (Tenn. 2001). For that reason, "[a] substantial and material change in circumstances does not automatically entitle the petitioner to a modification." Wright, 83 S.W.3d at 772 (citing Bogan, 60 S.W.3d at 735). Instead, "[f]or rehabilitative alimony to be extended beyond the term initially established by the court, or to be increased in amount, or both, the recipient of the rehabilitative alimony shall have the burden of proving that all reasonable efforts at rehabilitation have been made and have been unsuccessful." Tenn. Code Ann. . § 36-5-121(e)(2).

If the spouse is not able to become rehabilitated, despite reasonable efforts to do so, the court may modify the rehabilitative award, where doing so may lead to rehabilitation, such as where the recipient is not able to complete an educational program in the time allowed, due to

illness, but may be able to do so with additional rehabilitative alimony. On the other hand, if rehabilitation is not feasible, the court may order *in futuro* support, instead.

The provisions of Tenn. Code Ann. § 36-5-121(f)(2)(B) which provide for a rebuttable presumption in all cases involving alimony *in futuro*, where the alimony recipient lives with a third person, were held not applicable to awards of rehabilitative alimony in Bryan v. Leach, 85 S.W.3d 136:

> By its terms, this statute applies only where (1) *in futuro* alimony has been previously awarded, and (2) where modification by the court of the previous award is available. Because we have determined that the alimony award in this case was not "*in futuro* " this provision does not apply. Id. at 144, n.5.

(Note: The provisions of Tenn. Code Ann. § 36-5-121(f)(2)(B) are applicable to awards of transitional alimony. Tenn. Code Ann. § 36-5-121(g)(2)(C).)

In Finchum v. Finchum, 2013 Tenn. App. LEXIS 101 (Tenn. Ct. App. 2013), the parties' divorce agreement provided that Husband would pay rehabilitative alimony which would terminate upon Wife's death. When Wife remarried and her job prospects improved, Husband stopped paying alimony and filed a petition to terminate his alimony payments. The trial court entered summary judgment against Husband, finding that the alimony was contractual in nature and not subject to termination or modification upon Wife's death or remarriage, and found Husband in contempt for stopping his alimony payments prior to filing his petition. Husband appealed. The Court of Appeals reversed on the issue of whether his rehabilitative alimony was subject to modification (it is, by statute), but affirmed an award of attorneys' fees for the contempt related to Husband's unilateral cessation of alimony payments. The case was remanded to the trial court for a hearing on both issues.

In Owens v. Owens, 2013 Tenn. App. LEXIS 499 (Tenn. Ct. App. 2013), *app. perm. denied* 2013 Tenn. App. 919 (Tenn. 2013), the parties divorced in 2004 and the wife was awarded rehabilitative alimony through 2012. In 2009, Wife filed a petition asking that her alimony be extended or modified to be alimony *in futuro*. After a four day trial in 2011, the trial court found that, while Wife was still in need of alimony, there were no substantial and material changes in circumstances to justify a modification of alimony, nor had she shown by a preponderance of the evidence that she had made all reasonable efforts to rehabilitate herself in the seven years since filing her petition. Accordingly, the trial court denied her petition. Wife

appealed, and the Court of Appeals reversed, modifying the amount of alimony down from $3,000 per month to $2,000 per month and converting it to *in futuro* alimony. The Court of Appeals found that the trial court's findings of fact generally favored a modification of the alimony award and that the statute allowed the court the freedom to change the nature of rehabilitative alimony upon a proper showing. As the Court of Appeals explained,

> We find Wife's inability to be rehabilitated to the standard defined by the statute constitutes a substantial and material change of circumstances warranting a modification of the alimony.

Id. at *11.

In Cooley v. Cooley, 2016 Tenn. App. LEXIS 56 (Tenn. Ct. App. 2016), Wife had asked the trial court to extend her *in futuro* alimony from five years (after five years of transitional alimony) to "death or remarriage." Like the wife in Owens, the wife in Cooley argued that the recession made it more difficult for her to make a suitable and/or to make a more suitable living. The trial court agreed, applying Owens and Wiser v. Wiser, 339 S.W.3d 1 (Tenn. Ct. App. 2010). The Court of Appeals reversed, noting (1) Wiser didn't apply, because in Wiser the Court did not extend the duration of payments, but only the amounts; and (2) Owens didn't apply because the wife in Owens complained that the recession had hurt her ability to make a living as a realtor, while the wife in Cooley complained only that the recession had generally hurt her ability to make a living:

> Evidence of a recession, however, without evidence of its specific impact on a party's need for or ability to pay support, does not constitute a change in circumstances sufficient to justify modifying a previous alimony award. See Bordes v. Bordes, 358 S.W.3d 623, 627 (Tenn. Ct. App. 2011) (rejecting the trial court's finding that the economic downturn constituted a substantial and material change in circumstances because there was no evidence in the record to support it). In Owens, this Court observed the specific impact that the recession had on the wife's profession as a real estate agent by dramatically reduc[ing] the sales of homes. Owens, *2013 Tenn. App. LEXIS 499* at *1. Conversely, in the present case, there is no evidence in the record to support the trial court's finding that the recession had a significant impact on Wife's employability.

In Helton v. Helton, 2015 Tenn. App. LEXIS 889 (Tenn. Ct. App. 2015), the Husband had been ordered by the trial court to pay rehabilitative alimony to the former Wife to help her pursue the education she needed to return to her job as a pharmacist. The trial court also placed a

constructive trust over Husband's substantial life insurance policy and designated the former Wife as trustee. The former Wife was designated a one-third beneficiary, a grandfather was designated a one-third beneficiary, and the children were designated one-sixth beneficiaries. The grandfather passed away soon thereafter. The Husband's motion to terminate spousal support was based on his belief that the former wife was not actually taking steps to further her education. He had also filed a motion to substitute his new wife as a beneficiary in place of the deceased grandfather. The trial court denied both motions, but on appeal, the appellate court affirmed the denial of the motion to terminate spousal support but reversed the denial of their request to amend the life insurance policy, holding that "[b]eneficiaries named in a life insurance policy ordinarily hold a 'mere expectancy,' not a 'vested right or interest in the policy.'" Id. at *11 (quoting Herrington v. Boatright, 633 S.W.2d 781, 783 (Tenn. Ct. App. 1982))."[W]here a divorce decree requires the husband to keep a life insurance policy in effect and denies him the right to change the beneficiary, then the [named beneficiaries hold] a vested interest in the policy." Id. In concluding that the lower court erred in dismissing Husband's motion to substitute the beneficiary, the Court of Appeals focused on Husband's position as owner of the policy.

Church v. Elrod addressed two useful issues: can a court modify a life insurance obligation entered as part of a final decree of divorce, and how do scholarships affect a college payment obligation? No. M2018-01064-COA-R3-CV, 2019 Tenn. App. LEXIS 145 (Tenn. Ct. App. Mar. 25, 2019). In this case, the trial court found that the husband's agreement to maintain a $700,000 term life insurance policy for the benefit of the wife was an *in solido* alimony obligation, or a part of the property settlement, and therefore not subject to modification. The Court of Appeals disagreed:

> For a payment to be considered alimony *in solido*, the statute requires that the amount of alimony to be paid be ascertainable at the time of the award and that the payments be made over a definite period of time. Mr. Elrod's obligation to maintain a $700,000 life insurance policy has no definite end date. Furthermore, the amount he is obligated to pay in premiums is not ascertainable now, nor when ordered as insurance rates fluctuate according to age and overall physical health. Moreover, depending on Mr. Elrod's health, the premiums for such a large policy could reach a level that payment of the premium is not sustainable in the future.

> For these reasons, we conclude that the $700,000 life insurance policy maintained by Mr. Elrod cannot be classified as alimony *in solido* and must therefore fall into the category of alimony *in futuro*, which may be modified or terminated. Under the facts here involving a term life insurance policy and no written agreement designating the life insurance obligation as part of a property division, we hold that the life insurance policy was meant to secure Mr. Elrod's obligations under the AOLS in the event of his early death leaving his wife and children without his support.
>
> Inasmuch as Mr. Elrod's obligation for his children's college education expenses have not been satisfied, we decline to relieve him of his obligation to maintain the life insurance policy at this time.

In regards to college expenses, Mr. Elrod was obligated by the terms of the final decree to pay tuition and books up to the cost of the University of Tennessee. The parties' child attended an out-of-state university at a higher base cost than that of UT, but she also received significant scholarships and sponsor fees to offset that cost. The trial court held that "[t]here is no basis for the court to take these benefits into account in computing [Husband's] obligation." The Court of Appeals reversed, holding that, "based on our decisions in Cooper and Lopez, we hold that Mr. Elrod is liable for the cost of tuition and books, less scholarships and sponsor fees received by Shelby." In other words, if the scholarships and other benefits paid enough, the father would not have to pay anything. If there was a shortfall between what the scholarships and other benefits paid, then the father would pay the difference, with his limit being the cost of tuition and books at UT.

The Court of Appeals again addressed the issue of a constructive trust in Burton v. Mooneyham, No. M2017-01110-COA-R3-CV, 2018 Tenn. App. LEXIS 142 (Tenn. Ct. App. Mar. 19, 2018). Here, the ex-wife of the decedent filed an action to establish a constructive trust to the proceeds of a life insurance policy that are payable as a consequence of the death of the plaintiff's ex-husband. In the 2011 Final Decree, the ex-husband was ordered to maintain a specified life insurance policy in the amount of $500,000 with the plaintiff to be designated as

the sole beneficiary. Following the divorce, the ex-husband allowed the specified policy to lapse; however, he maintained a second life insurance policy that had a death benefit of $250,000 with seventy percent of the death benefits payable to the plaintiff and thirty percent to the decedent's mother. Following the ex-husband's death, the plaintiff commenced this action against the decedent's mother and the insurance company. The decedent's mother filed an answer in which she claimed the plaintiff had no legal rights to the insurance policy at issue. The decedent's mother also claimed she had a vested right to her share of the death benefits based on an oral contract. Relying principally on Holt, the Court of Appeals agreed that the decedent's mother had no vested right in the policy.

3. ALIMONY IN SOLIDO

"Final awards of alimony *in solido* are not modifiable," "except by agreement of the parties only." Tenn. Code Ann. § 36-5-121(h)(2); See Burlew v. Burlew, 40 S.W.3d 465, 471 (Tenn. 2001); Day v. Day, 931 S.W.2d 936, 939 (Tenn. Ct. App. 1996).

If the court finds, however, that payments designated by the parties in a Marital Dissolution Agreement as alimony *in solido* are really child support, the portion of payments determined to be child support may be modified. Chadwell v. Chadwell, 2000 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2000, perm. to appeal not sought). "We recognize that alimony *in solido* is not modifiable." Day, 931 S.W.2d at 939; Brewer v. Brewer, 869 S.W.2d 928, 935 (Tenn. Ct. App. 1993).

In Kelly v. Kelly, 2009 Tenn. App. LEXIS 206 (Tenn. Ct. App. 2009), the Court reviewed an alimony provision in a Marital Dissolution Agreement that provided simply: "[T]he Husband will pay alimony in the amount of $400.00 per month due on the 15th of each and every month for a period of five (5) consecutive years. Payments are to be made by direct bank deposit. This will be reviewed at the end of the period." Id. When Wife remarried, Husband filed a motion to terminate alimony based on her remarriage, and Wife objected, arguing that the alimony was an award of *in solido* alimony, not *in futuro* alimony. Id. The trial court agreed with the Wife and Husband appealed. Id. The Court of Appeals reversed, holding that since the award of alimony was subject to review, it was not necessarily for a fixed amount and thus was properly characterized as alimony *in futuro*, and allowed the alimony to be terminated effective with Wife's remarriage. Id. at *2.

In Young v. Young, 2015 Tenn. App. LEXIS 89 (Tenn. Ct. App. 2015), the Husband petitioned the trial court to terminate his alimony *in solido* payments of 50% of his monthly pension and to require his former Wife to reimburse him for the proceeds he believed were mistakenly overpaid to her. They had been involved in prior hearings involving her entitlement to alimony and his entitlement to a reduction in other types of alimony from the final decree. The trial court held that Husband's current petition was, therefore, barred by the doctrine of *res judicata*. The trial court also held that Husband was not entitled to terminate his payments once the former Wife received half of his total contributions to their retirement plan. The Court of Appeals held that: (1) the trial court was not barred by the doctrine of *res judicata* from considering the Husband's petition; and (2) the trial court did not err in interpreting the final decree as requiring the Husband to remit to the former Wife one-half of the total value of the pension plan, as of the date of the entry of the final decree of divorce. The Husband was, therefore, not entitled to terminate his payments once the former Wife received one-half of the Husband's total contributions to the plan, and Husband was not entitled to reimbursement of any overpayment. Id.

4. TRANSITIONAL ALIMONY

Transitional alimony shall be non-modifiable unless:

> (A) The parties otherwise agree in an agreement incorporated into the initial decree of divorce or legal separation, or order of protection;
>
> (B) The court otherwise orders in the initial decree of divorce, legal separation or order of protection; or
>
> (C) The alimony recipient lives with a third person, in which case a rebuttable presumption is raised that:
>
> > (i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or
> >
> > (ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

Tenn. Code Ann. § 36-5-121(g)(2).

In Harris v. Harris, 2009 Tenn. App. LEXIS 264 (Tenn. Ct. App. 2009), the Court affirmed a trial court ruling that reduced the amount and duration of an ex-husband's transitional alimony obligation following the remarriage of the ex-wife. The ex-husband appealed, contending that the trial court abused its discretion in not simply terminating his alimony obligation, and also in not making its modification retroactive to the date the ex-wife began living with her new husband. Id. The Court of Appeals found that the decision whether to suspend "all or a part" of an alimony obligation should be left to the sound discretion of the trial court, and held that the trial court had not abused its discretion in reducing the obligation rather than eliminating it. Id. at *3. The Court also remanded the case to the trial court for an award of fees and expenses on appeal to Wife. Id. at *4.

In Audiffred v. Wertz, 2009 Tenn. App. LEXIS 811 (Tenn. Ct. App. 2009), the Court of Appeals affirmed a trial court ruling that the remarriage of Wife was insufficient to affect Husband's transitional alimony obligation, as the Wife had rebutted the statutory presumption that she was either supporting her new husband or he was supporting her, and she still had a need for the transitional alimony.

In the case of Chadwell v. Chadwell, 2000 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2000), the parties had entered into an agreed order in which the majority of the father's child support was included in his transitional alimony obligation so that he could deduct his payments in his tax filings. The appeals court decided to separate the alimony and child support obligations, which necessarily would result in a larger child support payment. Id. at *3. The court recognized that "under the unique circumstances of this case" the transitional alimony obligation was subject to modification, as well: "We do not view our decree in this case as a modification of the alimony portion of the 'transitional alimony' award. We are merely excising from that award the portion that was intended to serve as child support." Id.

In Hickman v. Hickman, the husband filed a petition to modify his alimony obligation based on Tenn. Code Ann. § 36-5-121(g)(2)(C), which allows a court to suspend transitional alimony when the recipient lives with a third person and fails to rebut the presumption that the third person is either contributing to, or receiving contribution from, the alimony recipient, and, as a result, the recipient no longer needs alimony. 2014 Tenn. App. LEXIS 91 (Tenn. Ct. App.

2014). Specifically, the husband argued that as the parties' son continued to live with the wife after their son turned eighteen (18), his alimony obligation should be modified. Id. In determining whether the parties' son should be considered a "third person," as addressed by Tenn. Code Ann. § 36-5-121(g)(2)(C), the Hickman Court explained as follows:

> As much as we might agree with wife's argument [that the legislature did not intend the statute to apply to adult children], which is supported by reason and common sense, [the argument] must be directed to the state legislature. The statute, as currently written, provides for no exceptions to "third person." As we have consistently held, this Court cannot rewrite the statute by carving out an exception for children who have recently reached adulthood and continue to live at home. "Where the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, 'to say *sic lex scripta* ["so is the law written"] and obey it.'" Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 309 (Tenn. 2008) (quoting Hawks v. City of Westmoreland, 960 S.W.2d 10, 16 (Tenn. 1997)).

Id. at *18 (internal citations omitted).

So, according to Hickman, the statute applies to the parties' son. Hickman, 2014 Tenn. App. LEXIS 91. However, notwithstanding the statute's applicability, the wife was ultimately able to rebut the statutory presumption and show that she needed the alimony and that her financial situation had deteriorated since the entry of the original decree. Id. Specifically, the Court of Appeals explained that

> Wife's economic situation is on a downward spiral unrelated to her help for her children. Under the circumstances, we hold that wife has rebutted the statutory presumption and demonstrated her continuing need for the amount of transitional alimony initially awarded by the trial court. The trial court's judgment reducing wife's transitional alimony is reversed.

Id. at *22.

B. TERMINATION OF ALIMONY AWARDS UNDER SPECIFIC CIRCUMSTANCES

1. DEATH OR REMARRIAGE

a. ALIMONY IN FUTURO

Tenn. Code Ann. § 36-5-121(f)(3) provides:

An award for alimony *in futuro* shall terminate automatically and unconditionally upon the death or remarriage of the recipient. The recipient shall notify the obligor immediately upon the recipient's remarriage. Failure of the recipient to timely give notice of the remarriage shall allow the obligor to recover all amounts paid as alimony *in futuro* to the recipient after the recipient's marriage. Alimony *in futuro* shall also terminate upon the death of the payor, unless otherwise specifically stated.

b. ALIMONY IN SOLIDO

Tenn. Code Ann. § 36- 5-121(h)(3) provides:

> Alimony *in solido* is not terminable upon the death or remarriage of the recipient or the payor.

c. REHABILITATIVE ALIMONY

Tenn. Code Ann. § 36-5-121(e)(3) provides:

> Rehabilitative alimony shall terminate upon the death of the recipient.
>
> Rehabilitative alimony shall also terminate upon the death of the payor, unless otherwise specifically stated.
>
> Rehabilitative alimony does not automatically terminate upon the remarriage or cohabitation of the recipient. Remarriage or cohabitation could, however, be found to be a substantial change of circumstances, and it could thus open an award of rehabilitative alimony to increase, decrease, termination, extension or other modification pursuant to Tenn. Code Ann. § 36-5-121(e)(2). See Rickman v. Rickman, 2009 Tenn. App. LEXIS 213 (Tenn. Ct. App. 2009).

d. TRANSITIONAL ALIMONY

Tenn. Code Ann. § 36-5-121(g)(3) provides:

> Transitional alimony shall terminate upon the death of the recipient. Transitional alimony shall also terminate upon the death of the payor, unless otherwise specifically stated in the decree.

Tenn. Code Ann. § 36-5-121(g)(4) provides:

> The court may provide, at the time of entry of the order to pay transitional alimony, that the transitional alimony shall terminate upon the occurrence of other conditions, including, but not limited to, the remarriage of the party receiving transitional alimony.

2. COHABITATION

a. ALIMONY IN FUTURO

Tenn. Code Ann. § 36-5-121(f)(2)(A) provides**:**

> An award of alimony *in futuro* shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances.

Tenn. Code Ann. § 36-5-121(f)(2)(B) provides**:**

> In all cases where a person is receiving alimony *in futuro* and the alimony recipient lives with a third person, a rebuttable presumption is raised that:
>
> (i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or
>
> (ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse**.**
>
> THIS PRESUMPTION IS REBUTTABLE.

b. ALIMONY IN SOLIDO

Does not terminate based on cohabitation. Furthermore, alimony *in solido* is not modifiable except by agreement of the parties. Tenn. Code Ann. § 36-5-121(h).

c. TRANSITIONAL ALIMONY

Tenn. Code Ann. § 36-5-121(g)(2) provides: that if a recipient lives with a third person, in a rebuttable presumption is raised that:

(i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or

(ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

THIS PRESUMPTION IS REBUTTABLE

d. REHABILITATIVE ALIMONY

The statutes do not specifically address this issue, but Tenn. Code Ann. § 36-5-12(e)(2) provides that an award of rehabilitative alimony shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended or otherwise modified upon a showing of a substantial and material change of circumstances.

3. AGREEMENT OF PARTIES

Tenn. Code Ann. § 36-5-121(m) provides that:

> Nothing in this section shall be construed to prevent the affirmation, ratification and incorporation in a decree of an agreement between the parties as to support and maintenance of a party.
>
> Also, the Marital Dissolution Agreement can provide for any conditions for termination except alimony *in solido* which must be for definite amount and definite time and subject to mathematical calculation at the time of decree or agreement.
>
> NOTE: For alimony to be deductible by the payor and includable as income to the recipient, the alimony payments must terminate upon the recipient's death. *But see:* Chapter 3.

C. CLASSIFICATION OF ALIMONY IF DIVORCE DECREE IS SILENT AS TO TYPE OF ALIMONY

If the decree is silent on the issue of alimony, and the issue is not reserved by the court, the dependent spouse is foreclosed from seeking a modification thereafter, to award support. As the court held in Vaccarella v. Vaccarella, "as no alimony was awarded to Wife in the Marital

Dissolution Agreement, the issue of alimony is not modifiable." 49 S.W.3d 307, 316-17 (Tenn. Ct. App. 2001), *appeal denied.*

D. SERVICE OF PROCESS FOR PETITIONS TO MODIFY ALIMONY

In Beck v. Beck, 2012 Tenn. App. LEXIS 300 (Tenn. App. 2012), the Court of Appeals reminded us that, "[b]y statute, a court that has granted a divorce decree, based on personal jurisdiction and personal service or substitute service, generally has continuing jurisdiction to entertain petitions to modify or alter its orders regarding support and custody … *When a petition to modify or alter is filed, a new original summons is not required since the parties are already before the court, but notice of the petition must be given to the adverse party in a manner reasonably calculated to actually inform him of the pendency of the modification provision.*" Beck, Tenn. App. LEXIS 300 at *20 , (citing 1 Lawrence A. Pivnik, Tennessee Circuit Court Practice § 9:21 (2011)).

E. STANDARD FOR MODIFYING ALIMONY

To modify an alimony award, there must be a substantial and material change in circumstances. Tenn. Code Ann. § 36-5-121(a). The Court of Appeals of Tennessee and the Tennessee Supreme Court have interpreted the legislative intent of Tenn. Code Ann. § 36-5-121(e)(2) to reflect a policy that a final decree of divorce should settle the legal issues between the parties with a high degree of finality. See Waddey v. Waddey, 6 S.W.3d 230, 234 (Tenn. 1999) (quoting Harshfield v. Harshfield, 842 P.2d 535, 539 (Wyo. 1992), for the proposition that otherwise, "the finality of divorce would be illusory."). For that reason, "[t]he party seeking the modification has the burden of proving the substantial and material changes which justify it." Wright, 83 S.W.3d at 772 (holding that an increase in the obligor spouse's net worth, the increased time the couple's minor child would reside with the recipient spouse, and the fact that the recipient spouse would experience a change in lifestyle should he retire did not constitute circumstances warranting an increase in alimony).

To be considered "substantial," the changed circumstances must have "a significant impact on the recipient's need or to the obligor's ability to pay." Id. at 772. To be considered "material," the changed circumstances must have "occurred since the original [spousal support] award." Buettner v. Buettner, 183 S.W.3d 354, 361 (Tenn. Ct. App. 2005) *appeal denied* (holding that the recipient spouse's return to full-time employment and resultant increase in

income did not constitute a substantial and material change). "Furthermore, the change in circumstances must not have been foreseeable at the time the parties entered into the divorce decree." Watters, 22 S.W.3d at 821 (holding that obligor's voluntary decision to leave his job without first securing employment at or near the same earning level did not constitute a substantial and material change in circumstances). "If the change in circumstances was anticipated or in the contemplation of the parties at the time they entered into the property settlement agreement, such changes are not material to warrant a modification of the alimony award." Id. Moreover, when the parties' agreement addresses a particular circumstance, that circumstance becomes "foreseeable," and therefore does not provide a reviewing court an appropriate basis for modifying an alimony award. Grisham v. Grisham, 2011 Tenn. App. LEXIS 78, *13. Furthermore, "[h]ere the parties see fit to include alimony obligations in their marital dissolution agreement, [i]t must be presumed that the alimony provision was part of the inducement or consideration for the other provisions regarding division of the marital estate. The courts are justified in being reluctant to disturb an alimony obligation assumed under such conditions.'" Id., n. 4, citing Bryan v. Leach, 85 S.W.3d at 150.

The party seeking a modification must first establish that both a substantial and a material change of circumstances has occurred and then must prove that he or she is entitled to the modification, based upon the same factors that are relevant to an initial award of alimony. Tenn. Code Ann. § 36-5-121(i); Bogan, 60 S.W.3d at 730; *see also* Malkin v. Malkin, 2015 Tenn. App. LEXIS 151 (Tenn. Ct. App. 2015) (whether the obligor's retirement is objectively reasonable and, even where it is objectively reasonable, the trial court must still focus on need and ability to pay); *see also* Odom v. Odom, 2015 Tenn. App. LEXIS 217 (Tenn. Ct. App. 2015) (obligor's retirement was objectively reasonable and Wife's needs appeared to be more than that by her assets); Wright, 835 S.W.3d at 773.

The claimed change of circumstances must relate either to a change in the recipient's need or to the obligor's ability to pay, and must be both material and substantial. Bowman, 836 S.W.2d at 568."The party seeking the modification has the burden of proving the substantial and material changes which justify it." Wright, 83 S.W.3d at 772.

"A change is considered substantial if it has a significant impact on either the recipient's need or the obligor's ability to pay. A substantial and material change in circumstances does not automatically entitle the petitioner to a modification." Id. at 772-773 (citations omitted).

"The change in circumstances must have occurred after the original award. Such changes are not material if they were contemplated by the parties at the time of the divorce." Id. at 772 (citations omitted).

If the parties anticipate a change in circumstances at the time of the divorce, however, and agree that a modification petition may be brought, the petitioner may not have to show a substantial and material change of circumstances not contemplated at the time of the divorce. Such was the case in Mimms v. Mimms, 234 S.W.3d 634, 637 (Tenn. Ct. App. 2007). The Court of Appeals allowed the husband to seek a reduction in his rehabilitative alimony obligation without having to establish a substantial and material change of circumstances not contemplated at the time of the divorce. Id. at 640. In fact, the parties knew at the time of the divorce that the husband's income would end in a few months and they agreed that, if warranted, he could petition for a modification. Id. at 636. The Marital Dissolution Agreement provided that the parties would reevaluate their respective financial situations in or around August of 2005, and adjust the rehabilitative alimony payments accordingly. Id.

"Additionally, even where material and substantial changes exist, it is within the discretion of the trial court to determine whether a modification is warranted." Wright,83 S.W.3d at 772. Even if a substantial and material change in circumstances is established, the trial court is under no duty to modify the alimony award; the party seeking the modification must demonstrate that a modification is warranted. Bogan, 60 S.W.3d at 730; Wiser, 2010 Tenn. App. LEXIS 402 at *8.

"Once such changes are proved, the petitioning party must then demonstrate that a modification of the award is justified. The court should, where relevant, use the criteria provided by Tenn. Code Ann. § 36-5-101(d) [now § 36-5-121(i)], the criteria on which an initial award is based, to determine whether a modification is warranted." Wright, 83 S.W.3d at 773 (citations omitted).

1. CASES ADDRESSING SUFFICIENCY OF PROOF OF CHANGED CIRCUMSTANCES

a. OBLIGOR'S INCREASED EXPENSES

The obligor's increased expenses do not constitute changed circumstances absent proof of the obligor's inability to pay the ordered support. Elliot v. Elliot, 825 S.W.2d 87, 92 (Tenn. Ct. App. 1991).

b. OBLIGOR'S DECREASED INCOME

In Proctor v. Proctor, the court found that the husband's decrease in income was a substantial and material change in circumstance, stating:

> Husband's income dropped substantially, from $ 65,000 a year at the time of the divorce to $ 29,000 a year at the time of the hearing on the petition for modification. This change, being more than a 50% decrease in his annual income, constitutes a substantial change because it impairs Husband's ability to pay the amount of alimony set at the time of the divorce. See Bogan, 60 S.W.3d at 728 (citing Bowman, 836 S.W.2d at 568 (holding that a change is substantial when it significantly affects the obligor's ability to pay)). The dramatic drop in his income is also material because it was not within the contemplation of the parties at the time of the divorce. See Bogan, 60 S.W.3d at 728 (citing Watters, 22 S.W.3d at 821).

2007 Tenn. App. LEXIS 565 (Tenn. Ct. App. 2007). A finding of a substantial and material change of circumstance could not automatically entitle the obligor to a modification however. "For Husband to be entitled to a modification of his alimony obligation, he must affirmatively establish that modification is justified based upon the relevant factors in Tenn. Code Ann. § 36-5-121(i)." Proctor, 2007 Tenn. App. LEXIS at *12-13 (citing Bogan, 60 S.W.3d at 730; Wright, 83 S.W.3d at 773.).

In reviewing the obligor's financial obligations, which is included in the statutory factors, the court may consider the economic benefits of contributions from a new spouse or other person residing with the obligor:

> The obligor party's financial obligations are a statutory factor to be considered when setting or modifying alimony. See Tenn. Code Ann. § 36-5-121(i)(1). Accordingly, although we have concluded the statutory presumption under Tenn. Code Ann. § 36-5-121(f)(2)(B) does not apply, we should consider whether Husband is directly or indirectly receiving an economic benefit that reduces his financial obligations, regardless of the fact the economic benefit comes from his new wife or another person with whom he resides.

Proctor, 2007 Tenn. App. LEXIS 565.

In Fields v. Fields, 2013 Tenn. App. LEXIS 835 (Tenn. Ct. App. 2013), the Husband was ordered to pay $1,000 per month in alimony after a lengthy marriage. He had good earning capacity, but had just had two knee operations, including a knee replacement, and other health

problems evidenced by a military disability. The Wife did not have a college degree or appreciable work skills or work experience. Following the divorce, Husband returned to work for six months before a third knee operation to replace the knee he had replaced just before the divorce. After the third operation, Husband filed a petition to reduce his alimony obligation; Wife counter-claimed for an increase in alimony. Following a one-day trial, the trial court dismissed Husband's petition and granted Wife's petition, increasing her alimony to $2,000 per month. Husband appealed, and the Court of Appeals, in a divided opinion, affirmed the trial court. (Judge Swiney opined that neither party had shown a change of circumstances and therefore the Wife's petition should also have been denied.) The basis of the opinion is that the trial court believed that Husband was capable of working, with or without a bum knee, and the Wife needed the alimony, and the trial court's order should be affirmed.

In Osesek v. Osesek, 2012 Tenn. App. LEXIS 149 (Tenn. Ct. App. 2012) , the court found that while the Husband's job loss was not anticipated, there had not necessarily been a substantial and a material change of circumstances because the Husband had other assets from which to satisfy his alimony obligation. The Court of Appeals rejected the Husband's argument that he should not have to spend down his assets. The case was remanded to allow consideration specifically of Husband's assets, including their duration.

c. RECIPIENT'S INCREASED EARNINGS OR IMPROVED FINANCIAL POSITION

Pursuant to the court in Wright, an increase in a recipient's income does not by itself justify an alimony modification :

> Modification based on this increase is proper only where the initial alimony award was based on a presumption that the recipient would not continue to increase his/her income through the pursuit of his/her career. Whether such an increase in income constitutes a substantial and material change is a question of whether it was "sufficiently foreseeable."

83 S.W.3d at 774 (citations omitted). The Wright court ultimately found that recipient's increase in income was foreseeable. Id. at 775.

Wife's reentry into the workforce was foreseeable. Sannella v. Sannella, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999).

"Any income produced from the proceeds of the sale of the parties' marital home awarded to a spouse in the division of marital property should not be a factor in determining whether or

not a change of circumstances existed that warranted a modification of periodic alimony payments." Seal v. Seal, 802 S.W.2d 617, 621 (Tenn. Ct. App. 1990).

Absent the Husband's establishing that this income was unanticipated or unforeseen, any dividend or interest income earned by an alimony recipient from stocks or bonds received under a property settlement agreement should not be considered as a factor constituting a substantial and material change in circumstances to support a reduction in alimony payments. Id.

Wife's return to employment following the divorce was foreseeable to husband and was, thus, not a substantial and material change of circumstance. Buettner v. Buettner, 183 S.W.3d 354, 360-61 (Tenn. Ct. App. 2005).

In Church v. Church 346 S.W.3d 474 (Tenn. Ct. App. 2010), the Wife was suffering from breast cancer and the husband was earning over $150,000 at the time of the divorce. Later, the Husband lost his job (he found another, earning approximately $100,000 plus fluctuating income from an interest in some Sonic restaurants), lost money in failed investments, and spent 13 months unemployed, and the Wife's medical condition improved. Husband petitioned for a decrease in his $3,000 per month alimony obligation. The trial court found that there was a substantial and material change of circumstances since the entry of the Final Decree, but refused to reduce the Husband's alimony obligation, finding that Husband still made substantially more than Wife and that Wife still needed the alimony. The Court of Appeals affirmed, stating that "[E]ven if a substantial and material change in circumstances is established, the trial court is under no duty to modify the alimony award; the party seeking the modification must demonstrate that a modification is warranted." Id. at *11 (citing Bogan, 60 S.W.3d at 730; Wiser, 339 S.W.3d 1, at *8). "This Court is not so much concerned with a reduction in income from one source as it is concerned with whether Petitioner has sustained a significant change in his income from *all sources.*" Killian v. Killian, 2010 Tenn. App. LEXIS 629,*4 (Tenn. Ct. App. 2010) (emphasis in original).

In Williams v. Williams, 2012 Tenn. App. LEXIS 142 (Tenn. Ct. App. 2012), the Court of Appeals found that the trial court had abused its discretion when it reduced ex-Wife's alimony obligation on a petition by the ex-Husband, but did not terminate it. Williams relied on Gonsewski for the proposition that Wife received alimony *in futuro*, which "should be awarded only when the court finds that economic rehabilitation is not feasible and long-term support is

necessary," and since Wife no longer needed alimony, the trial court should have terminated it altogether, rather than reducing it from $750 per month to $500 per month.

d. OBLIGOR'S INCREASED EARNINGS OR IMPROVED FINANCIAL POSITION

One of the most important alimony modification decision rendered by a Tennessee court in the last decade involved a modification sought by the Wife based on Husband's increase in income after the divorce. Wiser v. Wiser, 339 S.W.3d 1 (Tenn. Ct. App. 2010) (cert. denied February 15, 2011). The Husband asserted that the Wife was not entitled to an increase in alimony because her needs had not changed since the divorce. The trial court declined to award an increase in alimony, and the Wife appealed. The Court of Appeals reversed, finding that refusal to increase alimony was an abuse of discretion:

> To modify an alimony award, there must be a substantial and material change in circumstances. Tenn. Code Ann. § 36-5-121(a) (2005); *accord* Bogan, 60 S.W.3d at 727-28 (citing Tenn. Code Ann. § 36-5-101(a)(1) (Supp. 2000)). "This change in circumstances must have occurred since the original award." Brewer, 869 S.W.2d at 935 (citing Jones v. Jones, 659 S.W.2d 23, 24 (Tenn. Ct. App. 1983)). A "substantial" change is one that "significantly affects either the obligor's ability to pay or the obligee's need for support." Bogan, 60 S.W.3d at 728 (citing Bowman, 836 S.W.2d at 568). A change is material if it was not "anticipated or [within] the contemplation of the parties at the time" of the original divorce. Id. (citing Watters, 22 S.W.3d at 821; McCarty v. McCarty, 863 S.W.2d 716, 719 (Tenn. Ct. App. 1992); Elliot, 825 S.W.2d at 90).
>
> The party seeking modification bears the burden of proving that a substantial and material change in circumstances has occurred. Freeman v. Freeman, 147 S.W.3d 234, 239 (Tenn. Ct. App. 2003) (*citing* Seal, 802 S.W.2d 617, 620 (Tenn. Ct. App. 1990). Once a substantial and material change in circumstances has been established, the trial court is under no duty to modify the award; the party seeking modification must demonstrate that a modification is warranted. Bogan, 60 S.W.3d at 730. In "assessing the appropriate amount of modification, if any, in the obligor's support payments, the trial court should consider the factors contained in" Tennessee Code Annotated § 36-5-121(i) "to the extent that they may be relevant to the inquiry." Id. (*citing* Watters, 22 S.W.3d at 821; Seal, 802 S.W.2d at 620; Threadgill v. Threadgill, 740 S.W.2d 419, 422-23 (Tenn. Ct. App. 1987)).

> The Bogan Court explained the difference in applying these statutory factors in determining the initial award of support and in a support modification proceeding: When addressing an *initial* award of support, the need of the spouse must necessarily be the most important factor to consider, because alimony is primarily intended to provide some minimal level of financial support for a needy spouse. Nevertheless, when deciding whether to *modify* a support award, the need of the receiving spouse cannot be the single-most dominant factor, as a substantial and material change in circumstances demands respect for other considerations. . . . [T]he ability of the obligor to provide support must be given at least equal consideration. Id. (citations omitted). Thus, while the obligee spouse's need is the central inquiry for an initial alimony award, other considerations become more prominent in a modification proceeding.

Id. at 12. Accordingly, the Court of Appeals modified the husband's alimony obligation from a declining award starting at $6,000 per month and declining to $4,000 per month over 12 years, to a constant $10,000 per month over that same period.

Wiser is the *last* word, but not the *only* word on the issue of whether an increase in the obligor's income merits an increase in the alimony obligation. "The increase in an alimony obligor's income or worth is not, in and of itself, sufficient to warrant an increase in alimony to the recipient. An award of alimony *in futuro* is not a guarantee that the recipient spouse will forever be able to enjoy a lifestyle equal to that of the obligor spouse." Wright, 83 S.W.3d at 773 (citations omitted) (noting that [t]he jury further found that [the recipient] enjoys a standard of living comparable to the one he enjoyed while married to [the obligor], that his standard of living has not declined since the divorce, that his expenses have not increased since the divorce, and that his net worth has increased since the divorce). (Note: the Wright opinion was decided prior to the amendment of the alimony statute in 2005).

e. OBLIGOR'S WILLFUL AND VOLUNTARY UNEMPLOYMENT OR UNDEREMPLOYMENT

Obligor's willful underemployment does not constitute changed circumstances to support a reduction in alimony. Watters v. Watters, 22 S.W.3d 817, 823 (Tenn. Ct. App. 2000) "The trial court did not err in refusing to modify Husband's alimony obligation. While technically there is a change of circumstances, the change was brought about solely by Husband's voluntary actions.

He should not be able to escape his obligations under such circumstances." Id. The dissent found that a job relocation would impede visitation, thus underemployment was not willful. Id. at 824.

Obligor, who was voluntarily unemployed was entitled to a reduction in his support obligation, because his petition was supported by medical evidence, but the support obligation was not terminated because he had some earning capacity and the recipient had need, despite her temporary increase in salary at a former job. Byrd v. Byrd, 184 S.W.3d 686, 692-93 (Tenn. Ct. App. 2005).

"The settled rule in Tennessee is that 'obligations voluntarily assumed are not proper to be considered as changed circumstance[s] to reduce support payments otherwise owed.'" Jackman v. Jackman, 2011 Tenn. App. LEXIS 571 at *28-29 (Tenn. Ct. App. 2011).

The Court in Hartman v. Hartman, 2006 Tenn. App. LEXIS 511 at * 5 (Tenn. Ct. App. 2006) found a reduction in husband's alimony obligation was warranted where husband suffered a significant decrease in his chiropractic practice since divorce due primarily to increase in competition, decreased patient visits and reduced reimbursements from private insurance companies and TennCare. Although the husband was entitled to a reduction in his alimony obligation, the evidence did not preponderate against the trial court's refusal to eliminate husband's spousal support obligation completely when the wife continued to demonstrate financial need, including a monthly shortfall of $200 over and above her alimony and other income. Id. at *7.

A reduction in rehabilitative alimony was warranted in Mimms, 234 S.W.3d at 640, where husband obligor's income dropped from $700,000 to $100,000 and where parties knew at the time of the divorce that his income would end in a few months. The court noted that the wife could seek an upward modification if his income increased significantly, as she predicted it would and further ordered the husband to provide the wife with annual tax returns or sworn statements of his income. Id.

In Hiatt v. Hiatt, the ex-husband's income had skyrocketed since the divorce, while the ex-wife had failed to find any financial success. No. E2015-00090-COA-R3-CV, 2016 Tenn. App. LEXIS 47 (Tenn. Ct. App. Jan. 28, 2016). The trial court found that the ex-wife was voluntarily unemployed, and rejected her request for additional alimony. The court of appeals reversed, holding that, while it had no issue with the finding that the ex-wife was voluntarily unemployed, the trial court should have examined other factors related to alimony rather than

making its decision based solely on ex-wife's failure to work. The court of appeals reversed the trial court's finding that there was no substantial and material change of circumstances, and remanded the case to the trial court to reexamine the alimony issue, but also ordered the trial court to award the ex-wife her attorney's fees incurred on the alimony question to date, as well as her fees on appeal.

f. OBLIGOR'S PRIOR EXISTING HEALTH CONDITION

Obligor's "basic heart problem is not a change in circumstances, Husband suffered a heart attack in 1987, *prior to the divorce*." Givler v. Givler, 964 S.W.2d 902, 906 (Tenn. Ct. App. 1997).

g. VOLUNTARY ASSUMPTION OF FINANCIAL OBLIGATIONS

Obligor cannot "avoid paying support by voluntarily assuming new financial obligations." Sannella, 993 S.W.2d at 76.

h. REMARRIAGE/COHABITATION BY A REHABILITATIVE ALIMONY RECIPIENT

A quote from Fulbright v. Fulbright, 64 S.W.3d 359, 368 (Tenn. Ct. App. 2001) is instructive on this topic:

> In Isbell v. Isbell, 816 S.W.2d 735, the Supreme Court rejected the argument that remarriage is by its nature rehabilitative and held that remarriage itself did not warrant termination of rehabilitative alimony, stating, "The presumption that the state of marriage in and of itself meets the economic needs of the female, or indeed of either spouse, is an antiquated presumption that may not be indulged in modern society." Isbell, 816 S.W.2d at 739.
>
> [W]e are of the opinion that cohabitation, in and of itself, does not constitute a change of circumstance sufficient to trigger a review of an award of rehabilitative support. The critical factor is not the cohabitation itself, but the economic impact on the recipient former spouse of any financial contribution from the cohabitee." Stockman v. Stockman, 1999 Tenn. App. LEXIS 553 (Tenn. Ct. App. 1999) (perm. to appeal not sought).

The Fulbright court nevertheless modified the trial court's order to remove the provision that remarriage would not terminate the rehabilitative alimony award, stating:

> This does not mean, however, that her remarriage coupled with other changes would not be sufficient to constitute a substantial

> and material change in circumstances. Accordingly, we modify the Trial Court's order by deleting the provision that Wife's remarriage will not terminate Husband's obligation to provide rehabilitative alimony. If a substantial and material change in circumstances occurs in the future, then either party may request appropriate relief from the Trial Court at that time.

Fulbright, 64 S.W.3d at 368-69 (internal quotations omitted).

In Strait v. Strait, 2006 Tenn. App. LEXIS 750 at *4 (Tenn. Ct. App. 2006) the Court of Appeals held that the trial court properly dismissed husband's petition to terminate his alimony *in futuro* obligation going forward. There was no basis for suspending husband's alimony *in futuro* obligation completely for all payments due from and after filing of husband's petition when alleged changed circumstances, i.e., third party's cohabitation with wife, no longer exists. Id. at *6.

In Mabee v. Mabee, 2013 Tenn. App. LEXIS 429 (Tenn. Ct. App. 2013) (*app. perm. denied* 2013 Tenn. App. LEXIS 858 (Tenn. 2013)), the Court of Appeals affirmed a finding by the trial court that alimony should not be terminated based on the alleged cohabitation by the ex-wife with another man, finding that the relationship between the ex-wife and her paramour did not amount to "cohabitation." As the Court stated,

> Cohabit is defined as:
>
> > 1: to live together as or as if as husband and wife (without formal marriage) [;] 2a: to live together or in company[;] b: to be intimately together or in company[.]
> >
> > Webster's Third New International Dictionary 440 (1993). Another definition for "cohabitation" reads:
> >
> > To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.
> >
> > Black's Law Dictionary 236 (5th ed. 1979). Honeycutt, 152 S.W.3d at 563 (footnote omitted).
> >
> > Based upon the foregoing definitions for "cohabit" and "cohabitation," we have concluded, as the trial court did, that the term cohabitation with another man requires more than an intimate or sexual relationship and more than spending the night on several occasions with another man. The term cohabitation with another man additionally requires something akin to the mutual assumption

> of duties and obligations that are customarily manifested by a married couple or life partners.

Id. at *7-8. Of note, the estimated 104 nights a year that the ex-wife and her paramour spent together, and the fact that the paramour himself was married with no intent to divorce his wife, were factors in the finding that the ex-wife and her friend were not cohabitating for the purpose of the provision in the parties' divorce agreement.

In Keith v. Keith, 2010 Tenn. App. LEXIS 224 (Tenn. Ct. App. 2010), Wife invited several other adults, together with their children, to share her home. Wife testified that at times, her girlfriend or the girlfriend's children had paid or helped pay the utility bills. There was no evidence, however, that the Wife did not need the amount of support previously awarded. Stated differently, the fact that the other adults in her home contributed to her support did not support a conclusion that Wife "did not need the amount of support previously awarded." Id. at *12-13. Accordingly, the Court of Appeals did not suspend Wife's alimony obligation.

In Vick v. Hicks, 2014 Tenn. App. LEXIS 739 (Tenn. Ct. App. 2015), the Court of Appeals confirmed that a contractual provision that "[t]he alimony shall not be modifiable by either party" trumps Tenn. Code Ann. § 36-5-121(g)(2).Thus, the Wife's remarriage did not lead to termination of the transitional alimony awarded to her in the parties' marital dissolution agreement.

In 2018, the Court of Appeals addressed a similar situation to Vick in Scherzer v. Scherzer, No. M2017-00635-COA-R3-CV, 2017 Tenn. App. LEXIS 849 (Tenn. Ct. App. May 24, 2018). Here, the parties' original marital dissolution agreement provided that the husband would pay wife transitional alimony. As the Court of Appeals noted, "the relevant sentence in the MDA alimony provision states: 'Said alimony shall terminate upon either party's death or the remarriage of Wife.'" Wife began cohabitating with a boyfriend, and the husband sued to terminate his alimony. Wife claimed that the alimony was subject to termination only upon her death or the husband's death, or her remarriage, and that the failure to include the statutory language concerning modification or suspension upon cohabitation meant that it did not apply.

The trial court and the court of appeals disagreed. In doing so, both courts distinguished this case from other contract cases concerning alimony:

> The trial court determined that in contrast, the parties in this case 'did not include any more restrictive terms than the statute, as the parties had in Honeycutt and Myrick, nor did they include any terms precluding modification altogether, as the parties had in Vick.'
>
> Upon our thorough review of the applicable authorities, we agree with the trial court that the authorities upon which Wife relies are highly factually distinguishable because the parties in this case did not expressly agree in the MDA that the transitional alimony would be nonmodifiable.
>
> ***
>
> To adopt Wife's argument that the statutory cohabitation provision does not apply because the parties did not expressly include it in their MDA would yield the statutory provision essentially meaningless because divorcing parties always have the ability at the outset to agree that transitional alimony will be modifiable upon the payee's cohabitation with a third party. See Tenn. Code Ann. § 36-5-121(g)(2)(A).

Id. at *25.

Note: Divorcing parties may expressly agree to forego the cohabitation exception to the non-modifiability of transitional alimony set forth in Tenn. Code Ann. § 36-5-121(g)(2). In order to ensure the exception does not apply, the alimony provision in the marital dissolution agreement should explicitly provide that the transitional alimony obligation is non-modifiable or that the statutory cohabitation exception is not applicable.

i. CHANGE IN TAX LAWS

"Federal Income Tax Laws change to some degree annually and therefore the fact that the tax laws will change is readily foreseeable although the exact manner in which they will change is not foreseeable. We do not find that the changes in the tax laws since 1983 are a material change in circumstances." Elliot, 825 S.W.2d at 91.

j. RECIPIENT'S INCREASED RESIDENTIAL TIME WITH THE PARTIES' CHILD/REN

The recipient's increased residential time with the parties' child is irrelevant to the issue of alimony:

> "The fact that Mr. Quillen's minor child is now spending considerably more time with Mr. Quillen than he previously was is

> not a circumstance warranting an increase in alimony. This is a question of child support, not alimony." Wright, 83 S.W.3d at 774.

k. RECIPIENT'S RECEIPT OF SOCIAL SECURITY BENEFITS

"[Sixty-eight-year-old Recipient's] receipt of social security cannot be said to have been an unanticipated event." Wright, 83 S.W.3d at 774.

l. PROOF THAT ALIMONY IS NOT NEEDED FOR SUPPORT

"Moreover, the fact that he has chosen to save, rather than to spend, his alimony receipts does not in itself constitute an unforeseen event warranting a modification in alimony." Wright, 83 S.W.3d at 774.

m. FORESEEABILITY OF INHERITANCE

Recipient's receipt of an inheritance was not foreseeable where obligor "testified that he was aware that the wife had an uncle who might leave her something, but he could not predict when or how much inheritance the wife could get…. It is undisputed that an inheritance, under some conditions, can constitute a change of circumstances. Brooks v. Brooks, 2000 Tenn. App. LEXIS 479 at *4-6 (Tenn. Ct. App. 2000) (citing Brewer v. Brewer, 869 S.W.2d 928 (Tenn. Ct. App. 1993)).

In Campbell v. Campbell the court stated:

> While it is true that Wife has improved her financial status since the time of the divorce due in part to the receipt of the inheritance from her mother's estate, Husband has failed to carry the burden thrust upon him in proving that such has constituted a substantial and material change of circumstances. It must have been foreseeable to the parties in a marriage of thirty-two years that Wife would receive an inheritance from her mother's estate. Regardless, Husband failed to carry his burden of proving that such was unforeseeable or that such was not within the contemplation of the parties at the time of the Agreement.
>
> 1998 Tenn. App. LEXIS 744, *10 (Tenn. Ct. App. 1998).

n. FORESEEABILITY OF RETIREMENT

The Supreme Court carved out a special test regarding modification of alimony obligations when the obligor retires. Instead of determining whether retirement was foreseeable at the time of the divorce, as other appellate courts had done (See Sannella, 993 S.W.2d at 75 (Tenn. Ct. App. 1999)), the Tennessee Supreme Court, in Bogan, held that:

> [W]hen an obligor's retirement is objectively reasonable, it does constitute a substantial and material change in circumstances — irrespective of whether the retirement was foreseeable or voluntary — so as to permit modification of the support obligation. However, while bona fide retirement after a lifetime spent in the labor force is somewhat of an entitlement, an obligor cannot merely utter the word 'retirement' and expect an automatic finding of a substantial and material change in circumstances. Rather, the trial court should examine the totality of the circumstances surrounding the retirement to ensure that it is objectively reasonable. The burden of establishing that the retirement is objectively reasonable is on the party seeking modification of the award, cf. Seal, 802 S.W.2d at 620, and the trial court's determination of reasonableness will not be reversed on appeal absent an abuse of discretion, See, e.g., Crabtree, 16 S.W.3d at 360. Although we decline to confine this inquiry to consideration of a list of factors, in no case may a retirement be deemed objectively reasonable if it was primarily motivated by a desire to defeat the support award or to reduce the alimony paid to the former spouse.
>
> Nothing we have said would prevent parties from deciding for themselves the effect of a bona fide retirement on spousal support payments. Indeed, because voluntary retirement is usually always foreseeable in some sense, parties are especially encouraged to make arrangements for this occasion in the marriage dissolution agreement. Moreover, although not critical to our analysis, we note that a majority of jurisdictions addressing this issue also only require a reasonable, good faith retirement.
>
> While the primary purpose of the retirement cannot be to defeat the support obligation, we cannot further require that an obligor be ignorant of the effects of his or her retirement upon the receiving spouse. See, Smith, 419 A.2d at 1038. In most cases, if not all, the obligor will undoubtedly be aware that retirement will affect the income available to pay his or her support obligations, but mere knowledge of this fact alone will generally be insufficient to find that the retirement was taken primarily as an effort to avoid support obligations. Bogan, 60 S.W.3d at 729.However, even when an obligor is able to establish that a retirement is objectively

> reasonable, and therefore that it constitutes a substantial and material change in circumstances, the obligor is not necessarily entitled to an automatic reduction or termination of his or her support obligations. Id. at 730.
>
> Instead, the change in conditions resulting from retirement merely allows the obligor to demonstrate that reduction or termination of the award is appropriate. Id.
>
> Accordingly, when assessing the appropriate amount of modification, if any, in the obligor's support payments, the trial court should consider the factors contained in Tenn. Code Ann. § 36-5-101(d)(1) to the extent that they may be relevant to the inquiry. Id.
>
> Although section 36-5-101(d) lists several factors for consideration, the two most important considerations in modifying a spousal support award are the financial ability of the obligor to provide for the support and the financial need of the party receiving the support. Id.
>
> Nevertheless, when deciding whether to modify a support award, the need of the receiving spouse cannot be the single-most dominant factor, as a substantial and material change in circumstances demands respect for other considerations. While the need of the receiving spouse remains an important consideration in modification cases, the ability of the obligor to provide support must be given at least equal consideration. Accordingly, to the extent that any case would compel giving more weight to the need of the receiving spouse than all other factors in order to modify a support obligation, it is overruled. Id.
>
> Although an obligor's retirement age may be considered in assessing the overall reasonableness of the retirement, we are reluctant to establish a presumptive age for an objectively reasonable retirement. Id. at 731.

In Miller v. Miller, 81 S.W.3d 771 (Tenn. Ct. App. 2001) the trial court "specifically found that there was not a substantial and material change of circumstances which would justify modification of the husband's alimony obligations" as a result of his voluntary retirement. Id. at 775. The Court of Appeals applied the Bogan test, stating "an objectively reasonable retirement, taken in good faith and without intent to defeat the support obligation, does constitute a substantial and material change in circumstances so that a modification of support obligations may be considered." Bogan, 60 S.W. 3d at 727. The appellate court nevertheless affirmed the

trial court's holding, relying on the language in Bogan stating, "an obligor cannot merely utter the word 'retirement' and expect an automatic finding of a substantial and material change in circumstances." Bogan, 60 S.W. 3d at 728; and "The two most important considerations in modifying a support award are the financial ability of the obligor and the financial need of the party receiving support, both given equal consideration." Bogan, 60 S.W. 3d at 729. The Miller court held that "there has not been a substantial and material change of circumstances which should justify modification of Mr. Miller's alimony obligations." Miller, 81 S.W. 3d at 774.

To reinforce the proposition that ability to pay must be given equal consideration to need in modification cases, consider Wilhoit v. Wilhoit No. M2017-00740-COA-R3-CV, 2018 Tenn. App. LEXIS 91 (Tenn. Ct. App. Feb. 16, 2018). In Wilhoit, the Court of Appeals heard the second appeal from a trial court decision which originally denied a petition to modify alimony, and then on remand reduced the alimony from $3,540 per month to $2,990 per month. The former husband appealed a second time. In this case, the Court of Appeals found that the trial court had abused its discretion in failing to reduce the former husband's alimony obligation far enough to allow him the ability to pay it over the long term:

> Using the figures determined by the trial court, Husband's monthly expenses, including his alimony obligation, total $6,662 per month. Husband has a monthly social security income of $2,060, resulting in a monthly deficit of $4,602. Although he retains assets, if Husband paid the alimony as ordered by the trial court, he would have depleted his assets before the end of 2015. In Bowman v. Bowman, 836 S.W.2d 563 (Tenn. Ct. App. 1991), this Court concluded that, where the husband-obligor was unable to work and was forced to liquidate all of his assets in order to pay spousal support, (such that he would soon have nothing from which to support himself,) the support obligation should terminate within one year. *Id.* at 568-69. However, in Bowman, the recipient-spouse was to receive a large tract of land, which could be sold in order to provide for her support. Id. at 569.
>
> Here, the parties' cumulative incomes and assets are not sufficient to cover their respective expenses long-term. In cases such as this, the parties must recognize that "[j]ust as a married couple may expect a reduction in income due to retirement, a divorced spouse cannot expect to receive the same high level of support after the supporting spouse retires." Bogan v. Bogan, 60 S.W.3d 721, 729 (Tenn. 2001) (quoting In re Marriage of Reynolds, 63 Cal. App. 4th 1373, 74 Cal. Rptr. 2d 636, 640 (Ct. App. 1998)).
>
> Like Mr. *Bogan*, Dr. Wilhoit, while able to provide some level of support, cannot continue to pay support at pre-retirement levels without accruing a substantial monthly deficit. From the totality of

> the circumstances, we conclude that the trial court's order awarding Wife alimony *in futuro* in the amount of $2,990 per month was not supported by the evidence. If left to stand, the trial court's decision will result in Husband liquidating all assets and accruing insurmountable debt. Accordingly, the ruling constitutes a clear abuse of discretion. See Gonsewski v. Gonsewski**,** 350 S.W.3d 99, 105 (Tenn. 2011). While we concede that Wife has need of alimony, the question remains what, if any, amount of support Husband has the ability to pay. We now turn to that question.
>
> As set out above, Husband has income of $2,060 per month and expenses of $3,672 per month, not including alimony. Wife has income of $956 and alleged expenses of $4,045.70, which exceeds Wife's expenses as found by this Court in Wilhoit I**.** We, therefore, modify the trial court's award of alimony *in futuro* from $2,990 per month to $500 per month, effective May 30, 2012. This revised award of alimony *in futuro* provides an equitable distribution of income between the parties such that both parties can retain enough assets to continue to support themselves for years to come.

Id. The Court of Appeals also remanded the case to the trial court to determine how to reimburse the former husband for the amounts he overpaid in alimony during the pendency of the case, pointing out that "While the need of the receiving spouse remains an important consideration in modification cases, the ability of the obligor to provide support must be given at least equal consideration." Bogan**,** 60 S.W.3d at 730.

In Freeman, 147 S.W.3d at 242, the Court of Appeals affirmed the denial of the husband's petition for modification, which the husband based on his retirement, at nearly 70 years of age, and the sale of his dentistry practice. The Freeman court held that Husband did not satisfy his burden of proving that his retirement constituted a substantial and material change of circumstances so as to justify termination or modification of his spousal support obligation, stating:

> Upon examination of the record and the testimony in this case, we find that Husband did not satisfy his burden of proving that his retirement constituted a substantial and material change of circumstances so as to justify termination or modification of his spousal support obligation. We find that Husband provided inadequate proof that his current situation varies substantially and

> materially from his circumstances on September 12, 1984, the date of the court's Final Decree of Divorce and initial award of alimony. We do not dispute that Husband certainly has a right to retire or that he would conceivably be entitled to a modification or termination of his support obligation if he introduced sufficient evidence into the record to demonstrate that his retirement, in fact, resulted in a substantial and material change in circumstances and that such retirement was 'objectively reasonable' under the 'totality of the circumstances.'

In Malkin, 475 S.W.3d 252, 258 (Tenn. Ct. App. 2015) the appellate court assessed whether retirement was "objectively reasonable," and also still focused on the factors of need and ability to pay. Id.

o. INCOME RECEIVED FROM SALE OF PROPERTY AWARDED AT DIVORCE

In Lane v. Lane, 2009 Tenn. App. LEXIS 769 at *1 (Tenn. Ct. App. 2009), Husband earned $10,000 per month at time of divorce, and less than $3,000 per month at time of hearing on his petition to modify his $1,500 per month alimony *in futuro* obligation. The trial court determined that the Husband was willfully underemployed and refused to modify the award, and the Court of Appeals affirmed. Id. Of more interest was the Husband's argument that the Wife's receipt of a windfall from the sale of the marital residence awarded to her in the divorce ought to be considered in determining her need for alimony. Id. at *5. The trial court and the Court of Appeals rejected this argument, with the appellate court noting that:

> Wife was awarded the parties' marital home, valued at $280,000, in the divorce. She sold the marital home for $500,000, and with the proceeds she purchased her new home for $295,000.00. We reject Husband's suggestion that the proceeds from the sale of her home decreased Wife's need for alimony. This Court has stated that "[a]ny income produced [from assets] awarded to a spouse in the division of marital property should not be a factor in determining whether or not a change of circumstances existed to warrant a modification of periodic alimony payments." Richards v. Richards, 2005 Tenn. App. LEXIS 106 (Tenn. Ct. App. 2005) (quoting Norvell v. Norvell, 805 S.W.2d 772, 775 (Tenn. Ct. App. 1990)).

Lane, 2009 Tenn. App. LEXIS 769 at n.12.

F. JURISDICTION OF THE TRIAL COURT PENDING APPEAL

In Nieman v. Nieman, 2009 Tenn. App. LEXIS 593 (Tenn. Ct. App. 2009), the Court of Appeals addressed the question of whether the trial court could hear a request by the husband to modify his child support and alimony obligation pending an appeal of a divorce decree that had already decided those issues. The Court of Appeals stated:

> Lastly, Husband asserts that the trial court erred in denying his Motion for Decrease in Child and Spousal Support Upon a Material Change in Circumstances on the basis that the trial court lacked jurisdiction to modify a final order that was pending on appeal. In the motion, Husband contended that there was a "substantial and material variance in the defendant's income such that he requests modification of his child and spousal support obligations" and requested that the trial court "grant a reduction in child support based upon the child support guidelines and a reduction in rehabilitative alimony.
>
> To support his argument that the trial court had jurisdiction while the Final Decree of Divorce was pending on appeal, Husband relies on Tenn. R. Civ. P. 62.03, titled "Relief Pending Appeal," which states that:
>
> > When an appeal is taken from an interlocutory or final judgment in actions specified in Rule 62.01 or in action for alimony or child support, the court in its discretion may suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal and upon such terms as to bond or otherwise as it deems proper to secure the other party.
>
> Tenn. R. Civ. P. 62.03 (emphasis added); Young, 971 S.W.2d at 393 (holding that "[t]he express language of [Tenn. R. Civ. P. 62.03] gives the trial court the discretion to suspend or grant whatever relief is deemed appropriate during the pendency of an appeal in an action for alimony or child support").
>
> In his motion, Husband sought a permanent change in child and spousal support pursuant to Tenn. Code Ann. § 36-5-101(g)(1) and Tenn. Code Ann. § 36-5-121(a), rather than a temporary change effective only during the pendency of this appeal. Thus, Tenn. R. Civ. P. 62.03 is not applicable to the present matter. "[O]nce a party perfects an appeal from a trial court's final judgment, the trial court effectively loses its authority to act in the case without leave of the appellate court." First Am. Trust. Co. v. Franklin-Murray Dev. Co., L.P., 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001) (footnote in original).

> We are of opinion, however, that the trial court had jurisdiction to consider the motion, since Husband specifically sought relief under Tenn. Code Ann. § 36-5-101(g)(1) and 36-5-121(a), based on the difference in the currency conversion rate between the date of trial and the date of the motion. Thus, Husband was not seeking to modify the order that was on appeal based on circumstances existing at the time of trial but, rather, sought to have the court set child and spousal support based on what was alleged to be a significance variance between the amount of child support he had been ordered to pay and the applicable guidelines and, with respect to spousal support, a material change in circumstance.
>
> As noted by the court in Hannahan v. Hannahan, 247 S.W.3d 625, 627 (Tenn. Ct. App. 2007): "After a divorce decree becomes final, a marital dissolution agreement becomes merged into the decree as to matters of child support and alimony, and the trial court has continuing statutory power to modify the decree as to those matters when justified by changed circumstances."

Id. at *8-10.

G. MARITAL DISSOLUTION AGREEMENT PROVISIONS PRECLUDING MODIFICATION PETITIONS REGARDING ALIMONY *IN FUTURO*

Marital Dissolution Agreement provisions which purport to prevent modification petitions by the recipient of alimony *in futuro* are not enforceable. Anderson v. Anderson, 810 S.W.2d 153 (Tenn. Ct. App. 1991). In Anderson, the parties had entered into a Marital Dissolution Agreement which provided that the Wife would receive alimony *in futuro* in the amount of $250.00 per month until her death or remarriage, or the inability of the Husband to pay this alimony. The Agreement further provided that the Wife would not seek any more increases in the alimony award in light of certain concessions made by the Husband in the remainder of the Agreement. The Wife later sought an increase in the alimony award, and the trial court dismissed her petition.

The Court of Appeals reversed, finding that the court could not deprive itself of the authority conferred upon it by the statute to modify the award upon a proper showing. See, e.g., Tenn. Code Ann. § 36-5-101 (a)(1).

It is important to note that Anderson was decided prior to the passage of the transitional alimony provisions of Tenn. Code Ann. § 36-5-101(d)(1)(D) (now Tenn. Code Ann. § 36-5-121(g)). It is unlikely that Anderson could be used as authority to permit the modification of

alimony which the parties themselves agreed was non-modifiable. However, Anderson may still be good law as applied to alimony *in futuro*.

H. PROVISION CALLING FOR AUTOMATIC SUSPENSION OF ALIMONY UPON FAILURE OF WIFE TO SUPPLY INCOME INFORMATION NOT ENFORCEABLE

In Beck**,** the Husband ceased paying alimony to Wife, in accordance with the Marital Dissolution Agreement, when the Wife failed to provide him with her tax returns. 2012 Tenn. App. LEXIS 300 (Tenn. Ct. App. 2012). The Court of Appeals' own summary of this case tells the story:

> This is a post-divorce action, concerning the Appellant Husband's obligation to pay alimony *in futuro* to Appellee Wife. Husband and Wife entered into a marital dissolution agreement ("MDA"), which was incorporated and made part of the final decree of divorce. The MDA provided that both parties would exchange tax returns each year and that, if these returns were not proferred, then alimony would be suspended until they were.
>
> Wife provided her tax returns after redacting her personal information. Husband concluded that the redaction was a breach of contract and, without prior court approval, unilaterally stopped making alimony payments. Because the MDA provision for alimony *in futuro* lost its contractual nature upon being incorporated into the trial court's order, and because Husband failed to obtain court approval before he suspended payments, we conclude that he lacked authority to stop those payments. Therefore, the award of arrears was proper.

Id. As the Court explained in its decision,

> …the parties' MDA, insofar as it addresses alimony *in futuro* payments, lost its contractual nature when it became the trial court's order. Mr. Beck, therefore, had no contractual right to treat Ms. Beck's alleged failure to provide tax returns as a suspensory condition, i.e., a "condition precedent that suspend[s] the operation of a contractual promise [in this case, Mr. Beck's promise to pay alimony] until those conditions are met." Bryan A. Garner, A Dictionary of Modern Legal Usage 862 (2nd ed. 1995). In short, the decision whether to suspend, modify, or terminate alimony *in futuro* was not Mr. Beck's to make; it was the trial court's.

Id. at *16.

In Longstreth v. Longstreth, 2016 Tenn. App. LEXIS 271 (Tenn. Ct. App. 2016), the trial court and the Court of Appeals agreed that a 27-year marriage, with a great disparity in income potential, and an ill wife, resulted in an alimony *in futuro* obligation to be paid by the husband. The Court of Appeals, however, struck down a provision that allowed for automatic increases or decreases of alimony in the event certain economic thresholds were met:

> [W]e have approved automatic increases in alimony in limited circumstances, such as when a minor child will soon reach majority and the obligor is no longer required to pay child support. See Bloom v. Bloom, No. W1998-00365-COA-R3-CV, 2000 WL 34410140, at *5 (Tenn. Ct. App. Sept. 14, 2000); Erwin v. Erwin, No. W1998-00801-COA-R3-CV, 2000 WL 987339, at *2 (Tenn. Ct. App. June 25, 2000).
>
> In these unique cases, we reasoned that automatic modification was appropriate because a spouse's ability to pay alimony was directly affected by the termination of child support. *See Erwin,* 2000 WL 987339, at *2. Since the ability to pay alimony is one of the most important factors in determining the amount of alimony, an automatic increase may be appropriate when child support is no longer required. See id.
>
> Importantly, the facts in Ewing and Bloom were unique because the minor children were approaching the age of majority; therefore, the modification of alimony was certain to occur shortly after the order was issued. See Id. at *1 (daughter was 17 at the time of the divorce); Bloom, 2000 WL 34410140, at *1 (son was 15 at the time of trial). By including the automatic modification provision, the trial courts in these cases "spared the parties the additional expense and trouble that they would have otherwise incurred from having to re-open the question of alimony *so soon after the court's decree.*" Anderson v. Anderson, No. M2005-02029-COA-R3-CV, 2007 WL 957186, at *8 (Tenn. Ct. App. Mar. 29, 2007) (emphasis added).
>
> Except in cases involving unique circumstances that are expected to occur in the near future, automatic modifications are generally not appropriate. See Id. For example, in Anderson, we vacated the trial court's judgment automatically increasing alimony when the parties" child reached majority because "the length of time before the increase is scheduled to go into effect [approximately nine years] is so long that any predictive advantage is likely to be overcome by the effects of other events, at this point quite unpredictable, such as changes in the employment, income and health of either or both parents." Id. at *9. We concluded that the statutory provisions for modification were the "most appropriate vehicle" for managing the uncertainty of future

> events and that using these provisions "relieve[d] the trial court from having to base its judgment on an act of clairvoyance." Id. (citing Crabtree, 16 S.W.3d 356, 360 (Tenn. 2000)).

However, that is not to say that there are not instances in which automatic modifications of alimony are appropriate. In McBroom v. McBroom, the court of appeals affirmed a trial court's order that set husband's alimony obligation at one level for three years, and at a different level three years down the road when wife was able to draw on social security. No. W2016-01276-COA-R3-CV, Tenn. Ct. App. LEXIS 412 (Tenn. Ct. App. June 21, 2017). On appeal, the appellate court addressed the propriety of an automatic decrease in alimony:

> Regarding a future automatic modification of alimony, in Longstreth v. Longstreth, No. M2014-02474-COA-R3-CV, 2016 WL 1621094, at *5-*6 (Tenn. Ct. App., filed Apr. 20, 2016), we stated:
>
> The general rule is that alimony in futuro is not modifiable until a party files an application and makes the required showings. See Tenn. Code Ann. § 36–5–121(f)(2)(A); Bogan v. Bogan, 60 S.W.3d 721, 730 (Tenn. 2001).* * *The foregoing notwithstanding, we have approved automatic increases in alimony in limited circumstances, such as when a minor child will soon reach majority and the obligor is no longer required to pay child support. See Bloom v. Bloom, No. W1998–00365–COA–R3–CV, 2000 WL 34410140, at *5 (Tenn. Ct. App. Sept. 14, 2000); Erwin v. Erwin, No. W1998–00801–COA–R3–CV, 2000 WL 987339, at *2 (Tenn. Ct. App. June 25, 2000). . . . By including the automatic modification provision, the trial courts in these cases "spared the parties the additional expense and trouble that they would have otherwise incurred from having to reopen the question of alimony so soon after the court's decree." Anderson v. Anderson, No. M2005–02029–COA–R3–CV, 2007 WL 957186, at *8 (Tenn. Ct. App. Mar. 29, 2007) (emphasis added). Except in cases involving unique circumstances that are expected to occur in the near future, automatic modifications are generally not appropriate.

I. TIMING IS EVERYTHING…

In Wilkinson v. Wilkinson, 2013 Tenn. App. LEXIS 107 (Tenn. App. 2013), the parties' Marital Dissolution Agreement provided that Husband's alimony obligation would "self-terminate" in the event of Wife's cohabitation. Husband later "self-terminated" his alimony after finding evidence that the Wife was cohabitating with another individual. The Court of Appeals did not reach the same issue addressed in Beck**,** but did note that, "[W]e caution litigants, however, that they rely on "self-terminat[ion]" clauses at their peril," citing cases that make clear that only the court can terminate alimony, not the parties themselves. (Presumably, this does not

include provisions which provide that alimony automatically ceases upon remarriage?) Additionally, the Court of Appeals reiterated that a finding of contempt is not necessary for the award of attorneys' fees at both the trial level and the appellate level where there is a provision in the final decree allowing for the recovery of fees upon breach of the contract.

III. DEDUCTIBILITY OF ALIMONY

IMPLICATIONS OF THE TAX CUTS & JOBS ACT OF 2017 ("TCJA")

A. THE TAKEAWAY

1. For divorce or separation instruments executed before January 1, 2019, alimony payments are tax deductible by the Payor spouse and taxable as income to the Payee/Recipient spouse, as long as I.R.C. §71 and I.R.C. §215 are met; and the parties did not agree to apply the TCJA to alimony modifications after December 31, 2018.

2. For divorce or separation instruments executed after December 31, 2018, alimony payments are no longer tax deductible by the Payor spouse; and no longer taxable to the Payee/Recipient as income.

B. DEDUCTIBILITY OF ALIMONY REPEALED IN 2019

The deductibility of alimony under 26 U.S.C.A.§215, I.R.C.§215 and 26 U.S.C.A.§71, I.R.C.§71 has been repealed by the Tax Cuts and Jobs Act of 2017 ("TCJA"). See Budget Fiscal Year, 2018, PL 115-97, December 22, 2017, 131 Stat 2054. The effective date of TCJA's amendment repealing the deduction for alimony payments was deferred to December 31, 2018. See 26 U.S.C.A.§61 Editor's and Revisor's Notes.[1]

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[1] **(c) Effective date.**--The amendments made by this section [amending this section and 26 U.S.C.A. §§ 62 , 121 , 152 , 219 , 220 , 223 , 382 , 408 and 7701 , and repealing 26 U.S.C.A. §§ 71 , 215 , and 682] shall apply to--

(1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act [Dec. 22, 2017]) executed after December 31, 2018, and

(2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section [amending this section and 26 U.S.C.A. §§ 62 , 121 , 152 , 219 , 220 , 223 , 382 , 408 and 7701, and repealing 26 U.S.C.A. §§ 71 , 215 , and 682] apply to such modification.

Tax Cuts and Jobs Act of 2017, Pub.L. 115-97, Title I, § 11051(c) , Dec. 22, 2017, 131 Stat. 2090; 26 U.S.C.A. 61 Editor's and Revisor's Note.

C. DEDUCTIBILITY OF ALIMONY BEFORE DECEMBER 31, 2018

Prior to the repeal, I.R.C.§71 defined the items specifically included in gross income which "includes amounts received as alimony or separate maintenance payments" by the Payee/Recipient; and I.R.C.§215, allowed as a deduction "an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year" for the Payor. This allowed divorcing couples to shift taxation of a definite sum of money to the Payee/Recipient who, as the economically disadvantaged spouse, is taxed at lower tax bracket, resulting in tax savings between the couple. The Tax Cuts & Jobs Act of 2017 eliminated the tax benefit. Thus, after December 31, 2018, the Payor will pay income taxes without any deductions for alimony and separation maintenance payments which will be taxed at the rates applicable to the Payor.

For tax rules regarding divorce and alimony and the fulfilment of the statutory test for the deductibility of alimony payments before January 1, 2019, see *Baur v. C.I.R.*, T.C.Memo.2014-117(2014), 107 T.C.M. (CCH) 1566, T.C.M. (RIA) 2014-117, 2014 RIA TC Memo 2014-117. See also previous statutory and case law cited in the Alimony Bench Books produced prior to this edition.

D. CURRENT DEFINITION OF ALIMONY OR SEPARATE MAINTENANCE PAYMENT

What is considered "alimony or separate maintenance payment" is now defined in 26 U.S.C.A. §152(d)(5)(B)[2]. It applies to any payment in cash if-

(i) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument (as defined in section 121(d)(3)(C)),

(ii) in the case of an individual legally separated from the individual's spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(iii) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

[2] 26 U.S.C.A 152 relates to Deductions for Personal Exemptions.

Section 71 (now repealed) has been slightly redefined under Section 152. Section 152 eliminated the requirement in Section 71(b)(1)(B) that "the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income". Thus, theoretically, it appears that alimony payments can now be combined with other payments that are not includible in gross income, such as child support; and/or shifted to payments for dependents, such as tuition payments for children.[3] Pre-2019 payments associated with contingencies related to children, such as reducing payments when children reaching certain age, did not qualify as alimony for deductibility. *Baur v. C.I.R.*, 2014 WL 2619658, at *5 (U.S. Tax Ct. 2014), T.C.Memo.2014-117 (2014). With the repeal, it does not appear to matter whether payments are made with contingencies regarding the children because the Payee/Recipient gets the money, whether it is child support or alimony, free from taxation. However, it still may be advisable to clearly designate what payments are alimony versus support of dependents because "payments to a spouse of alimony of separate maintenance payments shall not be treated as a payment by the payor spouse for the support of any dependent." This is because there are different factors applicable to modification of alimony versus child support. There are also tax benefits associated with support of dependents, especially for the parent who receives the tax benefits as described below. Under 26 USCA 152(e) for divorced or legally separated parents or parents living apart during the last 6 months of the calendar year, the parent who gets to claim the dependency exemption has the child "more than one-half of the calendar year" or provides "over one-half of the child's support during the calendar year".[4] Even though the dependency exemption deduction was $0 beginning in 2018, the exemption is still important. The dependency exemption is required for claiming the child tax credit or any of the applicable education credits. A custodial parent can furnish IRS Form 8332 to the non-custodial parent entitled to the dependency exemption. 26 USCA 152(e)(B)(2).

[3] College and tuition payments "for and in behalf of the children" were not alimony within the meaning of Section 71 and are not tax deductible by payor. *Sperling v. C.I.R.*, 726 F.2d 948, 951 (1984). Section 71 is now repealed.

[4] For the Internal Revenue Service, dependency is normally determined by the number of calendar days of residency per year with each parent. 26 USCA 152(c)(1)(B). Note that the calculation of number of "days" under the Tennessee Child Support Guidelines is different. See Tenn.Comp.R. & Regs 1240-2-4-.02(10); *Stogner v. Stogner* 2012 WL 1965598, at *4 (Tenn.Ct.App.2012); and *Hooper v. Hooper*, M2013-01019-COA-R3-CV, at *4 (Tenn.Ct.App. 2014) – a "Day" of parenting time is credited to the parent who has the child(ren) more than 12 consecutive hours within a 24 hour period, beginning at the time the parent is on-duty.

E. EXCESS FRONT-LOADING OF ALIMONY PAYMENTS (Not repealed but no tax benefit after TCJA)

Section 71(f) and (l) used to curtail excess alimony payments following a divorce to prevent parties from disguising a property settlement as payments qualifying as alimony for deductibility. Excess alimony payments in the first two years following a divorce were included in the gross income for the Payor spouse. With the repeal of Section 71, Excess Front-Loading of alimony is no longer an issue. The rules were in place to keep parties from shifting income to the spouse in the lower tax bracket. The repeal of Section 71 effectively eliminates any benefit from front-loading.

F. TERMINATION OF ALIMONY AT PAYEE'S DEATH

Under Tennessee law, payments of rehabilitative, *in futuro*, and transitional alimony, "shall terminate upon death of the recipient." Tenn.Code.Ann. §36-5-121 (e) – (g). However, alimony *in solido* is not terminable upon death or remarriage of the recipient or the payor. Tenn.CodeAnn. §36-5-121(h). The requirement for alimony to terminate upon death of the Payee/Recipient remains the same pre-TCJA and post-TCJA.

G. PROHIBITION OF FILING OF JOINT TAX RETURNS (Repealed by TCJA)

Before 2019, to claim tax deductibility and shift taxation under Sections 71 and 215, parties were prohibited from making a joint tax return. Sections 71 and 215 have been repealed without any further guidance about filing joint tax returns while making payments of support. Sec. 6013 states that married individuals *may* file a joint return if they are married on the last day of the year. Marital status for federal tax purposes depends on state law. The state law is important because of differences in various states regarding common law marriages.

H. PAYMENTS FROM AN ALIMONY TRUST

Before TCJA, Payments received from an alimony trust under Section 682 were taxable as income to the Payee/Recipient spouse under I.R.C. §215(d). Any distributions from the Trust to the recipient that were agreed to be support for the benefit of the grantor's minor children would be deemed to be income allocable to the grantor.

TCJA repealed §682 of the I.R.C. regarding the treatment of Alimony Trusts. The repeal of §682 is not set to expire until the end of 2025. Therefore, the Internal Revenue Service issued IRS Notice 2018-37, "Guidance in Connection with the Repeal of Section 682," that clarifies the treatment of Alimony Trusts following the passage of TCJA. IRS Notice 2018-37 states that the Department of the Treasury intends to issue regulations providing clarification of the application of the provisions concerning the repeal of §682. The Notice also states that the future regulations will provide that §682, as in effect prior to December 22, 2017, will continue to apply with regard to trust income payable to a former spouse who was divorced or legally separated under a divorce or separation instrument executed before January 1, 2019. Thus, payments from an alimony trust would continue to be treated as taxable income to the beneficiary under most circumstances for Alimony Trusts established prior to January 1, 2019.

I. INSTRUMENTS AFFECTED BY THE REPEAL; DEFINITION OF "WRITTEN SEPARATION AGREEMENT"

The repeal of the tax benefit is specifically limited to:

> **(1)** any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act [Dec. 22, 2017]) ***executed after*** December 31, 2018, and
>
> **(2)** any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section [amending this section and 26 U.S.C.A. §§ 62 , 121 , 152 , 219 , 220 , 223 , 382 , 408 and 7701, and repealing 26 U.S.C.A. §§ 71 , 215 , and 682] apply to such modification.
>
> Tax Cuts & Jobs Act of 2017, Pub.L. 115-97, Title I, §11051(c) , Dec. 22, 2017, 131 Stat. 2090; 26 U.S.C.A. 61 Editor's and Revisor's Note (Emphasis added)

The definition of "divorce or separation instrument" which has been removed from repealed Section 71 is currently defined in Section 121 as follows:

> (C) DIVORCE OR SEPARATION INSTRUMENT.—For purposes of this paragraph, the term 'divorce or separation instrument' means—

(i) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(ii) a written separation agreement, or

(iii) a decree (not described in clause (i)) requiring a spouse to make payments for the support or maintenance of the other spouse.

26 U.S.C.A. §121(d)(3)(C).

This is the same definition of "divorce or separation instrument" provided by Section 71 which has been repealed.

Pre-2019 case law is instructive on what is considered a "written separation agreement" for the tax deductibility of alimony payments:

> The term "written separation agreement" is not defined in the Code, the applicable regulations, or in the legislative history. *Leventhal v. Commissioner,* T.C. Memo.2000–92, 2000 Tax Ct. Memo LEXIS 106, at *19 (citing *Jacklin v. Commissioner,* 79 T.C. 340, 346, 1982 WL 11139 (1982)); *Greenfield v. Commissioner,* T.C. Memo.1978–386, 1978 Tax Ct. Memo LEXIS 132, at *4–*5. A written separation agreement has been interpreted to require a clear statement in written form memorializing the terms of support between the parties. *Jacklin v. Commissioner,* 79 T.C. at 348; *Bogard v. Commissioner,* 59 T.C. 97, 101, 1972 WL 2480 (1972). While an oral agreement does not qualify as a written separation agreement, an oral agreement in court which is recorded in a written, official transcript does qualify. *Prince v. Commissioner,* 66 T.C. 1058, 1066–1067, 1976 WL 3686 (1976). A separation agreement requires mutual assent of the parties. *Kronish v. Commissioner,* 90 T.C. 684, 693, 1988 WL 31959 (1988).[*11] Letters which do not show a meeting of the minds between the parties cannot collectively constitute a written separation agreement. *See Grant v. Commissioner,* 84 T.C. 809, 822–823, 1985 WL 15346 (1985), *aff'd without published opinion,* 800 F.2d 260 (4th Cir.1986); *Estate of Hill v. Commissioner,* 59 T.C. 846, 857, 1973 WL 2535 (1973). However, where one spouse assents in writing to a letter proposal of support by the other spouse, a valid written separation agreement has been held to exist. *Leventhal v. Commissioner,* 2000 Tax Ct. Memo LEXIS 106, at *20.
>
> *Milbourn v. Commissioner of Internal Revenue*, 2015 WL 393040, at *4 (U.S. Tax Ct. 2015), T.C.Memo.2015-13 (2015).

See also *Brooks v. C.I.R.*, T.C.Memo.1983-304 (1983) which states that the agreement must be sufficiently memorialized by a "written instrument" within the amendment of Section 71(a)(1) to satisfy the IRS for claims of tax deductibility:

> Section 71(a)(1) requires a writing which memorializes the agreement between the former spouses concerning support obligations. *Prince v. Commissioner,* 66 T.C. 1058 (1976); *Jefferson v. Commissioner,* 13 T.C. 1092 (1949). The written instrument need not itself be an enforceable obligation. Clark v. Commissioner, 58 T.C. 519, 523–524 (1972); *Campbell v. Commissioner*, 15 T.C. 355 (1950). However, writings which provide mere evidence that an agreement may exist are insufficient. *Gordon v. Commissioner,* 70 T.C. 525 (1978) (husband's income tax returns insufficient); *Blanchard v. United States,* 424 F.Supp. 916 (D. Md. 1976) (husband's checks to wife insufficient). While the writing need not satisfy particular formal requirements, it must provide "adequate proof of the existence of an obligation and the specific terms thereof." *Prince v. Commissioner,* 66 T.C. at 1067; *Fixler v. Commissioner,* 25 T.C. 1313, 1316 (1956).
>
> *Brooks v. C.I.R.*, 1983 WL 14288, at *1 (U.S. Tax Ct. 1983), T.C.Memo.1983-304 (1983).

Further, under the prior alimony law, a final decree or order is not needed for alimony payments made under a "written instrument" to be tax deductible:

> "Section 71 speaks only in terms of a 'written instrument'; it does not dictate the medium which may be used nor the form of writing which the instrument must take." *Prince v. Commissioner,* 66 T.C. 1058, 1067 (1976). The written instrument is not required to state a definite amount of support to be paid. *Jacklin v. Commissioner,* 79 T.C. 340, 348 (1982).
>
> "Incident" as an adjective is defined as "[d]ependent upon, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance)". Black's Law Dictionary 777 (8th ed.2004). A "decree" is a court's final judgment or any court order, especially one in a matrimonial case. *Id.* at 440. The circuit court's pretrial order is not dependent upon, subordinate to, or arising out of a decree of divorce or separate maintenance. It is, however, "otherwise" [*8] connected with a decree of divorce as the circuit court sent the order to both parties before the April 15, 2010, trial that produced the judgment. Therefore, the circuit court's pretrial order is a written instrument incident to a decree of divorce or separate maintenance.
>
> *Anderson v. Commissioner of Internal Revenue*, 2016 WL 976816, at *3 (U.S. Tax Ct. 2016), T.C.Memo. 2016-47 (2016). See also *Osterbauer v. C.I.R.*, 1982 WL 11051, at *1 (U.S. Tax Ct. 1982), T.C.Memo. 1982-266 (1982)(letter satisfies the written instrument requirement).

TCJA applies to "divorce or separation instrument" EXECUTED AFTER December 31, 2018. TCJA does not use the terms "entered", "dated", or "filed", after December 31, 2018, which are terms normally associated with final orders for a divorce or legal separation. Thus, since the definition of "divorce or separation instrument" remains the same under TCJA, it is possible that written instruments executed before 2019, which comply with the requirements of the prior law for the deductibility of alimony payments will be grandfathered in. This could possibly mean that the legal rights under written instruments such as prenuptial agreements, post-nuptial agreements, reconciliation agreements, *pendente lite* orders, marital dissolution agreements or legal separation agreements relative to the deductibility of alimony payments executed on or by December 31, 2018, would possibly not be affected by TCJA. We would not know until our Courts or legislature provide further guidance.

J. MODIFICATION OF ALIMONY ORDERS

TCJA applies to "any divorce or separation instrument (as so defined) executed on or before such date and modified after such date ***if the modification expressly provides that the amendments made by this section apply to such modification***". 26 U.S.C.A.§61(c)(2) Editor's and Revisor's Notes (Emphasis added).[5] Does this mean that the deductibility of alimony will be automatically grandfathered in when alimony is modified? Answer: No, until further guidance is provided by our legislature or by the Internal Revenue Service. TIP: As a precautionary measure, orders modifying pre-2019 alimony awards should state that the deductibility of alimony payments for the Payor spouse and the taxability of alimony payments to the Payee/Recipient spouse will be grandfathered into the amended order.

There may be a lack of guidance from the Internal Revenue Service, case law, or legislature, for several years until specific issues relating to TCJA work their way through our government, legislature, or courts. In the meantime, here are some tips provided by Attorney Brian C. Vertz, author of Divorce Taxation and member of the American Association of Matrimonial Lawyers:

[5] This provision on the effect of modification of pre-2019 written separation instruments is in the Notes section of Title 26, Section 61, but not found within the body of the Internal Revenue Code.

If faced with the deductibility of alimony issue:

TIP: Use contract language requiring both ex-spouses to synchronize their returns each year in which alimony is paid, by giving notice on March 15 of the intended alimony deduction (with a mechanism for resolving disputes).

TIP: Use contract language dealing with the consequences of disallowance: how and when to adjust the amount of alimony (forward and backward); how to apply refunds to deficiencies; and who is responsible for additional tax, interest, penalties and professional fees.

TIP: If the alimony is modest in amount or duration, or the payor and recipient are in the same bracket, then the risk might be low. But if the alimony is large in amount or duration, and there is a disparity in tax brackets creating substantial tax savings, the risk is greater. Also, the risk may be greater for business owners (esp. retail) or executives who earn commissions (as they are more likely to be examined by IRS for other reasons) than W-2 wage earners.

Interesting New Developments in Other States:

The Colorado legislature has stated that TCJA is not a substantial change of circumstance to modify pre-2019 alimony orders:

> The enactment of the December 2017 "Tax Cuts and Jobs Act", Pub.L. 115-97, federal tax legislation, does not constitute a substantial and continuing change of circumstance for purposes of modifying maintenance orders entered prior to the effective date of that law.
>
> Colo. Rev. Stat. § 14-10-114

New legislation has been adopted in Iowa to clarify that, in modification proceedings, the tax deductibility of pre-2019 spousal support orders are grandfathered absent agreement otherwise. In a recent child support modification case which, under Iowa law, takes into consideration alimony in the calculation of child support, the Iowa Court of Appeals stated in *dicta*:

> We note that the Tax Cuts and Jobs Act (TCJA) repealed the provision of the federal tax code that allowed an individual to deduct spousal support payments from their income for purposes of filing taxes. *See* Tax Cuts and Jobs Act, Pub. L.

No. 115-97, sec. 11051 131 Stat. 2054 (2017) (repealing 26 U.S.C. § 215). Iowa Court Rule 9.5(1)(a) was recently amended, effective January 1, 2019, "to clarify the different tax treatment of spousal support after implementation of the TCJA. Unless modified with the parties' consent, spousal support orders entered before January 1, 2019, are grandfathered, and the payor may continue to deduct spousal support payments and the recipient should report payments as income." Iowa Supreme Court Order, In the Matter of Adoption of Amendments to the Iowa Child Support Guidelines in Chapter 9 of the Iowa court Rules, Nov. 16, 2018, https://www.iowacourts.gov/collections/360/files/720/embedDocument/. The district court may consider any applicable tax consequences in determining child support. --------

Grask v. & Concerning William Thomas Grask, No. 17-1104, at *17 n.3 (Iowa Ct. App. Nov. 21, 2018)

CURRENT SPECIAL ISSUES

Modification of Net Operating Losses

The TCJA, which was enacted in 2017, eliminated Net Operating Loss (NOL) carrybacks for certain years. NOLs arising after 2017 could be carried forward indefinitely, but were limited to 80% of taxable income in the relevant period. These rules were changed by the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act") to allow NOLs arising in tax years 2018 – 2020 to be carried back five years. In addition, the 80% limitation created by the TCJA has been eliminated for tax years beginning before January 1, 2021.

Taxpayers will be able to amend tax returns for the applicable years to claim refunds arising from the use of these NOLs. Taxpayers seeking to carry back 2020 losses to earlier years will have to wait until their 2020 returns are filed, which may not be until March or April of 2021 (or even later if the returns were extended).

Any NOLs arising prior to or during the marital dissolution proceedings should be addressed. Issues to address should include: (1) Will the NOL be carried back to a prior period to claim a refund? (2) If so, how will the refund be split amongst the parties? And (3) if the NOL is not being carried back, but is being carried forward, which party may use the NOL and how will that entitlement be documented and enforced.

CARES Act Economic Impact Payments

The CARES Act initially provided Economic Impact Payments to American households of up to $1,200 per adult for individuals whose income was less than $99,000 (or $198,000 for joint filers) and $500 per child under 17 years old. The Coronavirus Response and Relief Supplemental Act of 2021 authorized additional payments of up to $600 per adult and up to $600 for each qualifying child.

In general, individuals with adjusted gross income of up to $75,000 (or $150,000 for joint filers) were to receive the full amount of the second payment. For taxpayers whose adjusted gross income exceeded these amounts, the payment was reduced.

The Internal Revenue Service was tasked with issuing or distributing the payments under both acts. To date, the system has been inconsistent with how the payments have been distributed, which has created confusion for many individuals. Inquiry should be made with the parties during the pendency of the divorce to determine whether Economic Impact Payments have been received and who received them. The total amount for a married couple, with or without dependents, could be issued to one party via direct deposit or check without the other party's knowledge.

To check the status of a payment, visit https://www.irs.gov/coronavirus/get-my-payment. The IRS' website will ask for some identification verification information before access is provided. Once access is obtained, an individual can see whether a payment has or will be issued and the form of the payment if it was issued. Additionally, if no payment has been received by the parties,

they can use the payment not received as a credit on their 2020 individual tax return. The credit is known as the Recovery Rebate Credit and is authorized by the CARES Act. The instructions to Form 1040 include a Recovery Rebate Credit Worksheet that can be completed to assist with deducting the credit on a tax return to lower any taxes due or increase a potential refund due to the individual (or couple filing jointly).

Paycheck Protection Program

For business owners involved in a divorce, attention should be given to the impact of a loan received by the business owner through the Small Business Administration (SBA) under the Paycheck Protection Program (PPP or PPP2). The PPP was established as part of the CARES Act to help businesses keep their workforce employed during the COVID-19 pandemic.

The first round of the PPP generally occurred in the spring of 2020, although first round loans are still available as of the writing of this text. Businesses who qualified for the loan, received loans from their bank, guaranteed by the SBA. If the loan was spent on the business' payroll costs, utilities, mortgage interest, or rent, the SBA would forgive the loan and the proceeds would be treated by the business owner as tax-free income. If not all of the loan was forgiven, the balance would have an interest rate of 1%, with a term of either two or five years depending on when the loan was issued.

The second round of the PPP (known as "PPP2") resumed January 11, 2021 for businesses who received funds under the original program, and who could meet certain criteria related to a demonstration of at least a 25% reduction in gross receipts between comparable quarters in 2019 and 2020. The same general rules that applied to the forgiveness of the PPP also applied to PPP2.

The result as it relates to a divorce proceeding is that businesses who had their PPP loan forgiven have some level of tax-free income that must be considered. Attention must be given to what effect, if any, the PPP loan had on the business owner's after tax income for 2020. For some owners, it may have artificially increased their income for one year. For others, it may not have been enough to replace all of their income from prior years and the income for 2020 is still less than most prior years. Each case will be fact dependent on the form of the business ownership (proprietorship, LLC, corporation, etc.), the industry that the business operates in, and how the funds were expended. In addition to identifying how the loan forgiveness affected the owner's compensation, attention should be given to the short- and long-term prospects of the business.

Is the business expected to immediately recover when the economy normalizes, or will it take months or years to recover back to previous levels? Some businesses actually performed better in 2020 and received a PPP loan. Will such businesses decrease back to prior levels post-pandemic? Such questions and answers can affect support issues such as alimony and child support. What is the proper level of income to include in child support calculations or an individual's ability to pay alimony?

DOMESTIC LAW TAX PLANNING ISSUES (Q & A)

Q1. Are there any benefits to the allocation of retirement assets?

A. The use of a Qualified Domestic Relations Order (QDRO) can be utilized to transfer more retirement (pre-tax) assets to the economically disadvantaged former spouse. This technique moves funds that are taxable upon distribution to the person with the lower effective tax rate. If significant retirement assets are transferred, income tax considerations could warrant a little larger percentage of the total marital estate to the economically disadvantaged spouse than would otherwise have been realized.

Warning: The structure of the payment is important. Retirement funds can be distributed directly to an ex-spouse under the terms of a QDRO. The distribution will be taxable income to the ex-spouse (payee). If distributed under the terms of a QDRO, the proceeds are exempt from the 10 percent penalty for early distribution. However, if the funds are rolled over to an Individual Retirement Account (IRA) from the participant to the ex-spouse, the ex-spouse receiving the funds will later incur a 10 percent penalty if he/she needs to receive a distribution from the new IRA before age 59 ½.

The exception to the 10 percent early distribution penalty under I.R.C. 72(t)(2)(c)[6] applies to distributions from a qualified plan, such as 401(k) plans. It does not apply to distributions from IRAs, SEPs, SIMPLE IRAs, or SARSEPs.

All or portions of an IRA account may be transferred without current taxation if care is taken to make the transfer at the trustee level. That is the transferor spouse must direct the current trustee (typically a bank or investment company) to move some or all of the account directly to the trustee holding an account for the transferee spouse. If the transferee spouse does not hold a pre-existing IRA account, before the transfer is requested he or she must complete an IRA account application with the trustee to receive the IRA assets.

Q2. Under TCJA beginning on January 1, 2019, neither child support nor alimony payments are tax deductible by the payor spouse – nor are they taxable income to the payee spouse. Are there any benefits to increasing or decreasing one over the other?

A. There are no real tax benefits to the dollar amount associated with either alimony or child support. However, depending on the situation, both types of payments may have varying expiration dates depending on the type of alimony and the ages of the dependents (child support). It also could depend which amounts fall into categories that are modifiable versus non-modifiable, and the different factors considered under the statute, guidelines, or case law governing modification of alimony and modification of child support.

[6] Section 72(t)(2) of the Internal Revenue Code of 1986 has been amended by the Further Consolidated Appropriations Act, 2020, PL116-94, December 20, 2019, 133 Stat 2534, to allow distributions from retirement plans in case of a qualified birth of child or adoption, not to exceed $5,000.00.

Q3. Now that the dependency exemption is $0 under TCJA, does it matter who claims the dependents on each spouse's personal tax returns?

A. Dependency exemptions are still important, even though the exemption deduction has been changed to $0 for the tax years of 2018 through 2025. Credits such as the child credit (for children under 17 years) and applicable education credits depend on which spouse claims the dependent exemption. Planning can be addressed if the custodial parent's income is too high to qualify for various credits. A person filing Single or Head of Household begins to lose the $2,000 child credit when their annual Adjusted Gross Income reaches $200,000 ($400,000 if they have remarried and are filing jointly). The credit is completely phased out at an annual Adjusted Gross Income of $240,000/$440,000. The $200,000/$400,000 limitation is for 2020. College education credits all have a lower income limitation than the child credit. The income limitation depends on which credit is taken – the American Opportunity Credit or the Lifetime Learning Credit.

The Honorable Judge James G. Martin, III, of the Chancery Court for Williamson County, Tennessee, 21st Judicial District, has used the following language in Permanent Parenting Plans to accommodate for the best tax outcome:

> The parties shall exchange their tax information such as W-2s, 1099s, and K-1s by February 15th of each year.
>
> The parent who would benefit the most from being able to claim the child(ren) as either a dependent or under the credits available in the federal income tax code shall be allowed to do so on their tax returns, and will pay the other parent fifty percent (50%) of the difference in the savings that the other parent would have realized. For example, if it amounts to Father being penalized from not being able to claim the child(ren) and he loses $2,000 in tax savings, then Mother would pay Father $1,000 or fifty percent (50%) of the difference in the savings he would have realized had he claimed the child(ren) on his tax returns.
>
> Both parents will cooperate in furnishing the IRS Form 8332 to the parent who will be claiming the tax exemption or credit by March 15 of the year the tax return is due.

A parent can release the claiming of the dependent by making a written declaration on Form 8332 and providing it to the other parent. The waiver must be obtained each year that the parent releases the dependent exemption.

Even if the primary residential parent waives claiming the dependent, the primary residential parent may still claim the child for the purposes of the head of household filing status, the earned income credit, the dependent care credit, and the exclusion of dependent care benefits.

Lastly, administrations change and political majorities in Congress change. With such change, there are often modifications in tax laws. Dependency exemptions may currently be worth $0 in many situations, but tax laws can always be adjusted in the future where dependency exemptions do matter and have an effect on tax liability. It is still important to properly assign the dependency exemptions because they may become more important again in the future. Additionally, we have

witnessed during the COVID-19 pandemic, that legislation such as the CARES Act has produced temporary items such as Stimulus Payments that have been allocated based on dependency exemptions.

Q4. Have there been any changes to 529 Plans that were established for future use to offset education expenses?

A. Yes. The TCJA (Tax Cuts & Jobs Act of 2017) amended the definition of "qualified education expenses" to include up to $10,000 of expenses for tuition in connection with enrollment at an elementary or secondary school. Prior to the passage of TCJA, qualified education expenses only included certain expenses related to post-secondary education. Paying for qualifying education through 529 Plans may be a way to offset certain expenses for the economically disadvantaged spouse.

Q5. The marital estate has an HSA (Health Savings Account) that is attributable to only one spouse. Can a former spouse receive benefits from the HSA post-divorce?

A. Owners of an HSA (Health Savings Account) should not pay healthcare expenses of their former spouses from the account. Distributions from an HSA for a former spouse are includable in income of the account owner and subject to an additional 20% tax unless the owner is 65 or older.

However, an individual doesn't have to be the medical plan subscriber to be HSA-eligible. If the former spouse meets all HSA eligibility requirements, they can open their own HSA. Anyone, including their former spouse, can contribute to the HSA. WARNING: The former spouse will receive the deduction for any contributions into his/her HSA, regardless of who actually contributes the money.

Existing HSAs can also be rolled over into a new HSA of the spouse as part of the divorce settlement. The rollover is not a taxable event. Once the rollover is executed, the former spouse can pay his/her medical expenses from the account. He or she may only make additional contributions to the account if they are HSA eligible.

Q6. If there is a plan to sell the marital residence post-divorce, does it matter who owns the house and how the sale is structured?

A. Yes it does. There is a provision in the tax code that allows the seller to exclude $250,000 of the gain on the sale of a home if he/she has lived in the house for at least two of the last five years. If the house is titled jointly, and the parties sell the house jointly, they would each receive a $250,000 exclusion – or $500,000 in total. If the marital residence belongs to only one spouse post-divorce, then the total exclusion can only be $250,000.

Planning Note: If the parties have not owned the residence for long, they are probably not in jeopardy of needing the full exclusion, because there is likely little or no gain involved in the sale. However, for a residence that has been in the marital estate for decades, the possibility of large

gain becomes much more prevalent. The parties will want to take advantage of the full $500,000 gain exclusion amount that would be attributed to them on a combined basis.

Q7. Who can claim the deduction for mortgage interest and property taxes?

A. The deduction for home mortgage interest and property taxes generally goes to the spouse who pays the interest and/or taxes. If the payments are made by both spouses, the deduction should be split between the individuals – usually 50/50. Both mortgage interest deductions and property tax deductions are subject to limitations.

Mortgage interest is deductible by the payor who must also be either the owner of the home or an "equitable owner" in the home. A taxpayer becomes an equitable owner of a property by assuming the benefits and burdens of ownership (see *Wainwright v. Commissioner*, TC Memo 2017-70). Under TCJA, mortgage interest is deductible on the first $750,000 of acquisition indebtedness for tax years beginning in 2018 through 2025. Acquisition indebtedness incurred prior to 2018 has been grandfathered with a limit of $1.0 - $1.1 million depending on the circumstances surrounding any existing Home Equity Indebtedness. All limits are subject to a limit of the fair market value of the residence.

Under TCJA, state and local taxes (referred to as "SALT") – including property taxes – are subject an annual deduction limitation of $10,000 per year beginning in 2018 through 2025. The limitation is $5,000 if married filing separately. The SALT deduction limitation applies to the combination of state and local real property taxes, state and local personal property taxes, state and local income taxes, and state and local sales taxes deducted in lieu of state and local income taxes (very common in Tennessee). The limitation is not significant to the majority of residents in Tennessee but can affect taxpayers with significant real property holdings. The Hall income tax is being phased out by 2021 and Tennessee does not charge a personal property tax on automobiles like most other states. The limitation can become a much more significant issue for spouses paying income taxes to states other than Tennessee.

Q8. Should the amount of the alimony payments structured under a pre-nuptial or post-nuptial agreement that were assumed to be tax deductible at the time the agreement was executed be addressed or re-visited?

A. Possibly, if TCJA affected the legal rights of the parties to the agreement. Pre-2019 case law suggests that these "written instruments" would not be affected by TCJA if they were executed before 2019. Further clarification is needed by the federal tax court or legislators. However, if the agreements have to be revisited, consideration (as it is used in legal terms) is a necessary part of the revision. Support payments would not necessarily need to be as much as originally anticipated due to repeal of the deductibility of the payments. Since consideration is necessary, the parties may want/need to take into account the current gift tax limitations if the consideration is monetary. The annual gift exclusion available for 2020 and 2021 is $15,000.

Q9. Can I make monthly premium payments into a life insurance policy that will be for the benefit of my former spouse?

A. Payments can be made into a life insurance product for the future benefit of your former spouse. When this occurs as part of the settlement of a marital estate, it should also be addressed as part of an overall individual estate plan. If the person paying the premiums remains the owner of the policy with an ex-spouse listed as the beneficiary, the death benefits will still be a part of the insured's overall estate. As an estate planning technique, individuals will often assign the ownership of a life insurance policy to another individual, which can be construed as a gift if the policy has a cash value. After the assignment, the new owner is responsible for making the premium payments to keep the life insurance in force. If the former owner of the policy continues to make the premium payments – or gives money to the new owner to make the premium payments – those payments would be subject to annual gift exclusions. The annual gift exclusion amount for 2020 and 2021 is $15,000.

Estate planning professionals often utilize an irrevocable life insurance trust for these same purposes. The trust removes the death benefits from the insured's estate. However, payments to the trust to fund the insurance premiums are subject to the annual gift exclusion amounts. Some insurance products, such as whole life or variable life, contain a cash value. Normally, the assignment of an insurance policy with a cash value would be deemed a gift and would be subject to gift tax statutes. The assignment of an insurance policy with a cash value as part of the division of the marital estate would not be a gift. However, post-divorce payment of premiums by the insured on a policy owned by the ex-spouse would be subject to the annual gift exclusion. As a planning tip if possible, an adequate amount of funds would be included in the alimony payments such that the ex-spouse who now owns the policy could make the premium payments without the issue of the annual gift exclusion.

Q10. Will a tax liability indemnification clause in a Marital Dissolution Agreement (MDA) provide protection from the acts of an ex-spouse?

A. The inclusion of a tax liability indemnification clause in the MDA means that one ex-spouse is legally entitled to be reimbursed if that spouse is forced to pay a tax liability caused by the other ex-spouse. The clause will not help avoid tax liabilities from prior years in which joint tax returns were filed. The IRS can still attempt to collect the unpaid tax liability from either ex-spouse, unless the "innocent spouse" rules apply. The indemnification clause simply gives a spouse who ended up paying the liability when it was the fault of the other ex-spouse a legal recourse against the ex-spouse.

If the IRS is unable to collect the unpaid taxes from the guilty spouse, the indemnification clause will not help the innocent ex-spouse. Still, it doesn't hurt to include an indemnification clause in the MDA. Practice tip: For divorces with business interests, include the provision that the business spouse acknowledges that that other spouse is an innocent spouse.

The recent enactment of IRC 6015 contains improved rules for Innocent Spouse Relief. It doesn't repeal the joint-and-several-liability rule related to years in which joint tax returns are filed. However, it does greatly improve the chances of an individual qualifying for Innocent Spouse Relief. The election for Innocent Spouse Relief must be made on IRS Form 8857 within two years of the beginning of the IRS collection efforts.

To qualify for Innocent Spouse Relief, and individual must establish that (a) he or she did not know of the tax understatement, (b) that he or she had no reason to know of the tax understatement, and (c) that it would be unfair to hold him or her responsible for the tax understatement after considering all of the facts and circumstances. In real-life circumstances, item (b) is often the condition that makes it difficult to qualify for relief.

When in doubt about the only reliable method to avoid joint-and-several liability is by not filing a joint tax return. This decision usually results in a larger tax liability for the spouses combined. The financial consequences should be weighed against the liability consequences. A larger tax liability for the combined spouses theoretically reduces the size of the overall marital estate. A spouse should consider seeking the advice of a tax advisor when determining whether or not to file separately or jointly with their spouse.

Q.11 If I receive alimony, can I use that income to qualify for the contribution to an IRA?

A. Individual IRA contributions are limited to the contributor's earned income for the year. If an individual receives alimony pursuant to a divorce agreement executed prior to January 1, 2019 the alimony payments are considered to be taxable income and earned income. Therefore, an IRA contribution would be available to the individual based on their earned income including alimony. For alimony payments received pursuant to a divorce agreement executed after December 31, 2018, the alimony is nontaxable income and would not be included in the individual's earned income. Therefore, an IRA contribution would be available to the individual only based on their earned income and not including alimony received.

IV. THE DISCHARGEABILITY IN BANKRUPTCY OF DEBTS FOR ALIMONY AND PROPERTY SETTLEMENTS ARISING FROM DIVORCE

A. BIG PICTURE: DISCHARGE v. DISCHARGEABILITY

1. The Discharge in General

Obtaining a discharge is the singular objective in the overwhelming majority of consumer bankruptcy filings. A bankruptcy discharge absolves the debtor from personal liability for any debt that is discharged and acts as a permanent statutory injunction prohibiting creditors from initiating or continuing any further action against the debtor to collect the discharged obligation. The Bankruptcy Court grants an individual debtor a discharge of his or her debts pursuant to 11 U.S.C. § 727(a), absent the existence of any of the exceptions set forth in § 727(a)(1) – (a)(12). The grounds for denying an individual's discharge in § 727 speak more to actions offensive to the integrity of the bankruptcy system as a whole rather than a specific type of debt. Examples of debtor behavior rendering him or her ineligible for a discharge include a laundry list of bad acts such as: (1) concealing, transferring, or destroying property to hinder, delay or defraud a creditor[1]; (2) hiding, destroying or falsifying records concerning their financial condition or business transactions[2]; and, (3) knowingly and fraudulently making a false oath in the bankruptcy case, or withholding information concerning their property of financial affairs.[3]

If grounds exist to deny entry of a debtor's discharge, an adversary proceeding (i.e. a lawsuit in a bankruptcy case) must be commenced against the debtor within the times fixed by Rule 4004(a) of the Federal Rules of Bankruptcy Procedure. Once a complaint objecting to discharge is filed in the main bankruptcy case, the adversary proceeding will be assigned a separate case number and procedurally governed by Fed. R. Bankr. P. 7001, et seq.

Creditors, the U.S. Trustee and the panel trustee assigned to a bankruptcy case have standing to object to a debtor's discharge in a proceeding under Chapter 7; however, creditors do not have standing to object to discharge of a Chapter 13 debtor.

[1] 11 U.S.C. § 727(a)(2).
[2] 11 U.S.C. § 727(a)(3).
[3] 11 U.S.C. § 727(a)(4).

2. Dischargeability of a Specific Debt

It is vital for practitioners to grasp the distinction between the grounds to deny a debtor a discharge of his or her debts in 11 U.S.C. § 727 (governing right to receive a discharge of *any* debt) and the exceptions to the dischargeability of a *specific* debt set forth in 11 U.S.C. § 523(a). Section § 523(a) lists the nineteen types of debt which are not discharged by the granting of a discharge to an individual in bankruptcy and include, generally speaking and without limitation: (1) taxes[4]; (2) debts incurred through fraud[5]; (3) undisclosed debts[6]; (4) debts for embezzlement, larceny, or defalcation while acting in a fiduciary capacity[7]; (5) *domestic support obligations*[8]; (6) willful and malicious injury by the debtor to another or to their property [9]; and, (7) *debts to a former spouse, or child of the debtor that do not qualify as a "domestic support obligation" and are incurred in the course of a divorce or separation*. [10]

Section 523(a) is largely self-effectuating since the majority of claims specified are automatically excluded from the reach of the discharge. The types of debts described in § 523(a)(2), (4), and (6) – think obligations tinged with fraud or malice – are not automatically excluded from discharge. Creditors holding claims of this nature must seek affirmative relief to have the debt deemed nondischargeable by commencing an adversary proceeding against the debtor within the times fixed by Fed. R. Bankr. P. 4007.

Practice Tip: Under the Bankruptcy Code, Section 523(a)(5) debts (e.g. alimony) and Section 523(a)(15) debts for non-support obligations (e.g. property settlements) stemming from a divorce proceeding are designed to survive discharge without the need to file an adversary proceeding seeking to declare the debt nondischargeable. Don't fall in this trap. If a former spouse/creditor/client believes they hold a debt for a marital obligation under 523(a)(5) and/or (15), they should request debtor's counsel enter into an agreed order at the outset of the case acknowledging the nature of the debt and declaring it nondischargeable under the appropriate section(s). If any dispute over the characterization of the debt arises, then file a complaint to

[4] 11 U.S.C. § 523(a)(1).
[5] 11 U.S.C. § 523(a)(2).
[6] 11 U.S.C. § 523(a)(3).
[7] 11 U.S.C. § 523(a)(4).
[8] 11 U.S.C. § 523(a)(5).
[9] 11 U.S.C. § 523(a)(6).
[10] 11 U.S.C. § 523(a)(15).

determine dischargeabilty of the debt. The benefit of obtaining a Bankruptcy Court order declaring your debt to be a nondischargeable marital obligation cannot be overstated as it will eliminate the need for any future litigation before a state court judge seeking a determination of the parties' rights post-bankruptcy; a task most trial courts are loath to undertake with good reason given federal bankruptcy law controls this determination.

3. Timing of Discharge Varies By Bankruptcy Chapter

In a Chapter 7 case, the Bankruptcy Court typically enters a debtor's order of discharge upon expiration of the time fixed for filing a discharge complaint which is 60 days after the first date set for the meeting of creditors under § 341(a). Fed. R. Bankr. P. 4004(a).

The discharge of a Chapter 13 debtor will be entered as soon as practicable after completion of all payments under a confirmed plan (maximum length: 60 months), and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid. 11 U.S.C. § 1328.

B. 11 U.S.C. § 523(A)(5) - DEBTS IN THE NATURE OF ALIMONY, MAINTENANCE OR SUPPORT ARE NOT DISCHARGEABLE IN BANKRUPTCY

1. Domestic Support Obligations

Preserving the sanctity of alimony and support as a nondischargeable debt in bankruptcy has long been a staple of public policy. The Bankruptcy Abuse Prevention and Protection Act of 2005 ("BAPCPA") bolstered this goal by introducing a new defined term into bankruptcy vernacular: the Domestic Support Obligation.

Section § 523(a)(5) states that a debt for a "domestic support obligation" ("DSO") is nondischargeable in bankruptcy. A DSO is defined in 11 U.S.C. § 101(14A) as a debt that accrues before, on, or after the date of the order of relief, including interest that accrues on that debt as provided under applicable nonbankruptcy law, and is:

(i) owed to or recoverable by a spouse, former spouse, child of the debtor or such child's parent, legal guardian, responsible relative or a governmental unit;

(ii) in the nature of alimony, maintenance or support (including assistance provided by a governmental unit) without regard to whether such debt is expressly so designated;

(iii) established or subject to establishment before, on or after the date of the order for relief by a separation agreement, divorce decree or property settlement agreement, an order of a court of record, or a determination made in accordance with non-bankruptcy law by a governmental unit; and

(iv) not assigned to a nongovernmental entity[11], unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

All four elements must be satisfied for a debt to qualify as a DSO. In what is otherwise an expansive definition designed to capture most obligations stemming from a divorce proceeding, the requirement that the debt be "in the nature of alimony, maintenance or support" creates fertile ground for litigation in bankruptcy given the consequences on the rights of the parties. [12] Depending on the particular chapter of the debtor's case, a Bankruptcy Court determination that a debt fails to pass the DSO test can be the difference between the debt surviving bankruptcy or being washed away like any other garden-variety unsecured liability.

2. Is the Marital Obligation a DSO?

BAPCPA broadened the protection for marital obligations in the nature of support by incorporating the former version of § 523(a)(5) into the definition of a DSO. As a result, courts routinely rely on pre-BAPCPA cases to decide whether a debt is in the nature of alimony, maintenance or support post-BAPCPA. [13] This determination remains a federal, rather than a state, question with the non-debtor carrying the burden of establishing an obligation is a DSO under 11 U.S.C. § 523(a)(5). In re Calhoun, 715 F.2d 1103, 1111 (6th Cir. 1983).

[11] The term "entity" includes person, estate, trust, governmental unit, and U.S. Trustee. 11 U.S.C. § 101 (15).
[12] *See* David Cox, "Demystifying Domestic Support Obligations in bankruptcy," Virginia Lawyer 30-33, February 2016.
[13] *See* Diane Brazen Gordon, "Marital Debt Disputes in Chapter 13: Is the Debt a DSO," ABI Journal 60-61, 80, March 2014.

In Calhoun, the Sixth Circuit provided an analytical framework for determining whether an obligation "is actually in the nature of alimony, maintenance, or support," even though it is not so designated. Calhoun involved a continuing obligation imposed in a separation agreement under which the debtor agreed to assume five joint marital obligations and hold his ex-spouse harmless on the debts. Id. 715 F.2d at 1105. The Court found that a hold harmless obligation could constitute nondischargeable support although not paid directly to the former spouse and announced a four-part test for determining whether an obligation not denominated as alimony or maintenance was actually in the nature of support and thus nondischargeable:

(i) "First, the obligation constitutes support only if the state court or parties intended to create a support obligation.

(ii) Second, the obligation must have the actual effect of providing necessary support.

(iii) Third, if the first two conditions are satisfied, the court must determine if the obligation is so excessive as to be unreasonable under traditional concepts of support.

(iv) Fourth, if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law." In re Fitzgerald, 9 F.3d 517, 520 (6th Cir. 1993) (citing Calhoun, 715 F.2d at 1109-10).

3. Deference to State Court

Unlike Calhoun, where it was necessary to determine whether something *not* expressly labeled as support in the divorce decree was really support, in Fitzgerald v. Fitzgerald (In re Fitzgerald), 9 F.3d 517 (6th Cir. 1993), the Sixth Circuit addressed whether something labeled as alimony was really alimony and not, for example, a property settlement in disguise. Id. 9 F.3d at 521.

Asserting that his ex-wife, who had become self-supporting, did not presently need the monthly $1,500.00 payments he had been making under an agreement incorporated into a state court divorce decree, the debtor-spouse in Fitzgerald maintained that an obligation denominated as alimony actually was not in the nature of support. Id., 9 F.3d at 521. The Fitzgerald court began its analysis by expressing the view that Calhoun had been too expansively applied by bankruptcy courts. Id. 9 F.3d at 520. Noting that Calhoun's "present needs" test had been criticized as "undue federal interference with state court domestic authority," the court explained that

the Calhoun decision was "not intended to intrude into the states' traditional authority over domestic relations . . . ." Id. 9 F.3d at 520-21. Because the monthly payments in question bore at least two earmarks of a traditional alimony award - (1) they were intended to permit the non-debtor spouse to achieve a standard of living compatible with what she might expect were the marriage to continue; and (2) they terminated upon remarriage - the Sixth Circuit held that the payments were nondischargeable under § 523(a)(5). Id. 9 F.3d at 521. Fitzgerald thus stands for the proposition that a state court's alimony award is entitled to deference when the obligation is clearly so designated and structured. In re Hammermeister, 270 B.R. 863, 872 (Bankr. S.D. Ohio 2001) (citing In re Sorah, 163 F.3d 397, 401 (6th Cir. 1998).

4. Traditional State Law Indicia Consistent with a Support Obligation

In Sorah, the Sixth Circuit again considered the dischargeability of marital obligations, this time in the context of a case in which the debtor-spouse's monetary obligation was labeled "monthly maintenance." Sorah, 163 F.3d at 401. Despite this label, the debtor-spouse asserted - and the bankruptcy court found - that the monthly $750.00 payments were actually a disguised property distribution. Id. 163 F.3d at 400. The Sixth Circuit reversed the bankruptcy court, holding that the monthly maintenance award was nondischargeable under § 523(a)(5). Id. 163 F.3d at 403. Stating that" if something looks like a duck, walks like a duck, and quacks like a duck, then it is probably a duck," the Sixth Circuit directed bankruptcy courts in determining whether an award is actually support to "first consider whether it 'quacks' like support." Id. 163 F.3d at 401. Specifically, a bankruptcy court should look to the traditional state law indicia consistent with a support obligation Id. These include, but are not necessarily limited to:

(i) a label such as alimony, support, or maintenance in the decree or agreement;

(ii) a direct payment to the former spouse, as opposed to the assumption of a third-party debt; and

(iii) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits. Id.; Hammermeister, 270 B.R. 863, 872-873; see also Fitzgerald, 9 F.3d 517, 521 (6th Cir. 1993).

5. Determination of Support Obligation Not Limited to Traditional Indicia

When a bankruptcy court determines whether an award constitutes a nondischargeable obligation for support under § 523(a)(5), it need not limit its analysis to consideration of the three traditional indicia, but also may look to other factors. Sorah, 163 F.3d at 401. Other indicia of a support obligation include:

(i) the disparity of earning power between the parties;

(ii) the need for economic support and stability;

(iii) the presence of minor children; and

(iv) marital fault.

In re Bailey, 254 B.R. 901, 906 (B.A.P. 6th Cir. 2000); In re Luman, 238 B.R. 697, 706 (Bankr. N.D. Ohio 1999) (citing In re Singer, 787 F.2d 1033, 1035 (6th Cir. 1986)).

Bailey involved a state court divorce decree that required the debtor-spouse to assume mortgage and credit card debts, and ordered the parties to sell certain personal property with the proceeds to be used for the care and maintenance of the debtor's wife and children. Bailey 254 B.R. at 903-904. The bankruptcy court had entered an order holding the debts nondischargeable and ordering the sale of the personal property. On appeal, the debtor argued that the obligations were not in the nature of support. Id. The Sixth Circuit Bankruptcy Appellate Panel (the "BAP") affirmed the bankruptcy court. The BAP noted that the state court had repeatedly labeled the award as maintenance, support, and alimony. Id. 254 B.R. at 905. The BAP also pointed out that the state court had found a disparity in income between the parties, that the debtor's wife was unable to obtain a higher-paying job due to her obligation to care for their children, one of whom was disabled, and that she would have to pay the mortgage and credit card debts absent the debtor's assumption of those debts, thereby adversely affecting her ability to support herself and the children. Id. Upon consideration of the traditional state law indicia of support identified by the Sixth Circuit in Sorah, the BAP concluded that the bankruptcy court had correctly determined the debtor's obligation to be nondischargeable support. Hammermeister, 270 B.R. 863, 873.

In Bullock v. Hodge, 265 B.R. 908 (Bankr. N.D. Ohio 2001), the bankruptcy court reached the same conclusion on similar facts. There, the debtor filed bankruptcy after a divorce in which he was ordered to pay a jointly incurred marital debt. Id. 265 B.R. at 909. Under the divorce decree, the parties expressly waived any claim against each other for spousal support. Id. 265 B.R.

at 910. The debtor's former wife filed a dischargeability complaint, alleging that the debtor's assumption of the debt was in the nature of support and therefore nondischargeable under § 523(a)(5). The Hodge court ruled that:

> "Given the admonition in In re Sorah that a bankruptcy court should not second-guess state court support obligations, [the Court] can see no reason why the tenets set forth in In re Sorah should not be equally applicable to the situation where, as in this case, it was specifically stated that no alimony would be awarded to either Party. Stated in more precise legal terms, when a divorce decree or separation agreement holds that no spousal support shall be awarded to either party, any obligations contained therein should be viewed as a property settlement -- and thereby subject to 11 U.S.C. § 523(a)(15) - unless it can be clearly and unequivocally shown by the context of the divorce decree or separation agreement that it was the intent to create a support obligation." Hodge, 265 B.R. at 912. See also. In re Findley, 245 B.R. 526, 528 (Bankr. N.D. Ohio 2000) (concluding that debtor-husband's hold harmless obligation was not excepted from discharge under § 523(a)(5) where state court divorce decree provided that neither spouse was obligated to pay spousal support and noting that "under recent Sixth Circuit authority . . . the court is constrained to give substantial weight to the characterization of the financial arrangement . . . made by the parties and the domestic relations court"). Hammermeister, 270 B.R. 863, 875.

6. Are Attorneys' Fees Domestic Support Obligations?

To the chagrin of many family law practitioners, the term "attorney" is glaringly absent from the definition of a DSO in 11 U.S.C. § 101(14A). The majority of bankruptcy courts, including the Sixth Circuit, have rejected this exclusion as determinative of whether an attorney's fees are entitled protection in bankruptcy as a nondischargeable DSO. In lieu of a literal reading of the definition, courts assess whether the debtor's payment of attorneys' fees has "the *effect* of providing support to the spouse under a third-party beneficiary analysis, thus examining the substance of the obligation over its form." In re Micek, 473 B.R. 185, 189 (Bankr. E.D. Ky. 2012). Termed the "support-obligation approach," the creditor is not the focus of the dischargeability analysis. Instead, "it is the nature of the debt, rather than the identity of the creditor, that controls." Micek, 473 B.R. at 190 (relying on In re Kassicieh, 467 B.R. 445 (Bankr. S.D. Ohio 2012)(holding debtor's obligation for guardian ad litem fees have the effect of providing support and constitute a domestic support obligation).

Practice Tip: Effectively drafting attorney fee provisions in domestic-relations orders is the most efficient way to ward off costly litigation and insulate attorneys' fees from being discharged in bankruptcy. Suggested approaches include awarding the fees directly to an ex-spouse and mandate that the fees be paid from the client to the attorney. Additionally, expressly note the independent obligation of the client ex-spouse to make payment of these fees to the attorney if the debtor ex-spouse fails to satisfy the obligation required by the order.[14]

C. DISCHARGEABILITY OF MARITAL OBLIGATIONS THAT ARE NOT ALIMONY, MAINTENANCE OR SUPPORT - 11 U.S.C. § 523(A)(15)

1. Non-Domestic Support Obligations

A debt that falls outside the definition of a DSO can still avoid discharge by virtue of 11 U.S.C. § 523(a)(15) which provides that an individual debtor does not receive a discharge from any debt "to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. § 523(a)(15).

Section 523(a)(15) is meant to capture those non-support obligations flowing from a court's orders or final decree in a divorce proceeding (e.g. property settlements and hold-harmless agreements) with the qualification that they must be owed to a spouse, former spouse or child of the debtor. A limitation, no doubt, of keen importance to family law practitioners.

2. Hold Harmless Clauses

Under § 523(a)(15), many courts have held that there must be "hold harmless" or other indemnification language in a divorce decree in order for one spouse to be obligated to avoid discharge. See In re LaRue, 204 B.R. 531, 535 (Bankr. E.D. Tenn. 1997).

Hold-harmless agreements and indemnity provisions contained in divorce decrees are often characterized as nondischargeable support awards in bankruptcy, although the underlying debts to third parties may still remain dischargeable. In re Bailey, 254 B.R. 901. Tennessee courts have

[14] *See* Jacy Rush, "The Dischargeability of Attorneys' Fees Ordered as Part of DSOs in Chapter 7 Cases," ABI Journal 40-41, 69, September 2017.

held both (1) that debts owed to third parties may not qualify for nondischargeability under § 523(a)(5) and (a)(15) without a hold-harmless provision creating the debt to the ex-spouse and (2) that those same debts may qualify for nondischargeability. See In re LaRue, 204 B.R. at 535 ("In the absence of a 'hold harmless' provision, a former spouse who is called upon to pay a claim owed to a creditor but included as a debt that the debtor was supposed to pay will find that debt dischargeable"), but cf., In re Crawford, 262 B.R. 435, 441–42 (Bankr. E.D. Tenn. 2001) (court looked "beyond the presence or absence of indemnification language ... to determine whether a debt was 'incurred by' the debtor in the course of the marital dissolution."). Although there are cases indicating that an obligation can still be nondischargeable "notwithstanding that the debt is payable to a third party and the Separation Agreement lacks hold harmless or other indemnification language," In re Gibson, 219 B.R. 195, 203 (B.A.P. 6th Cir. 1998), in light of the fact that courts are split on the issue, the inclusion of a hold-harmless provision may better ensure that the debt is deemed nondischargeable pursuant to § 523(a)(15).

D. TREATMENT OF MARITAL OBLIGATIONS IN CHAPTER 7 V. CHAPTER 13

1. Chapter 7

In a case under Chapter 7, the difference between a domestic support obligation under § 523(a)(5), and the non-domestic support obligations arising under the catch-all provision of § 523(a)(15), is immaterial as both are nondischargeable in bankruptcy. The affirmative defenses formerly available under § 523(a)(15), opening the door to a discharge of obligations borne from property settlements have been eliminated by BAPCPA in an effort to reduce the appeal of seeking bankruptcy protection under Chapter 7 by broadening nondischargeability.

2. Chapter 13: Non-DSOs Are Dischargeable

The disparate treatment of a DSO and a non-DSO in Chapter 13 is stark due to the broader discharge available to a debtor under 11 U.S.C. § 1328(a). Debts dischargeable in a Chapter 13 include debts for willful and malicious injury to property (as opposed to a person), debts incurred to pay nondischargeable tax obligations, and *non-domestic support obligations arising under 11 U.S.C. § 523(a)(15)*.

Given the scope of the Chapter 13 discharge, ensuring that the claims owed to a former spouse are treated as a DSO in the debtor's Chapter 13 plan is of paramount importance. A DSO is considered a priority claim under § 507(a)(1)(A) and entitled to payment *in full* under the debtor's Chapter 13 plan pursuant to § 1322(a)(2). Failure to stay current in the payment of a DSO constitutes grounds to deny confirmation of a debtor's proposed plan under § 1322(a)(8) and grounds for dismissal under § 1307(c)(11). A Chapter 13 debtor's right to a discharge is contingent upon completion of all payments under his plan and certification to the Bankruptcy Court that all DSO obligations coming due during the case have been paid in full.

On the opposite end of the spectrum, non-DSO claims owed to a former spouse can be treated as a general unsecured claim in Chapter 13 and relegated to the bottom rung of the priority scale established by the Bankruptcy Code. Holders of claims in this class will only be entitled to the remnants of the debtor's monthly disposable income remaining after all other creditors are paid which routinely leads to a recovery equivalent to pennies on the dollar with the balance of the claim discharged at the conclusion of the case.

Practice Tip: Deadlines matter in Bankruptcy Court. Creditors with adequate notice of a proposed Chapter 13 plan that neglect to object to confirmation or appeal a confirmation order are generally bound by the terms of the confirmed plan.[15] For this reason, if a client receives notice of a Chapter 13 case filed by their former spouse, it is imperative to take action to protect their interests. Failure to file a proof of claim or contest confirmation of the proposed plan can lead to harsh results so engage local bankruptcy counsel in the district of the filing to assess the case. They will likely know the debtor's counsel and be able to resolve any issues with the treatment of your client's claim without the necessity of litigation.

E. THE AUTOMATIC STAY AND DOMESTIC RELATIONS PROCEEDINGS

1. The Automatic Stay

The automatic stay in 11 U.S.C. § 362(a) provides for a statutory injunction that automatically takes effect immediately upon the filing of a bankruptcy petition and prohibits creditors from pursuing collection efforts against a debtor and property of the bankruptcy estate.

[15] *See* United Student Aids Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010).

Section 362(b) provides exceptions to the automatic stay for proceedings which routinely occur in state court: criminal actions[16] and domestic relations matters.[17]

2. Domestic Relations Proceedings the Automatic Stay Does Not Stop

Tennessee state courts are free to proceed with many matters over which they routinely adjudicate in domestic relations cases without seeking a modification of the automatic stay by the Bankruptcy Court. They may:

- determine whether maintenance, alimony, or support should be required and enter orders regarding those determinations;
- determine whether a previous order for maintenance, alimony, or support should be modified and enter an order modifying such a previous order;
- determine whether a marriage should be dissolved and enter an order dissolving the marriage;
- enter orders concerning child custody and visitation;
- enter orders regarding domestic violence; and
- enter orders allowing non-debtors to collect on domestic support obligations from property as long as the property is not property of the bankruptcy estate.[18]

3. Domestic Relations Proceedings Barred by the Automatic Stay

Two types of proceedings that are enjoined by the automatic stay are:

- the division of marital property that is property of the bankruptcy estate;[19] and
- proceedings to collect on a domestic support obligation from property of the bankruptcy estate.[20]

Property of the bankruptcy estate is defined in 11 U.S.C. § 541 and "generally includes all property in which the debtor had any interest of any kind on the date the bankruptcy case was filed."[21] In a chapter 13 case, property of the estate also includes post-petition earnings and other

[16] 11 U.S.C. § 362(b)(1).
[17] 11 U.S.C. § 362(b)(2).
[18] *In re Welsch*, 602 B.R. 682, 683-684 (Bankr. N. D. Ill. 2019).
[19] 11 U.S.C. § 362(b)(2)(A)(iv).
[20] 11 U.S.C. § 362(b)(2)(B).
[21] *In re Welsch*, 602 B.R. at 684.

property that the debtor acquires after the case was filed but before it is closed, dismissed, or converted to another chapter.[22]

Utilizing these definitions, the automatic stay "applies to any proceeding in the state court to divide marital property if one spouse files a bankruptcy petition before the state court enters an order distributing marital property. That is because all of the property of the spouse who is in bankruptcy is property of the bankruptcy estate. Although proceedings to divide marital property must cease when the bankruptcy case is filed, bankruptcy courts will almost always modify the stay to permit those proceedings to continue. If the bankruptcy case is a chapter 7 case, a trustee might wish to be involved in those proceedings, but the stay will still almost always be modified to permit the state court to complete them."[23]

The automatic stay also applies to proceedings to collect a domestic support obligation from property of the bankruptcy estate which largely depends on the chapter under which the debtor's bankruptcy case is pending. "In a chapter 7 case, the debtor's post-petition income and assets generally are not property of the estate. The stay therefore will not bar domestic relations proceedings attempting to collect on domestic support obligations from post-petition income of the chapter 7 debtor. If the debtor is in chapter 13, on the other hand, the stay will bar any proceeding to collect from post-petition income while the chapter 13 case is pending because that income is estate property."[24]

State courts have jurisdiction to determine whether their own proceedings are subject to the automatic stay; but, litigants proceeding in this way "proceed at [their] own risk"[25] because, "when the stay would otherwise apply, bankruptcy courts have the exclusive jurisdiction to grant relief from the stay." Wohleber v. Skurko (In re Wohleber), 596 B.R. 554, 571-72 (B.A.P. 6th Cir. 2019) (holding that an ex-spouse and her attorney violated the stay by proceeding with a sentencing hearing for contempt against the debtor when he failed to pay a dischargeable money judgment") (citing Cathey v. Johns-Manville Sales Corp., 711 F.2d 60, 62 (6th Cir. 1983)). "If the non-bankruptcy court's initial jurisdictional determination is erroneous, the parties run the risk that

[22] 11 U.S.C. § 1306.
[23] *In re Welsch*, 602 B.R. at 684.
[24] *Id*.
[25] *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 1986 U.S. App. LEXIS 33182, 123 L.R.R.M. 2905, 105 Lab. Cas. (CCH) P12,089, Bankr. L. Rep. (CCH) P71,520.

the entire action later will be declared void *ab initio*." Chao v. Hospital Staffing Services, Inc., 270 F.3d 374, 384 (6th Cir. 2001). "If a state court and the bankruptcy court reach differing conclusions as to whether the automatic stay bars maintenance of a suit in the non-bankruptcy forum, the bankruptcy forum's resolution has been held determinative . . . ." Id. In other words, if the state court wrongly decides that the stay does not apply and continues with a proceeding against the debtor, it has effectively granted relief from the stay, intruding on the exclusive jurisdiction of the bankruptcy court. In re Shrum, 597 B.R. 845, 853-854, 2019 Bankr. LEXIS 1035, *16-17.

Practice Tip: State court judges are often concerned about violating the automatic stay and want guidance from bankruptcy courts regarding whether the stay applies. If any doubt exists in the minds of the court or the parties, then it is incumbent to seek relief from the automatic stay or obtain a determination from the bankruptcy court that the stay does not apply before proceeding.

V. TRUSTS AND ALIMONY

The purpose of this section is to give a general overview of trusts so that one can understand the basic terminology and mechanics of a trust, the different types of trusts that can be established, which types of trusts can protect against creditors, and how such protection may be limited in the instance of divorce. Since there are many complexities with the creation of trusts, this section is not intended as a guide to actually form and fund a trust.

A. BASIC TERMINOLOGY AND MECHANICS

1. WHAT IS A TRUST AND HOW IS ONE CREATED?

Trusts have been variously defined as: "an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof" (2 Story, Eq. Jur. § 964); or as a "confidence reposed in some other, not issuing out of the land, but, as a thing collateral to and next in privity to the estate of the land and to the person, touching the land, for which the cestui que trust has no remedy but by subpoena in chancery" (Perry and Lewin on Trusts); or as "an equitable obligation, either expressed or implied, resting upon a person by reason of confidence reposed in him, to apply or deal with property for the benefit of some other person, for the benefit of himself and others, according to such confidence" (see Perry, Trusts, § 2); or, it is said, "a trust exists where the legal interest is in one person, and the equitable interest is in another;" "a trust is where property is conferred upon and accepted by one person, on terms of holding, using, or disposing of it for the benefit of another;" "a confidence reposed in a person that he will act in certain manners for the benefit of another; but, technically, it signifies a holding of property subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived" (see 27 Am. & Eng. Enc. Law, pp. 3, 4). Muldoon v. Trewhitt, 38 S.W. 109, 112 (Tenn. Ct. Ch. App. 1896).

Essentially, a trust is an arrangement between an agent, known as a trustee, property, known as corpus, and beneficiaries. The trustee manages and holds the property for the benefit of beneficiaries, in accordance with the trust document. The person who contributes the property to the trust is known as a grantor or trustor or settlor or trustmaker (these four words all mean exactly the same thing, and it's a matter of style preference as to which one an estate planner uses). For ease of understanding, this section will use the term "grantor," throughout, although any of the four terms are equally correct. Also note that there can be more than one grantor of a trust.

A trust may be created by: (1) the transfer of property to another person as trustee during the grantor's lifetime or by will or other disposition taking effect upon the grantor's death; (2) the declaration by the owner of property that the owner holds identifiable property as trustee (aka self-declaration); (3) the exercise of a power of appointment in favor of a trustee; or (4) a court pursuant to its statutory or equitable powers in accord with Tennessee Code Annotated § 35-15-102. Tenn. Code Ann. § 35-15-401 (Lexis Advance through the 2016 Regular Session and the 2nd Extraordinary Session of the 109th Tennessee General Assembly). The terms of a trust are the manifestation of the grantor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding. Tenn. Code Ann. § 35-15-103(33). A trust instrument is an instrument executed by the grantor that contains terms of the trust, including any amendments thereto. Tenn. Code Ann. § 35-15-103(36). We generally will be discussing trusts intentionally set up by an estate planner, by the grantor via forms obtained online, through a form book, etc.

The title therefore to any property transferred to the trust will no longer be owned by the transferor, even if transferor is a beneficiary. Instead, it will be the trustee on behalf of the trust that actually holds title to the property so transferred. Therefore, if assets are held by a trust and the trust is not a party to the proceedings, then the court may not consider the trust assets when making a determination in a divorce proceeding. See Desiree Daniels Disterdick v. John Disterdick, 2018 Tenn. App. LEXIS 325, 2018 WL 3026063 (Tenn. Ct. App., June 18, 2018). In the Desire Daniels Disterdick case, the governing documents of the trust at issue stated that the trust assets were owned by the trust, and not by the parties. Since the trust was not a party to the proceedings, the appellate court affirmed that the trial court had no authority over the trust or its assets. Id. As such, if there a question as to whether funds transferred to a trust are marital property, it is important to include the trust as party. However, not all transfers to a trust are marital property, or even separate property. In the case of Wheeler v. Wheeler, 2014 Tenn. App. LEXIS 213, 2014 WL 1512828 (Tenn. Ct. App., January 24, 2014), the court found that property transferred via a will to a trust with the spouse as a trust beneficiary, was not separate property of that spouse, since title transferred to the trust and not the spouse. Since the property in the trust was never separate property it could not transmute into marital property. Id.

Practice Tip: As the trustee is the one to actually hold the trust property on behalf of the trust, property must be conveyed to the trustee on behalf of the trust. What does this mean as a

practical matter? It would be improper to deed property directly to a trust, i.e. Sally Smith hereby conveys to The John Smith Revocable Trust all of her interest in Blackacre (this would be incorrect). Instead, it would have to be Sally Smith hereby conveys to the Trustee of the John Smith Revocable Trust all of her interest in Blackacre. Although inartful or vague language may be corrected (see, for example, In re Walker, 849 S.W.2d 766, 768 (Tenn. 1993)) best practices are to have the property conveyed correctly.

Caution: Improperly conveyed property might be uninsurable for title insurance purposes until corrected. It can be very difficult to correct improperly conveyed property once a person has passed away or is incompetent. Also, important to make a trust a party to proceedings if the property contained in the trust is an issue.

Caution: Trusts not only can be an issue in property division in a divorce proceeding, sometimes trusts are used as a vehicle for making alimony payments. However, the Tax Cuts and Jobs Act (the "Act") enacted effective in 2018 (but effective for alimony in 2019) has changed the way alimony is handled for tax purposes, as it is no longer deductible by the payor of alimony. IRC § 682 regarding alimony trusts was also repealed by the Act, so that code section can no longer be used to shift the taxation of the trust income to the non-payor former spouse. However, Section 682 trusts set up before 2019 are grandfathered. IRS Notice 2018-37.

A Trust Advisor or Protector is a person or entity given specific powers to direct certain actions of a trustee, such as approving or directing certain distribution or approving investment advice. A trust that has such an advisor or director is often referred to as a Directed Trust due to the power of such protector to direct an action of a trustee. See Tenn. Code Ann. § 35-15-1201, et. al. In addition, Tenn. Code Ann. § 35-15-1301 allows, when a corporate advisor is serving as trustee, for the creation of special purpose entities to serve as Trust Advisors for trusts. Generally, such a special purpose entity will be a limited liability company set up to serve as such Trust Advisor, and is used to segregate some of the liability of such Trust Advisor, as well as to deal with certain taxation and nexus issues that may arise with other states. There are registration and other requirements needed for said special purpose entities.

A trust may also refer to a separate written list for distribution after the death of a grantor, but specific steps must be followed as set forth in Tenn. Code Ann. § 35-15-605.

Note On Power of Court Over Real Property in Another State: A court of one state generally does not have jurisdiction to pass title to land wholly contained in another state.

However, if a party is before the court here in Tennessee and that party is a trustee of a trust (or has such other powers to demand distributions) then the Court may issue a "decree in personam" that requires said party (or parties) to take the actions necessary to transfer title. Sekik v. Abdelnabi, No. E2019-01302-COA-R3-CV, 2021 Tenn. App. LEXIS 10, at *26 (Ct. App. Jan. 13, 2021).

2. TRUSTEE DUTIES AND RESPONSIBILITIES

A trustee is a fiduciary and, as such, has fiduciary duties to properly maintain the trust in accordance with the Tennessee code. A trustee can be an individual, a company, or a professional, and there can be co-trustee(s). See Tenn. Code Ann. § 35-15-103, cmt. As everyone learns in law school, it is well settled that a trust will not fail for want of a trustee. Pinson v. Ivey, 9 Tenn. 296, 332 (1830). As such, if a trust document fails to name a trustee, or there are no named trustees able or willing to serve, then there either can be a mechanism within the trust to name a trustee, or a court can name a trustee. Tenn. Code Ann. § 35-15-704.

Part 8 of the Tennessee Uniform Trust Code sets forth the fundamental duties and responsibilities of a trustee. See Tenn. Code Ann. § 35-15-801, *et seq*. The primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Tenn. Code Ann. § 35-15-801, cmt. A trustee owes a duty of loyalty to the beneficiaries of the trust and shall administer the trust solely in the interests of the beneficiaries. Tenn. Code Ann. § 35-15-802. The trustee shall not place its own interests over those of the beneficiaries. Id. A trustee also owes a duty of impartiality so that if a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests. Tenn. Code Ann. § 35-15-803. Furthermore, a trustee has a duty to administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. Tenn. Code Ann. § 35-15-804. In satisfying the "prudent person" standard, the trustee shall exercise reasonable care, skill, and caution. Id. In administering a trust, the trustee may only incur costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee. Tenn. Code Ann. § 35-15-805. If a trustee has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, the trustee shall use those special skills or expertise. Tenn. Code Ann. § 35-15-807. A trustee may delegate duties and powers that a prudent trustee of comparable skill could properly delegate under the

circumstances. Tenn. Code Ann. § 35-15-807. A trustee shall take reasonable steps to take control of and protect trust property. Tenn. Code Ann. § 35-15-809. A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust. Tenn. Code Ann. § 35-15-811. A trustee shall keep trust property separate from the trustee's own property. Tenn. Code Ann. § 35-15-801(b). A trustee shall keep adequate records of the administration of the trust and shall keep the beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Tenn. Code Ann §35-15-801(a); § 35-15-813(a).

3. TRUSTEE'S DECANTING POWER

Tennessee's decanting statute allows a trustee to use their discretionary powers to distribute the trust assets to a new trust. See Tenn. Code Ann. § 35-15-816(b)(27). Pursuant to the Tennessee Uniform Trust Code, a trustee's decanting power is considered a limited power of appointment that may be exercised with respect to any trust that is administered in Tennessee. Id. cmt. In order to exercise its decanting power, the trustee is required to sign a written notarized instrument that is maintained with the records of the original trust as well as the second, new trust. Id. The trustee does not have to obtain consent of the beneficiaries or a court in order to exercise its decanting power. Id. The only limitation on a trustee's decanting power is that the power may only be exercised in favor of the proper objects of the exercise of the discretionary power. Id. This means that new beneficiaries cannot be added to the second trust, though the second trust does not have to benefit all of the beneficiaries of the original trust. Id. So long as material parts of a Trust are not being changed, it may be possible to use nonjudicial modification even after the death of a grantor in a revocable trust that has become irrevocable due to such death. There are also laws that allow trust termination if it becomes uneconomical to administer a trust.

4. VIRTUAL REPRESENTATION

Part 2 of the Tennessee Uniform Trust Code deals with the representation of beneficiaries and other interested persons, both by fiduciaries (such as a personal representative, guardian, or conservator) and through what is known as virtual representation. Virtual representation is when a parent can represent the interests of a child without the need for a court appointed guardian ad litem. The only requirement for virtual representation in Tennessee is that there be no material

conflict of interest between the virtual representative and the person(s) represented. Tenn. Code Ann. § 35-15-101.

5. SPENDTHRIFT PROVISIONS

A spendthrift provision in a trust is a provision that withholds distributions from beneficiaries if there are creditors of the beneficiary attempting to attach the interest of the beneficiary. See Tenn. Code Ann. § 35-15-103(3); § 35-15-501. Under the Tennessee Uniform Trust Code, a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers of a beneficiary's interest. Tenn. Code Ann. § 35-15-502. If a trust contains a valid spendthrift provision, a creditor is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. Id. cmt. Once distributed to the beneficiary, any income paid from a valid spendthrift trust becomes subject to execution by creditors of the beneficiary. Id.

However, if the spendthrift provision is invalid, then a creditor may reach the beneficiary's interest before the beneficiary comes into possession of it. Id.; See also Atkins v. Marks, 288 S.W.3d 356 (Tenn. Ct. App. 2008). For example, if the grantor is also a beneficiary (which is called a "self-settled trust") then a spendthrift provision would be invalid, and the assets would be available to creditors of the grantor. There is one exception to this rule against self-settled spendthrift trusts in Tennessee, and that is the Tennessee Investment Services Act trust (and perhaps asset protection trusts from other states as well, see the Asset Protection Trust section infra).

The spendthrift clause would be effective (if properly set up) against the creditors of a beneficiary, even in divorce. For example, in Doksansky v. Norwest Bank Nebraska, N.A., the former spouse of a spendthrift trust beneficiary attempted to bring a claim for past due support against the debtor's interest in the trust that had been set up by the debtor's father. 260 Neb. 100, 615 N.W.2d 104 (2000). The court held that, because the debtor could not require the trustees to make distributions to satisfy his debt, his interest could not be reached by his former spouse. Id. Moreover, Pennsylvania caselaw is well settled that an interest in a spendthrift trust may not be attached by a former spouse to satisfy and equitable division debt. Clark v. Clark, 411 Pa. 251, 191 A.2d 417 (1963).

However, it is particularly unlikely to be effective in Tennessee in divorce in regards to the grantor, except under limited circumstances with Tennessee Investment Services Act trusts

(see that section, infra). For example, in the Tennessee case of Barnett v. Barnett, the court determined that the self-settled spendthrift trust created by the husband was ineffective to insulate the property from the marital claims of the wife upon their divorce. 2010 WL 680983, 2010 Tenn. App. LEXIS 170, 18 (Tenn. Ct. App. Feb. 26, 2010). Mr. Barnett during the divorce changed his Wife as Trustee to his niece as Trustee. However, in Shenouda v. Shenouda, No. 03A01-9505-CV-00151,1995 WL 684858, 1995 Tenn. App. LEXIS 748 (Tenn. Ct. App. Nov. 20, 1995), the court approved Husband's creation of a trust using marital assets for the benefit of the children's education.

6. TRUST DISTRIBUTIONS

Distribution interests are generally classified as either a mandatory interest, a support interest, or a discretionary interest. Tenn. Code Ann. § 35-15-103(10)(C). A trust will typically have either outright distributions to a beneficiary (mandatory interest) or could hold back the money, and only allow distributions for what are known as "ascertainable standards" (support interest). The typical ascertainable standard is health, maintenance, education and support. See Tenn. Code Ann. § 35-15-103(3). For example, in the case of Brown v. Brown, the trust document provided that the trustee "may distribute to or for the benefit of the surviving Trustmaker and our descendants as much of the principal of the Family Trust as our Trustee, in its sole and absolute discretion, shall consider necessary or advisable for their education, health, maintenance, and support." 2013 WL 1619687, 2013 Tenn. App. LEXIS 255, 27-28 (Tenn. Ct. App. Apr. 16, 2013). The "surviving Trustmaker and descendants" were not mandatory beneficiaries of either the income or the principal of the Family Trust, but they still had a present interest in the Trust as discretionary beneficiaries. Id. The general rule applying to discretionary interests (i.e. distributions made at the discretion of the Trustee) is that, if trustees exercise discretionary powers conferred on them in good faith and without fraud or collusion, courts of equity will not undertake to control their discretion. Falls v. Carruthers, 20 Tenn. App. 681, 693 (1936); see also Tenn. Code Ann. § 35-15-814(b)(2) (permitting courts to review a trustee's discretion in distribution "only if the trustee acts dishonestly, acts with an improper motive, or fails to act if under a duty to do so"). Unlike a mandatory or support interest, a discretionary interest does not constitute an enforceable right or a property interest but "a mere expectancy." Tenn. Code Ann. § 35-15-814(b)(1).

So long as the distributions are made in accordance with these standards, then a spendthrift clause would remain effective. Note that a spendthrift clause might not be effective as to a beneficiary if there is set forth in the trust document an outright distribution to that beneficiary, as opposed to discretionary distributions or those made in accordance with ascertainable standards. See generally Tenn. Code Ann. § 35-15-502(a). But holdback provisions are permitted to allow the trustee to hold back an outright distribution in certain circumstances. For example, a trust may also hold back distributions in the case of a minor child, or before a beneficiary reaches a certain age. See generally Bennett v. Nashville Trust Co., 153 S.W. 840 (Tenn. 1912). The trust assets would generally be unavailable to a creditor of the beneficiary under those circumstances until distributed (or until the beneficiary has an unrestricted right to the assets). See Tenn. Code Ann. § 35-15-504(b); Atkins v. Marks, 288 S.W.3d 356, 371 (Tenn. Ct. App. 2008) ("Once distributed to the beneficiary, income paid from a valid spendthrift trust becomes subject to execution by creditors of the beneficiary; however, where the spendthrift provision as to income is invalid, a creditor may reach the beneficiary's interest in the income before the beneficiary comes into possession of it."). Notably under a spendthrift provision, the trustee is permitted to directly pay any expense of the beneficiary, regardless of the existence of an outstanding creditor, up to and including the point of exhausting the principal. Tenn. Code Ann. § 35-15-502(e). This remains true whether the beneficiary's interest is mandatory, support, discretionary or a remainder. Id. The provisions would utilize the spendthrift and discretionary distribution statutes and case law cited herein and in the previous section.

Distribution interests are considered separate rather than marital property for the purposes of achieving an equitable division of marital property, and therefore, distribution interests are not relevant to such division. See Tenn. Code Ann. § 35-15-103, cmt; see also Eldridge v. Eldridge, 137 S.W.3d 1, 18–19 (Tenn. Ct. App 2002) (affirming the trial court's refusal to classify part of the trust as marital property because the beneficiary lacked a present possessory interest in the trust). Indeed, the mere fact that one's spouse had provided services for the trust in a fiduciary capacity does not change nature of these interests, nor does the provision of such services create a marital property interest. Tenn. Code Ann. § 35-15-103, cmt. Therefore, it can be affirmatively stated that neither the furnishing of such services nor the results from or effects of such furnishing of services are pertinent to the equitable division of property. Id. While not subject to division themselves, the distributions can, however, ultimately have an effect as trust incomes

are considered for purposes of alimony and child support. See Rogin v. Rogin, 2013 Tenn. App. LEXIS 448, at *18 (Tenn. Ct. App. July 10, 2013) (citing Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(a)). In addition, being a contingent beneficiary of a trust can also be considered as a factor when determining alimony. In Sima Khayatt Kholghi v. Aliabadi, the Court of Appeals determined that Husband's parent's advanced age made it likely that Husband would soon receive substantial assets since Husband would be sole beneficiary of the trust after the death of his parents. No. M2019-01793-COA-R3-CV, 2020 Tenn. App. LEXIS 417, at *73 (Ct. App. Sep. 18, 2020). The Court distinguished the facts of this case from Goodman v. Goodman, 8 S.W.3d 289, 292 (Tenn. Ct. App. 1999), since in that case the husband was borrowing from a trust in which his mother was a beneficiary, and was required to pay those loans back with interest, and as such the loans were not considered inome for purposes of setting alimony.

B. TYPES OF TRUSTS

There are many different types of trusts, from revocable living trusts, to irrevocable life insurance trusts, and many more varieties, many of which we will cover briefly herein. However, these trusts can be generally broken down into two categories: revocable and irrevocable.

1. REVOCABLE TRUSTS

A revocable trust is a trust that the grantor reserves the right to change later. Tenn. Code Ann. § 35-15-103(28). These trusts are generally used to avoid probate. Since a revocable trust is revocable, it does not provide any asset protection whatsoever during the life of the grantor, nor is it immune from the creditors of the grantor's estate, except when certain retirement accounts or life insurance policies name the trust as a beneficiary, but only to the extent of those assets. Tenn. Code Ann. § 35-50-102; § 35-50-108. A revocable trust will not allow a grantor to shelter assets from Medicaid, nor from any taxes. See Bell ex rel. Bell v. Tenn. Dep't Human Servs., 2006 WL 74143, 2006 Tenn. App. LEXIS 25 (Ten. Ct. App. Jan. 12, 2006). In fact, for tax purposes a revocable trust is ignored (except for certain state purposes it might not be ignored if used for business purposes, and under certain circumstances a trust can be subject to Tennessee or other state level taxation). See generally C. Douglas Miller & R. Alan Rainey, Article, Dying with the "Living" (or "Revocable") Trust: Federal Tax Consequences of Testamentary Dispositions Compared, 37 Vand. L. Rev. 811, 814–17 (1984).

A revocable trust, revocable living trust, living trust, are all the same type of trust, and the different names are style choices. There is no required naming convention for trusts; therefore, the item to look for in the trust document is any abilities of the grantor to change the terms of the trust, particularly the abilities to revoke the trust, to change the beneficiaries of the trust, to direct the distribution of trust property, etc. See Revocable Trust, Black's Law Dictionary (10th ed. 2014).

A Revocable Living Trust is generally done for the purposes of avoiding having to go to probate court, not only in Tennessee but also in other states. See, e.g., Head v. Wachovia Bank of Ga., N.A., 88 S.W.3d 180, 187 (Tenn. Ct. App. 2002). This trust would only avoid probate, however, for items placed into the trust, either by deed, bill of sale, or other conveyance. This trust would likely not be able to avoid, for example, probate for real property in other countries, and a competent attorney in the relevant country should be consulted regarding the use of United States Trusts. That aside, United State trusts are generally poor vehicles for foreign assets, for reasons that exceed the scope of this section, but include difficulties with foreign jurisdictions recognizing properly United States trusts.

As stated previously, a Revocable Living Trust does not avoid taxes, Medicaid, and it does not protect against the creditors of the grantor. Remember, however, if the trust receives (after the death of the settlor) life insurance proceeds or retirement account proceeds those should still be protected from creditors. Tenn. Code Ann. § 35-50-102; § 35-50-108. Claims arise from a divorce, however, because the retirement account could have accrued during the marriage or the premiums for the life insurance policy might have been paid out of marital funds. See Gorbet v. Gorbet, 2012 WL 4847090, 2012 Tenn. App. LEXIS 714, at *36 (Tenn. Ct. App. Oct. 11, 2012) (noting that where a "whole-life policy was acquired during the marriage with marital funds" the trial court properly "classif[ied] the term-life policy as marital property"); Catignani v. Catignani, 1999 WL 976564, 1999 Tenn. App. LEXIS 734 at *17 (Tenn. Ct. App. Oct. 28, 1999) ("An interest in a retirement benefit plan is marital property subject to division . . . ."). Therefore, anything placed into a revocable trust (aside from life insurance and retirement proceeds) should therefore be available in divorce, subject to the same considerations as other assets regarding separate property issues. C.f. Dalton v. Dalton, 2006 WL 3804415, 2006 Tenn. App. LEXIS 819, at *16 n.8 (Tenn. Ct. App. Dec. 28, 2006).

As stated above, this trust will become irrevocable on the death of the grantor(s), unless it distributes to another revocable trust. As such, with a valid spendthrift clause, this trust may be able to protect against the creditors of the non-grantor beneficiaries, even in the case of divorce with those beneficiaries. As an example, if Johnny Mae contributes property to a revocable trust, upon his death the trust will become irrevocable, since he will no longer be alive to revoke it. If Sally Mae is the beneficiary, and there is a valid spendthrift clause, ascertainable standards and/or trustee discretion, and no current right for Sally Mae to demand distribution, then the undistributed amounts in the trust would be protected from Sally Mae's creditors.

Practice tip: Revocable Trusts, like all trusts, only control the assets transferred into them. As an example, let's say that a deed to Blackacre is in the name of Sally Smith, with no right of survivorship or tenancy by the entirety. Sally Smith has a revocable trust which states that Blackacre is to go to Johnny Mae. Sally Smith also has a valid Will that states Blackacre is to go to Mark Lee. Upon Sally Smith's death, once the Will is admitted to probate and goes through the proper procedures and Executor's deed, the property will go to Mark Lee. It won't go to Johnny Mae since it was not transferred into the trust (unless her Will had been a pour over will and named her trust as a beneficiary). A pour over will is a type of will whereby the residuary beneficiary is a trust or trusts. Therefore, the purpose is to pour over property into the trust that was not already transferred to the trust. Most estate planning practitioners can attest to the fact that many, if not most, revocable trusts end up being empty due to a failure to convey assets to the trust.

Additional practice tip: Had the deed stated instead Sally Smith and Gary Smith, as either a married couple or joint with survivorship, then the interest would have gone to Gary Smith, and would not go to Johnny or Mark.

2. IRREVOCABLE TRUSTS

An irrevocable trust generally cannot be revoked by the grantor (although there may be decanting allowed under certain circumstances as described infra). As such, a grantor would give up grantor's right to make changes to the trust. So long as the grantor is not also a beneficiary (except for asset protection trusts as discussed infra), and so long as any fraudulent transfer or bankruptcy laws aren't violated, then the trust assets would not be reachable by the creditor of the grantor. 11 U.S.C § 548(e)(allows avoiding transfers within ten years of filing of

petition if transfer to hinder, delay or defraud any entity); Tenn. Code Ann. § 66-3-301 (Tennessee's Uniform Fraudulent Transfer Act).

The most common irrevocable trust is the Irrevocable Life Insurance Trust, commonly known as an "ILIT". The purpose of this trust is to allow proceeds of a life insurance policy to avoid estate taxation. The basic way this trust typically works is that the grantor or grantors (in the case of a second to die policy) gift to the trust's bank account. The money is then held in that account for a certain period of time, and the beneficiary is given a "Crummey letter" which informs them that they have a certain amount of time to withdraw the money from the account. Note that the letter is called "Crummey" because it is from a famous case, Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968), and not because it's crummy. If the beneficiary does not withdraw the money in that period of time, then the trust can use the money to pay the life insurance premium. The purpose of this setup is to use annual exclusion gifts to pay the premiums. Annual exclusion gifts are gifts below the reporting threshold, and as such do not reduce a person's gift and estate tax credit. Annual exclusion gifts are only allowed to be made to human beings, and not trusts, so the purpose of the Crummey letter is to tie the gift into a person (i.e. the Crummey letter recipient who can withdraw the money). There cannot be a pre-agreement not to withdraw the money, and there is a risk with this trust that the trust will not be able to make the payments if the beneficiary withdraws the money. The funds gifted to the bank account are in theory available to the creditors of the beneficiary before it lapses. Many practitioners currently use a Crummey waiver letter rather than having to do an annual Crummey letter.

When the grantor or grantors die, the proceeds then go to the ILIT. Since the premiums are treated as having been paid by the beneficiary, the proceeds are kept out of the grantor(s) estate(s) for estate tax purposes. Since the proceeds are going to the trust, the trust and neither the grantor nor the beneficiaries would own the proceeds. The proceeds would then be administered, distributed, invested, etc. in accordance with the terms of the ILIT document. Provided that the ILIT has proper spendthrift or holdback provisions, these proceeds would not be available to the creditors of the beneficiaries. Again, since the trust is irrevocable, the proceeds would also not be available to the creditors of the grantor's estate.

3. GRANTOR VERSUS NON-GRANTOR TRUSTS

For tax purposes, a trust can be either a grantor trust or a non-grantor trust. For a grantor trust, the grantor retains certain powers, and therefore the trust will still be subject to the income tax of the grantor. For a non-grantor trust, the grantor does not retain those powers, and as such either the trust itself or the beneficiaries will be taxed (the taxation of trusts will be discussed infra).

All revocable trusts are grantor trusts. All non-grantor trusts are irrevocable trusts. However, not all irrevocable trusts are non-grantor trusts. An irrevocable trust may still have certain retained powers by the grantor, such as the right of grantor to substitute property of equal value, that will make the trust a grantor trust for income tax purposes, even though the grantor cannot revoke the trust. This type of trust is known as an "intentionally defective grantor trust" since it is intentionally defective for income tax purposes. As such, the grantor would still be taxed on the income of the trust. For estate tax purposes, such a trust (if properly set up) would not be so defective, and therefore would be treated as not being owned by the grantor for estate tax purposes.

As the saying goes, nothing is certain but death and taxes. This is especially true with trusts. Eventually, the grantor or grantors will die. At that point, the trust will generally become irrevocable, and would be a non-grantor trust subject to its own taxation. At that point, the trust assets would either be distributed in accordance with the trust agreement, or they would continue to be held in the trust in accordance with the trust agreement.

4. CHARITABLE TRUSTS

Trusts can also be set up to gain tax advantages by utilizing charitable donations. A charitable trust is a trust, or portion of a trust, created for a charitable purpose as described in Tennessee Code Annotated § 35-15-405(a). Tenn. Code Ann. § 35-15-103(6). There are many different types of charitable trusts, including charitable remainder trusts and charitable lead trusts. Essentially, some of these trusts might give a lifetime income to a beneficiary, and the remainder to a charity or, in the reverse, give an income to a charity and the remainder to a beneficiary. The various income formulas that can be used exceed the scope of this section. Generally, it will have to be examined as to the specific interests a beneficiary has in such a trust in order to determine if it is attachable by a creditor.

C. TRUSTS THAT CAN PROTECT AGAINST CREDITORS

1. ESTATE TAX PLANNING TRUSTS

Under current tax law, married citizen spouses can gift an unlimited amount to each other tax free and with no reporting. Also under current tax law each person can give away (or die with) a little more than five million dollars (indexed for inflation) without any estate taxes. The purpose of a marital trust is to utilize this unlimited gift ability. Although the exact specifics of a marital trust can be complex, basically the spouse must at least receive the income from the trust annually. Therefore, in this type of trust there may be assets available to creditors of the beneficiary of the marital trust (i.e. the income interest and possibly a limited right to some corpus).

Credit shelter trusts were originally created to preserve the estate tax credit of one spouse, since that spouse's credit would be lost if all of their estate passed to their spouse under the marital deduction. The current estate tax law allows for portability of this credit, and therefore these types of trusts are used less than before. However, they can still be useful and are still used in planning. Credit shelter trusts typically name a couple's children as the beneficiary, although they can provide for the health, maintenance and support of a spouse during life, and can also have limited withdrawal powers of principal (5% or $5,000.00 per year). Therefore, there may also be assets available to a creditor of the surviving spouse, depending upon their withdrawal rights.

These marital and credit shelter trusts are often referred to as A/B trusts. They are typically funded in accordance with sometimes complex formulas. A spouse could become the beneficiary of any multiple of these trusts if they remarry and have more than one spouse pass away.

Caution: In the current political environment the future of the estate and gift tax is uncertain and its effect on trusts is unknown. However, basic planning, such as the use of revocable trusts and pour over wills, is unlikely to change.

2. ASSET PROTECTION TRUSTS

Tennessee and several other states have asset protection trust laws. These are self-settled spendthrift trusts created under the laws of those various states. Normally, a self-settled spendthrift trust would be prohibited, but if these specific statutes are followed then they can be created. However, there are typically exception creditors to these trusts, such as in the case of

child support or alimony, and occasionally in the case of torts. Also, there are fraudulent transfer laws and bankruptcy laws that may circumvent these protections in these trusts. Tennessee's specific asset protection trust law, Tennessee Investment Services Act Trusts, will be covered in the next section on Tennessee specific trusts.

In addition to domestic asset protection trusts, there are also trusts created in foreign jurisdictions, aka Foreign Asset Protection Trusts ("FAPTs"). However, under many of the jurisdictions that solicit asset protection trust business, there are many restrictions on fraudulent transfer laws, a prohibition on contingency cases, and many other roadblocks. Typically, therefore, it is very difficult to reach the assets of those trusts going through the foreign jurisdiction. Therefore, more success has been had in finding the grantors, who typically are still in the United States, in contempt in order to encourage them to try to bring the assets back (but may actually not be possible due to anti-duress provisions in the trust). Such contempt orders have been routinely granted by courts, see, e.g., FTC v. Affordable Media LLC, 179 F.3d 1228 (9th Cir. 1999); In re Lawrence, 279 F.3d 1294 (11th Cir. 2002).

If any of the trust assets are contained in the United States or other more friendly jurisdictions then there may be ways to reach those assets and in effect pierce the trust. When assets are located in a state that either does not have its own asset protection trust law or has different exception creditors, it is unlikely that a court in that state will recognize either the trust's protections or the exceptions.

A creditor could attack a self-settled asset protection trust by arguing that the law of a different jurisdiction applies. For example, if you create a Delaware asset protection trust, a creditor from New York may argue that New York law applies instead of Delaware law because the offense occurred in New York and the offended party is a resident of New York. Because the laws of the State of New York do not allow a debtor to protect assets in a self-settled trust, the New York courts could potentially allow a New York resident to obtain a judgment against the trust. Similarly, it is possible that a federal court (including a bankruptcy court) could refuse to recognize the laws of a jurisdiction that provides asset protection for a self-settled trust. There are federal bankruptcy cases where the bankruptcy court has refused to recognize the self-settled trust laws of a foreign jurisdiction because it is against the policy of the federal bankruptcy courts. See Marine Midland Bank v. Portnoy (In re Portnoy), 201 B.R. 685 (Bankr. S.D.N.Y. 1996); Sattin v. Brooks (In re Brooks), 217 B.R. 98 (Bankr. D. Conn. 1998). In the Portnoy case,

Judge Brozman of the Federal Bankruptcy court said, "I think it probably goes without saying that it would offend our policies to permit a debtor to shield from creditors all of his assets because ownership is technically held in a self-settled trust." In re Portnoy at 700. Also, Section 548 of the Bankruptcy Code as well as the various fraudulent transfer laws (or voidable transaction laws) can also be used to pierce self-settled asset protection trusts (although some of the fraudulent transfer laws might be limited by the asset protection trust act in that state, if any. See the Tennessee Investment Service Trust section infra).

3. TENNESSEE INVESTMENT SERVICES TRUSTS

Investment Services Act trusts are Tennessee's version of what are colloquially known as domestic asset protection trusts. The Tennessee Investment Services Act of 2007 can be found at Tennessee Code Annotated § 35-16-101, *et seq*. As stated previously, the basic concept of all trusts is that there is a person who gives property (typically called a grantor or settlor) to a person (known as a trustee) to hold on behalf of the trust's beneficiaries. Historically, all of the states forbid self-settled spendthrift trusts. To review: "Self-settled" means the grantor (i.e. the person putting the assets into the trust) is also a beneficiary. "Spendthrift" is a provision whereby the trustee decides how the trust funds are spent for the beneficiary, and therefore creditors cannot reach the funds in the trust. See generally, Tenn. Code Ann. § 35-15-103, cmt. Generally, this means the beneficiaries do not have direct control over the trust. It should be noted however that a creditor of that beneficiary could reach any property distributed to that beneficiary.

Tennessee Code Annotated § 35-15-505 generally allows creditors of the grantor to reach assets transferred by a grantor to a trust of which he or she is also the beneficiary. However, the Tennessee Investment Services Act of 2007 established an exception to that rule by authorizing the creation of self-settled trusts that are exempt from the grantor's creditors if certain conditions are met. Tenn. Code Ann. § 35-16-101, cmt.

The main benefits of the Tennessee Investment Services Act trust (as amended effective July 1, 2013) are that pre-transfer creditors have either two years from the date of the transfer of the property to the trust (or six months from the date of the creditor's having discovered the transfer) to challenge the transfer or they are barred from bringing a claim. See Tenn. Code Ann. § 35-16-104. Also, a much longer ten year statute of limitations may also apply in certain cases of bankruptcy. See 11 U.S.C. § 548(e). An interesting aspect of Tennessee law is that "discovery" is deemed if the transfer is a public record. Tenn. Code Ann. § 35-16-104. Many

attorneys have begun recording affidavits of transfers in the applicable counties in order to make the transfers a public record, and thus ensure the shortest statute of limitation possible. Even if an action is filed within the statute of limitations period, it must be shown with clear and convincing evidence that the transfer was for the purpose of defrauding that creditor. Id.

In order to be eligible as an Investment Services Trust, the trust agreement must be irrevocable, must appoint at least one qualified trustee, must incorporate Tennessee law to govern the validity, construction, and administration of the trust, and must contain a spendthrift provision prohibiting the grantor or any beneficiary from transferring, assigning, pledging, or mortgaging their interest in the trust. Tenn. Code Ann. § 36-16-102.

An investment services trust is an instrument that appoints a qualified trustee and:

(1) expressly incorporates Tennessee law to govern the validity, construction, and administration of the trust;

(2) is an irrevocable trust; and

(3) includes a spendthrift provision

See § Tenn. Code Ann. 35-16-102(7).

The qualified trustee must:

(1) be a Tennessee resident or a corporate trustee licensed under Tennessee law, and

(2) have at least some certain duties such as custody of assets, preparing tax returns, or be materially administering the trust, and

(3) cannot be the transferor/grantor

See Tenn. Code Ann. § 35-16-102(12).

In order to take advantage of the creditor protection provided by an Investment Services Trust, the grantor must make a qualified disposition to the trust. In order to be a qualified disposition, the grantor must execute a qualified affidavit prior to making a transfer to the trust. The purpose of the affidavit is to make sure that the grantor is not defrauding his or her creditors. The statute lists seven (7) specific statements that must be addressed/included in the affidavit:

(1) the grantor has full right, title, and authority to transfer the assets to the trust;

(2) the transfer of the assets to the trust will not render the grantor insolvent;

(3) the grantor does not intent to defraud a creditor by transferring the assets to the trust;

(4) the grantor does not have any pending or threatened court actions against the grantor, except for those court actions identified by the grantor on an attachment to the affidavit;

(5) the grantor is not involved in any administrative proceedings, except for those identified on an attachment to the affidavit;

(6) the grantor does not contemplate filing for relief under the federal bankruptcy code; and

(7) the assets being transferred to the trust were not derived from unlawful activities.

See Tenn. Code Ann. § 35-16-103. There is no time limit for making a transfer to the Investment Services Trust after the affidavit is executed. Nevertheless, no transfers should be made after any of the statements in the affidavit become inaccurate.

The Tennessee Investment Services Trust Act does not protect assets from all creditors. The Tennessee Act permits certain "exception creditors" to be exempted from the provisions protecting trust assets. In order for an "exception creditor" to reach assets in an Investment Services Trust, there must be a final court order that a debt is due, such as for child support, alimony, spousal support, or division of marital property. Tenn. Code Ann. § 35-16-104, cmt. The court must also determine that the claimant has made reasonable efforts to collect the debt or that such attempts would be futile. Id. The Tennessee Investment Services Trust Act does not protect against past due child support, past due alimony, and a written agreement, judgment or order of the court for division of marital property of a spouse or former spouse, but only to the extent of such debt, legally mandated and the reasonable cost of collection. Tenn. Code Ann. § 35-16-104(i). It is important to note that child support obligations and obligations stemming from alimony or spousal support are outside of this statute's protections against creditors. The statute allows a "spouse" or "former spouse" to become an "exception creditor" under certain circumstances. Tenn. Code Ann. § 35-16-102, cmt. The statute defines "spouse" or "former spouse" as a person to whom the grantor was married to at or before the time of the qualified distribution to the Investment Services Trust. Tenn. Code Ann. § 35-16-102(13). Funding an Investment Services Trust prior to getting married is an effective method of protecting assets in the event of a subsequent divorce. Tenn. Code Ann. § 35-16-102, cmt. Moreover, unlike some domestic asset protection trust statutes, tort claimants are not "exception creditors" in Tennessee (i.e. tort claimants would be treated the same as any other creditors for the purposes of the Tennessee act). Tenn. Code Ann. § 35-16-104, cmt.

Additionally, the limited case law has shown that domestic asset protection trusts may have limited or no protection for assets located outside of the state of domicile for the trust. Nonresidents of Tennessee can certainly set up Tennessee Investment Services Act trusts, particularly if the qualified trustee and the property are located in Tennessee, but great care must be used if property outside of Tennessee is to be added to the trust. It is generally better to use the domestic asset protection trust law of the state of domicile (provided that said state has such a law) since a recent case out of Utah (regarding a Nevada asset protection trust) has shown that even among states with asset protection trust laws, other states' laws may create difficulties in enforcing the domestic asset protection trust. See Dahl v. Dahl, 2015 UT 23 (2015).

In the Dahl case, the Utah Supreme Court held that Mrs. Dahl had an enforceable interest in a Nevada asset protection trust that was established by her husband during the marriage with marital property. The trust instrument expressly stated that the trust was irrevocable and it provided that the trust was to be governed by Nevada law. However, the Utah Supreme Court held that Utah law applied since Utah has a strong public policy in favor of the equitable distribution of marital assets upon divorce and the application of Nevada law would deny the court the ability to equitably divide the marital assets. The court then determined that, under Utah law, the trust was revocable because Mr. Dahl, as grantor, had retained the power to amend the trust in any manner. Fortunately, Tennessee's Investment Services Act does have provisions allowing trusts from other states to be transferred to Tennessee. Tenn. Code Ann. § 35-16-106.

4. TENNESSEE COMMUNITY PROPERTY TRUSTS

Although Tennessee is not a community property state, it is possible through the use of a special type of trust, a community property trust, to elect community property treatment for assets put into the trust. A trust becomes a community property trust if one or both spouses transfer property to a trust that:

(1) expressly declares that the trust is a Tennessee community property trust;

(2) has at least one trustee who is a qualified trustee and whose powers include, or are limited to, maintaining records for the trust and preparing or arranging for the preparation of any income tax returns that must be filed by the trust (both spouses or either spouse may be a trustee);

(3) is signed by both spouses; and

(4) contains the following language in capital letters at the very beginning of the trust document: THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE.

Tenn. Code Ann. § 35-17-103.

One of the main reasons these trusts are set up is that there can be a double step in basis. Without community property, when one spouse dies there is only a half step-up in basis typically with property owned jointly. With community property, it is possible to receive a full step up on the death of one spouse for property owned jointly. See 26 U.S.C.S. § 1014(b)(6). As an example of how this would work: assume Sally Smith and Henry Smith bought a rental property for $100. At Sally Smith's death, the property has appreciated in value to $200. If the property is sold at that point for $200 there would be a 50% step up in basis, so there would be tax on $50 of gain ($100.00 basis plus $50 step up). If the property had instead been in a community property trust, there would be a full step up at Sally Smith's death and there would be no tax if the property sold for $200. There would be another full step up at the death of Henry Smith.

5. TENNESSEE TENANCY BY THE ENTIRETY TRUSTS

When a husband and wife own real property jointly, unless otherwise stated in the deed the property will receive Tenancy By The Entirety protection, meaning that a creditor of only one spouse cannot reach the interest until the other spouse dies. If the debtor spouse passes away first instead, then a creditor of only the debtor spouse would not be able to reach any of the interests in the property. A Tenancy By The Entirety Trust allows this treatment to be preserved with the use of a trust or trusts, provided that the statutory requirements are followed, including the required language to be listed on the deed.

Any property of a husband and wife that was held by them as tenants by the entirety and subsequently conveyed as tenants by the entirety to the trustee of one or more trusts, and the proceeds of that property, shall have the same immunity from the claims of their separate creditors as would exist if the husband and wife had continued to hold the property or its proceeds as tenants by the entirety, so long as:

(1) the husband and wife remain married;

(2) the property or its proceeds continues to be held in trust by the trustee or their successor in interest;

(3) the trust or trusts are, while both grantors are living, revocable by either grantor or both grantors, acting together;

(4) both the husband and wife are permissible current beneficiaries of the trust while living; and

(5) the trust instrument, deed, or other instrument of conveyance provides that this section shall apply to the property or its proceeds.

Tenn. Code Ann. § 35-15-510.

Special thank you to Rachel Dix Bishop, Esq. at Stites & Harbison, PLLC for her assistance!

INTRODUCTION

Judge Don R. Ash was a long-time contributor to the Alimony Bench Book, and, while he stepped aside in recent years from his duties with this publication, his attached checklist for findings of fact and conclusions of law remains as useful as ever. Judge Ash traced the checklist to attending the Judicial Academy in 1994, where he received a memorandum prepared by Judge Bill Swann which helped Judge Ash make findings of facts and conclusions of law in regard to divorce cases. He modified the checklist during his time on the bench, specifically with regard to alimony, and made other additions with the help of Professor Janet Richards and Attorney Amy Amundsen.

Because the checklist remains largely in the form penned by Judge Ash, he continues to deserve the credit for its preparation.

This Chapter is reviewed and edited each year by the Alimony Bench Book Committee to provide any appropriate changes and/or updates. The 2017 2020 versions were edited by Judge Mary L. Wagner

VI. CHECKLIST FOR FINDINGS OF FACTS AND CONCLUSION OF LAW IN REGARDS TO ALIMONY

A. FACTORS FOR CONSIDERATION REGARDING SPOUSAL SUPPORT

The legislature has directed Tennessee courts to consider twelve factors in awarding spousal support.(Tenn. Code Ann. § 36-5-121(i) (2019). Of the twelve factors, the Court in this case wishes particularly to emphasize the following factors:

YES	NO	
___	___	(1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
___	___	(2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
___	___	(3) The duration of the marriage;
___	___	(4) The age and mental condition of each party;
___	___	(5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
___	___	(6) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be the primary residential parent of a minor child of the marriage;
___	___	(7) The separate assets of each party, real and personal, tangible and intangible;
___	___	(8) The provisions made with regard to the marital property as defined in § 36-4-121;
___	___	(9) The standard of living of the parties established during the marriage;
___	___	(10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

___ ___ (11) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

___ ___ (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties

The court may consider four types of alimony scenarios when awarding spousal support: transitional alimony, rehabilitative alimony, alimony *in solido* and alimony *in futuro.*[1] Transitional alimony is intended to be used to "close in the gap" or "adjust to the realities of the divorce", but where rehabilitative alimony would not be appropriate. The concept of rehabilitation is intended to allow a spouse to achieve, with reasonable effort, an earning capacity to have a standard of living comparable to that of the marriage or that of the other spouse after the divorce. Alimony *in futuro* and alimony *in solido* are two forms of a long-term or more open-ended support. Burlew v. Burlew, 40 S.W.3d 465 (Tenn. 2001). Whether the spousal support is to be alimony *in futuro* or alimony *in solido* is determined by either the definiteness (*in solido*) or indefiniteness (*in futuro*) of the sum of alimony ordered to be paid at the time of the award. Burlew v. Burlew, 40 S.W.3d 465 (Tenn. 2001), (citing Waddey v. Waddey, 6 S.W.3d 230, 232 (Tenn.1999). McKee v. McKee, 655 S.W.2d 164, 165 (Tenn.Ct.App. 1983)). There is a statutory bias for awarding rehabilitative or transitional alimony over alimony in solido or in futuro. Henry v. Henry, 2020 Tenn. App. LEXIS 84, at *20 (Tenn. Ct. App. Feb. 26, 2020) (quoting Gonsewski v. Gonsewski, 350 S.W.3d 99, 109 (Tenn. 2011)(trial court awarded transitional alimony for 30 months followed by alimony in future). You may not award both rehabilitative and transitional together. Wright v. Wright, No. W2018-02163-COA-R3-CV, 2020 WL 1079266 (Tenn. Ct. App. Mar. 6 2020). You may combine transitional alimony and alimony in futuro. Henry v. Henry, No.M2019-01029-COA-R3-CV, 2020 WL 919248 (Tenn. Ct. App. Feb. 5. 2020). You may also combine rehabilitative alimony and alimony in futuro. Tenn. Code Ann. § 36-5-121(d)(4). You may also award alimony pending the receipt of marital assets as transitional alimony, if appropriate. See Hunt-Carden v. Carden, No. E2018-00175-COA-R3-CV, 2020 WL 1026263 (Tenn. Ct. App. Mar. 3. 2020).

In awarding alimony, T.C.A. §36-5-102(a) provides that "the court may decree to the spouse who is entitled to…alimony…such part of the other spouse's real and personal estate as it

[1] For a more detailed discussion of the types of alimony and the factors, please see Section I of the Alimony Bench Book.

may think proper. In doing so, the court may reference and look to the property that either party received by the other at the time of the marriage, or afterwards, as well as to the separate property secured to either by marriage contract, or otherwise."

The Tennessee legislature has demonstrated a preference for an award of rehabilitative alimony to rehabilitate an economically disadvantaged spouse. The legislative purpose behind the preference for rehabilitative alimony is to rehabilitate a spouse to achieve, with reasonable effort, an earning capacity that achieves a standard of living comparable to that during the marriage or the standard of living expected of the other spouse after the divorce.

There is no absolute formula that must be followed, however, the Supreme Court in Aaron v. Aaron, 909 S.W.2d 408 (Tenn. 1995), set out several guiding principles:

> (1) The real need of the spouse seeking the support is the single most important factor; (*Citing* Cranford v. Cranford, 772 S.W.2d 48 (Tenn. Ct. App. 1989)).
> (2) In addition to the need of the disadvantaged spouse, the courts most often consider the ability of the obligor spouse to provide support; (*Citing* Cranford v. Cranford, 772 S.W.2d 48 (Tenn. Ct. App. 1989)).
> (3) Further, the amount of alimony should be determined so that the party obtaining the divorce is not left in a worse financial situation then he or she had before the opposite party's misconduct brought about the divorce (Burlew v. Burlew, 40 S.W.3d 465, 469 (Tenn. 2001) citing Aaron v. Aaron, supra); and
> (4) While alimony is not intended to provide a former spouse with relative financial ease, we stress that alimony should be awarded in such a way that the spouses approach equity.

Although each of the 12 factors must be considered when relevant to the parties, " 'the two that are considered the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay.' " Gonsewski v. Gonsewski, 350 S.W.3d 99, 110 (Tenn. 2011)(citing Riggs, 250 S.W.3d at 457). In determining need and ability to pay, the trial court may consider earning capacity and not just actual earnings. Kanka v. Kanka, No. M2016-01807-COA-R3-CV, 2018 WL 565841 (Tenn. Ct. App. Jan. 25, 2018).

The cost of health care is a proper expense item to consider when awarding alimony. The court may order one party to obtain or maintain health insurance on the other spouse and may order payment of the premiums and health costs not covered. T.C.A. § 36-5-121 (k). Storey v. Storey, 835 S.W. 2d 593 (Tenn. Ct. App. 1992).

One way to guarantee alimony payments is with life insurance on the life of the obligor. The court may order one party to designate the other party as beneficiary under existing policies.

T.C.A. § 36-5-121(l)(2018). The Court can also order the acquisition and maintenance of such policies.

In determining the nature and the amount of alimony to be paid, the court should set an amount certain, as opposed to a percentage of obligor's income. Bettis v. Bettis, No. E2016-00156-COA-R3-CV, 2016 WL 6161559, 2016 Tenn. App. LEXIS 783(Tenn. Ct. App. Oct. 24, 2016).

In setting the amount of alimony to be paid, include specific findings pursuant to Tenn. R. Civ. P. Rule 52.01 to support that amount and duration. These findings should include findings on income, findings as to reasonableness of expenses, findings as to need and ability to pay, findings as to whether rehabilitation is feasible and whether an award of rehabilitative or transitional alimony would be appropriate. Although there is not a single test for whether a trial court has complied with Rule 52.01, as a general rule, "the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue." Beasley v. Beasley, 2020 Tenn. App. LEXIS 465, at *9 (Tenn. Ct. App. Oct. 20, 2020) (quoting Cain-Swope v. Swope, 523 S.W.3d 79, 86 (Tenn. Ct. App. 2016)).

B. THIS IS A CASE FOR TRANSITIONAL ALIMONY

Yes No

____ ____

This type of alimony was created by T.C.A. 36-5-121(g)(1). It is to be used when rehabilitation is not necessary but one party needs assistance adjusting to the economic consequence of a divorce.

1. Payable for a determinate period of time.
2. Terminates upon the death of the recipient.
3. Terminates on the death of payor (unless specifically stated) or upon some occurrence of other specifically stated conditions such as but not limited to cohabitation or remarriage of the party.
4. Unmodifiable except by agreement of the parties in an initial order or by the court in an initial order, or if the alimony recipient lives with a third person, in which

case a rebuttable presumption is raised that the third person is contributing to the support of the recipient, or the recipient is contributing to the support of the third person, and therefore the court should suspend all or part of the alimony obligation of the former spouse.

5. Can be awarded with other types of alimony, except rehabilitative alimony.

ELEMENTS

a) One spouse is temporarily economically disadvantaged relative to the other spouse (T.C.A. 36-5-121(g)(1)).
b) One spouse needs funds to help "bridge the gap" from the time of the divorce to a certain time in the future.
c) Used to soften the "economic blow" of divorce.

CHECKLIST FOR TRANSITIONAL ALIMONY

YES NO

___ ___ (1) The amount per month $_____;

___ ___ (2) The rationale for the amount (must be read into the record)

_____

_____

_____

_____;

___ ___ (3) The duration of the amount and rationale for duration

_____

_____

_____

_____;

___ ___ (4) The transitional alimony shall terminate upon the death of the recipient;

___ ___ (5) This transitional alimony shall terminate upon the

_____ death of the payor

_____ cohabitation of the payee

_____remarriage of payee

___ ___ (6) This transitional alimony shall _____ or shall not _____ be modified.

C. THIS IS A CASE FOR REHABILITATIVE ALIMONY

YES NO

____ ____

The question is whether, in light of all the circumstances, can the spouse rehabilitate themselves to achieve, with a reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living during the marriage or to the post divorce standard of living expected to be available to the other spouse. T.C.A. 36-5-121(e)(1)(2018). If the answer to the foregoing question is negative, the court should award alimony *in futuro* or alimony *in solido,* as it deems appropriate. The General Assembly has adopted rehabilitative alimony as the presumptive preference. Tenn. Code Ann. § 36-5-121(d)(2)(2018).

(1) Rehabilitative alimony is designed to temporarily support the disadvantaged spouse for the amount of time it will take to rehabilitate the recipient to such an extent that he or she can achieve, with a reasonable effort, an earning capacity that will permit that spouses standard of living after the divorce to be reasonably comparable to the standard of living or to the post divorce standard of living expected to be available to the other spouse.

(2) Rehabilitative alimony terminates upon the death of the recipient. Rehabilitative alimony shall also terminate upon the death of the payor unless otherwise specifically stated. T.C.A. § 36-5-121(e)(3).

(3) Rehabilitative alimony is subject to modification for the duration of the award upon a showing of substantial and material change in circumstances. T.C.A. § 36-5-121(e)(2)(2018). To be extended or increased, the recipient has the burden to prove that all reasonable efforts at rehabilitation have been made and have been unsuccessful.

(4) Rehabilitative alimony can be awarded with other types of alimony with the exception of Transitional alimony.

ELEMENTS

(a) One spouse is economically disadvantaged relative to the other spouse. T.C.A. § 36-5-121(e)(1)(2018).

(b) After a limited amount of time through additional training or education, the disadvantaged spouse is likely to increase appreciably his or her earning power or ability to accumulate capital assets so as to remedy the existing economic disadvantage, relative to the other spouse. Smith v. Smith, 912 S.W.2d 155 (Tenn. App. 1995), appeal denied.

(c) If rehabilitation of the disadvantaged spouse is feasible, then temporary rehabilitative alimony should be awarded. T.C.A. § 36-5-121(d)(2)(2018).

(d) The factors used to determine if rehabilitation is feasible are those set out in 36-5-121(d)(3).

1. Education
2. Employment history, and
3. Standard of living during the marriage.

Aaron v. Aaron, 909 S.W.2d 408 (Tenn. 1995).

CHECKLIST FOR REHABILITATIVE ALIMONY

(1) The amount per month $_____

(2) The rationale for amount *(read into the record)*

(Describe the standard of living the parties enjoyed during the marriage or the post divorce standard of living expected to be available to the spouse.)

(3) The duration _____.

(4) The rationale for duration *(read into the record)*

(Describe the training and or steps necessary for rehabilitation, including length of time and cost)

_____.

(5) The rehabilitative alimony shall _____ or shall not _____ terminate upon the death of the obligor _____. *(check one)*

(6) Any requirements to receive rehabilitative alimony. *See Treadwell v. Lamb, No.* M2015-01391-COA-R3-CV, 2017 WL 945940 (Tenn. Ct. App. Jan. 19, 2017)(Affirming requirement that wife actively pursue a teaching degree).

D. THIS IS A CASE FOR ALIMONY *IN SOLIDO* (LUMP-SUM ALIMONY)

YES NO

_____ _____

(1) Alimony *in solido* is designed to accomplish a stated result within a limited time and not be modifiable.

(2) It is a definite, fixed amount, payable in either lump sum or periodic payments.

(3) Can be awarded with other types of alimony, when there is property of which to award this alimony.

ELEMENTS

(a) One spouse is economically disadvantaged relative to the other spouse. T.C.A. § 36-5-121(d)(3).

(1) After a limited amount of time the disadvantaged spouse will no longer be in need of support from the former spouse.

(2) The disadvantaged spouse has already attained job security and only needs support temporarily.

Brown v. Brown, 913 S.W.2d 163 (Tenn. App. 1994), *appeal denied*.

CHECKLIST

(1) The amount awarded_____.

(2) The payment schedule _____.

(3) The property awarded_____

_____.

(4) The rationale for the award_____

_____.

(5) Post Judgment Interest. (post judgment interest for alimony should be awarded pursuant to Tenn. Code Ann. § 47-14-121).

E. THIS IS A CASE FOR SUPPORT ON A LONG-TERM BASIS *(IN FUTURO OR PERIODIC ALIMONY)*

YES NO

____ ____

The purpose of alimony *in futuro* is to provide financial support to a spouse who cannot be rehabilitated. Anderson v. Anderson, No. M2005-02029-COA-R3-CV, 2007 WL 957186, 2007 Tenn. App. LEXIS 175 (Tenn. Ct. App. Mar. 29, 2007), (*Citing* Burlew v. Burlew, 40 S.W.3d 465, 468 (Tenn. 2001)).

(1) Alimony *in futuro* is designed to continue the support that was incident to the marriage relationship, and is appropriate when the spouse cannot be rehabilitated. Rehabilitated means to achieve, with a reasonable effort a comparable standard of living to that during the marriage or which the other spouse will enjoy after the divorce. Tenn. Code Ann. § (f)(1)(2018).

(2) It is for an indefinite amount, payable in future periodic installments, and contingent upon the death or remarriage of the recipient and possibly on the death of the obligor or other contingencies as imposed by the court or statute.

(3) The recipient shall notify the obligor of the remarriage timely upon the remarriage. Failure to give notice will allow the obligor to recover all payments made after the date of the remarriage.

(4) Although the total amount is indefinite, the periodic payments should be of a definite amount and are subject to modification (both as to arrearages and future payments), based on a showing of a substantial and material change of circumstances arising after the divorce and not foreseen at the time of the divorce. T.C.A. § 36-5-121(f)(2)(a)(2018); Proctor v. Proctor, No. M2006-01396-COA-R3-CV, 2007 WL 2471504, 2007 Tenn. App. LEXIS 565 (Tenn. Ct. App. May 9, 2007).

(5) If the recipient lives with a third person, a rebuttable presumption arises that the third person is contributing to the support of, or receiving support from, the recipient and, therefore, the court should suspend all or part of the alimony obligation of the former spouse.

(6) Alimony in futuro can be awarded with other types of alimony, even rehabilitative or transitional. T.C.A. 36-5-121(d)(1)(2018).

ELEMENTS

(a) One spouse is economically disadvantaged relative to the other spouse. T.C.A. § 36-5-121(f)(1)(2018).

(b) Rehabilitation of the disadvantaged spouse is not feasible. T.C.A. § 36-5-121(f)(1)(2018).

CHECKLIST FOR ALIMONY *IN FUTURO*:

(1) The amount of the award $_____ per month;

(2) This award does ____ or does not ____ terminate upon the death of the obligor; *(check one)*

(3) Alimony shall terminate upon death or remarriage of the recipient [additional

contingencies] (or _____, whichever occurs first);

(4) The court foresees the following at the time of this award, which facts will not justify a sufficient change of circumstances to support a petition to modify the current alimony award (i.e., retirement of obligor, earnings or increased earnings of recipient, adult child living in recipient's home, etc.)_____

_____.

F. FACTUAL FINDINGS TO INCLUDE IN ANY ALIMONY DECISION

(1)Each party's actual current earnings, any known changes to future earnings or earning capacity.

(2)The parties' ages and how that affects your decision.

(3)If you are finding someone voluntarily underemployed state so.

Each party's need. State what expenses you are considering, which ones you find reasonable or unreasonable.

(4)Describe any mental and/or physical health issues that affect your decision.

(5)State if you are considering fault and why or why not.

(6)State if there is evidence in the record that additional training/education would increase an earning capacity.

(7)State if there is anything that limits or prevents a party from working.

(8)Make a finding whether rehabilitation is feasible or not.

(9)Detail any other factors you consider in making your ruling**.**

G. ISSUES OF TAX DEDUCTION AND BANKRUPTCY

Under the Tax Cuts and Jobs Act of 2017, alimony payments are no longer deductible for Final Divorce Decrees entered after December 31, 2018, or which are amended specifically to address the change in taxability. Even though alimony will no longer be deductible in new decrees entered after January 1, 2019, the Court may still consider the tax consequences of the alimony. This includes the possibility of hearing from expert and/or determining the amount of alimony based upon the tax affected amount.

Alimony payments under existing decrees will continue to be deductible (see requirements below). **IN SUM: Beginning January 1, 2019, alimony will not be tax deductible for the payor, nor taxable to the recipient. Modified orders, after January 1, 2019 will adhere to previous tax deductible/taxable treatment in the original orders, unless it is specified that the new tax treatment applies.**

Accordingly, if the Court is modifying a previous order, the Court should make the following findings:

1. Was the original award deductible by the payor and taxable to the payee. Yes_____ or No_____. If no, stop here, the modified award would not be deductible by the payor nor taxable to the payee. If yes, continue on.

2.Is the original Order regarding taxability grandfathered into the modification Order OR Does the Tax Cuts and Jobs Act of 2017 (26 U.S.C.A. §61(c)(2) apply to the modification Order (I.e. not deductible nor taxable)?

3.If the original Order is grandfathered into the modification Order, the Editor suggests that the Court make the following additional findings:[2]

(1) whether the alimony payments will be includible as income to the recipient and deductible as alimony to the payor pursuant to IRC § 71(b);[3]

(2) that the alimony is necessary for the support and maintenance of the spouse, and thus, not dischargeable in bankruptcy court; and

(3) whether the award of attorney fees as alimony is includible as income to the recipient and deductible as alimony to the payor pursuant to IRC § 71(b) (remember that alimony *in solido* "is *not* terminable upon the death or remarriage of the recipient or the payor." T.C.A. §36-5-121(h)(3), and thus not deductible, so fees may be awarded as alimony *in solido*).

In order for alimony payments to be deductible, however, the eight requirements of I.R.C. § 71 must be satisfied. These requirements are as follows:

YES NO

___ ___ (1) Payments must be made in cash;

[2] It is not clear whether these findings are required. However, out of an abundance of caution, this Editor suggests including these items to maximize the chance that it will be considered deductible/taxable by the I.R.S.

[3] I.R.C. § 71(b) was repealed effective Decemebr 31, 2018. Therefore, in considering this section it should be considered as effective 12/31/2018.

___ ___ (2) Payments must be to a spouse or on behalf of a spouse;

___ ___ (3) Payments must be made pursuant to a divorce or separation instrument;

___ ___ (4) Payments may not be designated as non-qualifying alimony;

___ ___ (5) Spouses may not be members of the same household;

___ ___ (6) The payments must terminate upon the recipient's death; (alimony *in solido* does not terminate on death and is not subject to be includible as income to the recipient and deductible by the payor);

___ ___ (7) Spouses may not file a joint return; and,

___ ___ (8) Payments must not constitute child support.

Include a finding that this is a domestic support obligation and thus, not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(5).

H. ADDITIONAL ORDERS

(1) A lien is imposed upon the following items of marital real property of the _____ as security for the payment of the spousal support _____

_____

_____.

(2) As additional alimony necessary for the support and maintenance of spouse, the _____ shall pay the health insurance premiums for the _____ for a period of_____ months. (Note that, pursuant to T.C.A.§36-5-121(k)(2018), the court "may direct a party to pay the premiums for insurance insuring the health care costs of the other party, in whole or in part, for such duration as the court deems appropriate."). Depending on the life insurance premium, the obligor may have to file a gift tax return. (See discussion in Section III).

(3) As additional alimony necessary for the support and maintenance of spouse, the _____ shall pay the attorney fees of $_____ in the amount of $_____ as the court finds that the amount of attorneys fees are both reasonable and necessary.

(4) The amount of alimony and the alimony obligation itself is necessary for the support and maintenance of the recipient [including attorneys' fees] and is not intended to be dischargeable in bankruptcy.

(5) The obligor shall obtain and maintenance life insurance in the amount of $_____, naming the other spouse as beneficiary until the alimony is paid in full.

(6) The life insurance policy insuring the obligor's life shall be owned by the payee..

(7) The alimony payment shall be made by wage assignment. T.C.A. 36-5-121(m).

I. MODIFICATION CASES

To modify a previous alimony award, the Court must first find a material and change of circumstances. Material means that the change was unforeseen and unanticipated at the time of the original order. Substantial means that the change signifigantly affects the obligor's ability or obligee's need. Barnes v. Barnes, N2018-01539-COA-R3-CV, 2019 WL 2452667 (Tenn. Ct. App. June 12, 2019). The Court should state specifically what the change of circumstances is upon which the Court bases the modification. Tenn. Code Ann. § 36-5-121(f)(2)(A). "The party seeking modification of the alimony award 'bears the burden of proving that a substantial and material change in circumstances has occurred.'" Malkin v. Malkin, 2019 Tenn. App. LEXIS 494, at *9 (Tenn. Ct. App. Oct. 7, 2019) (quoting Malkin v. Malkin ("Malkin I"), 475 S.W.3d 252, 257-58 (Tenn. Ct. App. 2015)).

Once the court has determined that there is a substantial and material change of circumstances that permits the court to review the alimony obligation, the court should review the obligation using the same factors as it uses in establishing the original award, including need and ability to pay. The Court should make the same findings as if establishing an original award.

"Transitional alimony is only modifiable when '(1) the parties agree that it may be modified; (2) the court provides for modification in the divorce decree, decree of legal separation, or order of protection; or (3) the recipient spouse resides with a third person following the divorce.'" Beasley v. Beasley, 2020 Tenn. App. LEXIS 465, at *7-8 (Tenn. Ct. App. Oct. 20, 2020) (quoting Mayfield v. Mayfield, 395 S.W.3d 108, 115 (Tenn. 2012)).

VII. ENFORCEMENT OF ALIMONY

A. AUTHORITY OF THE DIVORCE COURT

A divorce court has authority to enforce its decree by equitable and legal means. Divorce and separate maintenance are considered to be "in the nature of Chancery suits." Richmond v. Richmond, 18 Tenn. 343, 344 (Tenn. 1837).

In Tennessee, courts in divorce and support proceedings sit as courts of equity. Hoyle v. Wilson, 746 S.W.2d 665, 671 (Tenn. 1988) (citing Kizar v. Bellar, 241 S.W.2d 561, 563 (Tenn. 1951) and Mayer v. Mayer, 532 S.W.2d 54, 58 (Tenn. Ct. App. 1975)).

The Tennessee Supreme Court has held that "divorce proceedings are tried according to the forms of Chancery, and for all intents and purposes are Chancery proceedings." Ballard v. Ballard, 455 S.W.2d 592, 593 (Tenn. 1970) (citations omitted).

In Jones v. Jones, the Court of Appeals stated:

> The original proceeding is one of divorce. As such, it and all subsequent proceedings thereunder are inherently equitable in nature. Even though the matter is tried in the Circuit Court, it is yet a Chancery matter. In hearing matters of this nature, the Circuit Judge is clothed with all the powers of a Chancellor and the matter is tried as a Chancery matter and governed by the rules of the Equity Court. Broch v. Broch, 47 S.W.2d 84 (Tenn. 1932); Kizer v. Bellar, 241 S.W.2d 561 (Tenn. 1951).

486 S.W.2d 927, 931 (Tenn. Ct. App. 1972). Some relevant statutory provisions are as follows:

> T.C.A. § 36-5-121 (2019). **Decree for Support of Spouse** – (a) In any action for divorce, legal separation or separate maintenance, the court may award alimony to be paid by one spouse to or for the benefit of the other, or out of either spouse's property, according to the nature of the case and the circumstances of the parties. The court may fix some definite amount or amounts to be paid in monthly, semimonthly or weekly installments, or otherwise, as the circumstances may warrant. Such award, if not paid, may be enforced by any appropriate process of the court having jurisdiction including levy of execution. Further, the order or decree shall remain in the court's jurisdiction and control, and, upon application of either party, the court may award an increase or decrease or other modification of the award based upon a showing of a substantial and material change of circumstances; provided, that the award is subject to modification by the court based on the type of alimony awarded, the terms of the court's decree or the terms of the parties' agreement.

> T.C.A. § 36-5-102 (2019). **Portion of spouse's estate decreed to spouse entitled to alimony or support—Maintenance of minor custodial parent** – (a) In cases where the court orders alimony or child support in accordance with § 36-5-101 and 36-5-121, the court may decree to the spouse who is entitled to such alimony or child support such part of the other spouse's real and personal estate as it may think proper. In doing so, the court may have reference and look to the property that either spouse received by the other at the time of the marriage, or afterwards, as well as to the separate property secured to either by marriage contract or otherwise.
>
> T.C.A. § 36-5-103 (2019). **Enforcement of decree for alimony and support** – (a)(1) In addition to the remedies in part 5 of this chapter, the court shall enforce its orders and decrees by requiring the obligor to post a bond or give sufficient personal surety under § 36-5-101(f)(2) to secure past, present, and future support, unless the court finds that the payment record of the obligor parent, the availability of other remedies and other relevant factors make the bond or surety unnecessary.
>
> (2) The court may enforce its orders and decrees by sequestering the rents and profits of the real estate of the obligor against whom such order or decree was issued, if such obligor has any, and such obligor's personal estate and chooses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the obligee and the children, or by such other lawful means the court deems necessary to assure compliance with its orders, including, but not limited to, the imposition of a lien against the real and person property of the obligor.

Before issuing a lien against property, verify that the party hold an interest in the property to be enbumbered with the lien. See Barton v. Barton, No. E2019-01136-COA-R3-CV, 2020 WL 6580532 (Tenn. Ct. App. Nov. 10, 2020)(trial court erred in imposing liens against real property of an LLC. While Husband was the sole member of the LLC, Tenn. Code Ann § 48-249-502(a) provides that members do not hold a specific interest in LLC property.)

B. EXECUTION

After a money judgment is entered, it may be enforced by execution. T.C.A. § 26-1-103 (2019). Generally, the judgment needs to be final before execution, but T.C.A. § 26-1-206(a) authorizes accelerated execution if the defendant is about to fraudulently dispose of, conceal or remove the defendant's property thereby endangering plaintiff's debts. See T.C.A. § 26-1-206(a) (2019).

The writ of execution may be issued against non-exempt goods, chattels, lands and tenements of the judgment debtor. T.C.A. § 26-2-101 (2019) et seq.; T.C.A. § 26-2-301 (2019), et seq. (setting forth exemptions to executions).

Tennessee Rule of Civil Procedure 69 provides that the process to enforce a judgment for the payment of money shall be a writ of execution in aid of the judgment or execution. The judgment creditor or successor in interest may take discovery of any person in any manner provided by rules or statutes. Tenn. R. Civ. P. 69.06.

Monies received by a Tennessee resident from the State of Tennessee or any subdivision or municipality of Tennessee as pension is exempt from execution, attachment or garnishment, other than an order for assignment of support issued under T.C.A. § 36-5-501 (2019) or a Qualified Domestic Relations Order pursuant to T.C.A. § 26-2-105 (2019). If a case is being enforced under Title IV-D, income assignment may issue against Tennessee Public Pension.

C. GARNISHMENT

Garnishment proceedings are purely statutory. Gen. Truck Sales, Inc. v. Simmons, 343 S.W.2d 884, 885 (Tenn. 1961). Statutes creating the proceeding and giving it direction are found at T.C.A. § 26-2-201 (2019), et seq. The statutes provide that all property, debts, and effects of the defendant in the possession of the garnishee or under control of the garnishee are liable to satisfy the plaintiff's judgment. T.C.A. § 26-2-202 (2019). Property, debt, and effects include real estate, choses in action, judgments and money or stocks in the incorporated company. T.C.A. § 26-2-201 (2019).

Under T.C.A. § 26-2-204 (2019), the garnishee may be required to answer under oath statutory enumerated questions and such other questions put to the garnishee by the court of the judgment creditor.

T.C.A. § 26-2-106 (2019) provides a formula for the calculation of the amount to be withheld on a wage garnishment for alimony, child support and other debts.

D. RENEWAL OF JUDGMENTS

The General Assemby amended Tenn. Code Ann. § 28-3-110 to include a new subsection stating, "(e) Notwithstanding subsection (a), there is no time within which a judgment or decree in a domestic relations matter issued by a court with domestic relations jurisdiction pursuant to

title 36 must be acted upon, unless otherwise specifically provided for under title 36." By amending the statute, the General Assemby intended that all judgments or decrees in domestic relations matters issued by a court with proper jurisdiction "be enforceable and remain in effect from the date of entry until paid in full or otherwise discharged[.]" 2019 Tenn. SB 2651. This change became effective March 20, 2020.

Absent Tenn. Code Ann. § 28-3-110(e), attorneys likely want to advise their clients about the need to renew any judgment within ten years of the date of judgment. Tenn. Code Ann. § 28-3-110 (2019) provides that all actions on judgment and decrees of courts of record shall be commenced within ten (10) years after the cause of action accured. Renewal of unsatisfied judgments is pursued through the process set forth in Tenn. Rule Civ P. Rule 69.04. See also *Daughterty v. Dixon*, 297 S.W.2d 944 (Tenn. Ct. App. 1956)

Entry of a Qualified Domestic Relations Order for the division of retirement, more than ten years after the entry of the Final Decree of Divorce, is not an action to enforce the divorce judgment. Therefore, renewal is not required and the statute of limitions does not apply. Jordan v. Jordan, 147 S.W.3d 255 (Tenn. Ct. App. 2004).

E. EQUITABLE ENFORCEMENT REMEDIES

Equitable enforcement includes the following:

INJUNCTION

Tennessee Rule of Civil Procedure 65.07 provides an exception in handling domestic relation cases. Specifically, a restraining order or injunction "may be issued upon such terms and conditions and remain in force for such time as shall seem just and proper to the judge to whom application therefore is made, and the provisions of this rule shall be followed only insofar as deemed appropriate by such judge." Tenn. R. Civ. P. 65.07. In enforcing decrees for alimony, probably the most frequently entered injunction restrains the defendant from transferring, mortgaging, removing, or disposing of property. An injunction to perform may be used to enforce decrees of the court. Henry Richard Gibson & William H. Inman, Gibson's Suits in Chancery §301 (7th ed. 1988). A footnote in Gibson's § 305 states, "The preferred practice is to incorporate the injunction in the decree."

SEQUESTRATION

> T.C.A. § 21-1-801. **Sequestration** - If the Court sees proper in the first instance, or if upon issuance of the attachment, the delinquent cannot be found, a writ of sequestration may issue against the estate of such delinquent, to compel obedience to the decree.

For information on sequestration and powers and duties of sequestration See, Gibson & Inman, supra, §§ 311, 312, 313.

RECEIVER

> T.C.A. § 29-1-103. **Receivers and Receiverships** – The courts are all vested with power to appoint receivers for the safekeeping, collection, management, and disposition of property in litigation in such court, whenever necessary to the ends of substantial justice, in like manner as receivers are appointed by courts of Chancery.

If the obligor fails to pay alimony as ordered by the court, and especially in actions for support where the land is charged with the support, a receiver may be appointed. See T.C.A. § 36-5-103 (2019).

SPECIFIC PERFORMANCE

Courts of Chancery have inherent power to enforce their orders and decrees and can exercise such powers against the person or property of the party in default. Lehman v. Lehman, 1984 Tenn. App. LEXIS 2718, at *5 (Tenn. Ct. App. Mar. 2, 1984) (citing from Henry Richard Gibson & William H. Inman, Gibson's Suits in Chancery § 300 at 275 (6th ed. 1982).

F. CONTEMPT

Contempt of Court may be classified as direct or indirect. Direct contempt is based on acts committed in the presence of the court and may be summarily addressed. See Tenn. R. Crim. P. 42(a) (governing direct contempt); see McKenzie v. McKenzie, No. M2013-02003-COA-R3-CV, 2015 Tenn. App. LEXIS 100, at *3, 2015 WL 901717, at *1 (Tenn. Ct. App. Feb. 27, 2015) ("a judge may summarily punish a person for criminal contempt . . . [only considering] conduct the judge 'saw or heard' in the courtroom."). Indirect contempt is based upon acts or omissions not committed in the presence of the Court and may be dealt with only after the accused has been given notice and an opportunity to respond to the charges at a hearing. Lecroy-Schemel v. Cupp, No. E2000-00024-COA-R30-CV, 2000 Tenn. App. LEXIS 525, 2000 WL 1130683 (Tenn. Ct. App. Aug. 10, 2000); Thomasson v. Thomasson, 755 S.W.2d 779 (Tenn. 1988).

An act of contempt is a willful or intentional act that offends the court and its administration of justice. T.C.A. § 29-9-102(1). Graham v. Williamson, 164 S.W. 781, 782 (Tenn. 1914); see State v. Beeler, 387 S.W.3d 511, 523 (Tenn. 2012) (willfulness, for the purposes of criminal contempt, has two elements: (1) intentional conduct; and (2) a culpable state of mind); State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust, 209 S.W.3d 602 (Tenn. Ct. App. 2006) (discussing the difference between willfulness in the context of civil contempt and criminal contempt).

Contempt may be civil or criminal depending upon the action taken by the court to address the contempt. Cremeens v. Cremeens, No. M2014-01186-COA-R3-CV, 2015 Tenn. App. LEXIS 599, at *18, 2015 WL 4511921, at *6 (Tenn. Ct. App. July 25, 2015) ("[i]t is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between [civil and criminal contempt].") (citations omitted). The Court of Appeals has described the two as follows:

> Civil contempt is intended to benefit a litigant while criminal contempt is punishment for an offense against the authority of the court. Civil contempt is imposed to compel compliance with an order, and parties in contempt may purge themselves by compliance. Criminal contempt, on the other hand, is punishment for failing to comply with an order, and the contemptuous party cannot be freed by eventual compliance.

Lattimore v. Lattimore, No. M201800557-COA-R3-CV, 2019 WL 1579846, at *5 (Tenn. Ct. App. Apr. 12, 2019).

In proceeding, the party must elect whether they are proceeding under civil or criminal contempt before the matter is heard. Freeman v. Freeman, 147 S.W.3d 234 (Tenn. Ct. App. 2003).

Criminal Contempt

A criminal contempt is punitive in nature, and the proceeding is "to vindicate the authority of the law and the court as an organ of society." Shiflett v. State, 400 S.W.2d 542, 543 (Tenn. 1966).

Rule 42(b) of the Tennessee Rules of Criminal Procedure requires that criminal contempt be presented on notice, which "shall state the time and place of hearing, allowing a reasonable

time for preparation of the defense and shall state the essential facts constituting the criminal contempt charged and describe it as such." Tenn. R. Crim. P. 42(b); see Thomas v. Miller, No. M2013-01485-COA-R3-CV, 2015 Tenn. App. LEXIS 102, 2015 WL 899421 (Tenn. Ct. App. Feb. 27, 2015) (reversing judgment holding party in criminal contempt for lack of notice); see also Sprague v. Sprague, No. E2012-01133-COA-R3-CV, 2013 Tenn. App. LEXIS 398, 2013 WL 3148278 (Tenn. Ct. App. June 18, 2013) (reversing judgment holding party in criminal contempt for lack of notice); Jones v. Jones, No. 01A01-9607-CV-00346, 1997 Tenn. App. LEXIS 132, 1997 WL 80029 (Tenn. Ct. App. Feb. 26, 1997) (vacating contempt sanctions where party did not receive notice mandated by Tenn. R. Crim. P. 42(b) or the procedural safeguards due to persons facing criminal contempt).

Criminal contempts are crimes in the ordinary sense of the word and constitutional rights available to the accused of criminal acts are also available to persons charged with criminal contempt. Cottingham v. Cottingham, 193 S.W.3d 531 (Tenn. 2006).

In Hoyle v. Wilson, the Tennessee Supreme Court held that due process was not violated when a private attorney who represents the beneficiary of a Court order in a civil case prosecutes a criminal contempt action for a violation of that order. 984 S.W.2d 898 (Tenn. 1998).

The Tennessee Supreme Court has recognized that a person charged with criminal contempt "is presumed to be innocent, must be proven guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." Baker v. State, 417 S.W.3d 428, 436 (Tenn. 2013). That person is also entitled to an attorney and may have an attorney appointed at no cost if he is unable to afford an attorney. Id. at 436; see also Tenn. Sup. Ct. R. 13 § 1(d)(1)(B). However, while afforded certain constitutional rights, persons alleged of criminal contempt are not entitled to a jury trial if the contempt is not "serious" enough to require the protection of the constitutional right to a jury. Baker, 417 S.W.3d at 437 (discussing when an action is "serious enough" to afford a jury trial). Additionally, criminal contempt proceedings do not require an indictment or prosecution by the State. Id. at 437 ("Contempt proceedings are often initiated upon the court's own motion or upon the motion of a private party."); see also Tenn. R. Crim. P. 42(b)(2).

In criminal contempt, T.C.A. § 29-9-103 delineates the punishment; this includes fine, imprisonment, or both. An award of attorney fees is not included in T.C.A. § 29-9-103. But see, Tenn. Code Ann. § 36-5-103(c)(2019). In the past, attorney fees were generally *not* allowed in

criminal contempt actions. See, e.g., Ashford v. Benjamin, C.A. No. 02A01-9408-CV-00175, 1995 Tenn. App. LEXIS 785, 1995 WL 716822 (Tenn. Ct. App. Dec. 5, 1995); Butler v. Butler, Appeal No. 02A01-9409-CH-00218, 1995 Tenn. App. LEXIS 749, 1995 WL 695123 (Tenn. Ct. App. Nov. 21, 1995); Watts v. Watts, 2016 WL 3346547, 2016 App. LEXIS 402 (Tenn. Ct. App. June 8, 2016).

This was all modified effective July 1, 2018. Tennessee Code Annotated § 36-5-103(c) now provides that attorney fees may be awarded to the "prevailing party" in both civil and criminal contempt proceedings. For further discussion on attorney fees, see below.

Any judgment for criminal contempt "becomes final 'upon the entry of the judgment imposing a punishment therefore.'" Ballard v. Cayabas, No. W2016-01913-COA-R3-CV, 2017 WL 2471090 *2 (Tenn. Ct. App. June 8, 2017) (citing State ex rel. Garrison v. Scobey, No. W2007–02367–COA–R3–JV, 2008 WL 4648359, at *4 (Tenn. Ct. App. Oct. 22, 2008). Accordingly, upon entry, it becomes a final appealable order. It does not matter that the proceedings in which the contempt arose are ongoing.

Civil Contempt

Civil contempt occurs when a person refuses or fails to comply with a court order and a contempt action is brought to enforce a private right. Black v. Blount, 938 S.W.2d 394, 398 (Tenn. 1996), Howell v. Howell, No. M2005-01262-COA-R3-CV, 2006 Tenn. App. LEXIS 435, 2006 WL 1763660 (Tenn. Ct. App. June 28, 2006). Punishment for civil contempt is designed to coerce compliance with the Court's order and is imposed at the insistence and for the benefit of the private party who has suffered a violation of his or her rights. Doe v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 104 S.W.3d 465 (Tenn. 2003). There are four elements of civil contempt: the alleged contemnor must have (1) the order alleged to have been violated must be "lawful;" (2) the order must be clear, specific and unambiguous; (3) the order must have been actually violated; (4) the violation must be willful. Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346 (Tenn. 2008). The burden of proof in a civil contempt case is by a preponderance of the evidence. Id.

An order is lawful if the Court that issued the order had both subject matter jurisdiction and personal jurisdiction when issued. *Lattimore*, 2019 WL 1579846 (citing Konvalinka v.

Chattanooga-Hamilton Cnty. Hosp. Auth, 249 S.W.3d (Tenn. 2008)). An order is not unlawful merely because it is erroneous or subject to reversal on appeal. Id. Lawfulness is a question of law. Id.

With regard to the second element, "[a] person may not be held in civil contempt for violating an order unless the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden." Lattimore v. Lattimore, No. M201800557COAR3CV, 2019 WL 1579846, at *6 (Tenn. Ct. App. Apr. 12, 2019).

The third issue is whether the respondent actually violated the order. This is a factual issue. Id.

The final issue is willfulness. The term willfulness has different meanings in criminal and civil contempt.

> "In the context of a civil contempt proceeding under Tenn. Code Ann. § 29-[9]-102(3), acting willfully does not require the same standard of culpability that is required in the criminal context. Rather, willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is 'willful' if it is the product of free will rather than coercion. Thus, a person acts 'willfully' if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.Thus, acting contrary to a known duty may constitute willfulness for the purpose of a civil contempt proceeding.

Lattimore v. Lattimore, No. M201800557COAR3CV, 2019 WL 1579846, at *6 (Tenn. Ct. App. Apr. 12, 2019)(citations omitted).

For a court to find a person in civil contempt, the petitioner must first establish that the respondent has failed to comply with a court order. Slagle v. Slagle, No. E2013-01480-COA-R3-CV, 2014 Tenn. App. LEXIS 81, 2014 WL 631241 (Tenn. Ct. App. Feb. 18, 2014) (citations omitted). Once shown, the burden then shifts to the respondent to prove inability to pay. Id. If the respondent makes a *prima facie* case of inability to pay, the burden will then shift to the petitioner to show that the respondent has the ability to pay. Id. (citing State ex rel. Moore v. Owens, No. 89-170-11, 1990 Tenn. App. LEXIS 74, 1990 WL 8624 (Tenn. Ct. App. Feb. 7, 1990).

After a finding of civil contempt, the court has several remedies available depending on the facts of the case. The court can sentence the contemnor to jail to compel performance of a

court order. T.C.A. § 29-9-104(a) (2019). This remedy is available only when the individual has the ability to comply with the order at the time of the contempt hearing. Id.; Going v. Going, 256 S.W. 890, 899 (Tenn. 1923).

T.C.A. § 36-5-103(c) provides in pertinent part that "the plaintiff spouse may recover from . . . the other spouse reasonable attorney fees incurred in enforcing any decree for alimony . . . " In both criminal and civil contempt, attorney fees may be awarded. Tenn. Code Ann. § 36-5-103(c).

Damages lie for actual contempt found by the court. See Lovlace v. Copley, 418 S.W.3d 1, 91–92, n.26 (Tenn. 2013). "Whether a party violated an order and whether a violation was willful are factual issues, which appellate courts review de novo, with a presumption of correctness afforded the trial court's findings." Lovlace, 418 S.W.3d at 34 (Tenn. 2013) (citing Konvalinka v. Chattanooga-Hamilton County Hosp. Auth., 249 S.W.3d 346, 356–57 (Tenn. 2008)). A contempt finding is not required to issue a judgment for alimony owed. *Lattimore v. Lattimore*, No. M2018-005557-COA-R3-CV, 2019 WL 1579846 (Tenn. Ct. App. April 12, 2019)(citing Tenn. Code Ann. § 36-5-107(o)).

Checklist for Contempt

Civil Contempt v. Criminal Contempt

	Civil Contempt	**Criminal Contempt**
Burden of Proof	Preponderance	Beyond a Reasonable Doubt
Immediate Appeal	Maybe	Yes
Appellate Review	De novo with a presumption of correctness as to factual findings	Review to determine if evidence is insufficient to support the trier-of-fact's finding of contempt beyond a reasonable doubt. Individuals lose their presumption of innocence.
Willful Action	Acts or failures that are intentional or voluntary rather than accidental or inadvertent	A willful act is one undertaken for bad purpose
Remedy	May be imprisoned until compliance with Order. Remedy is designed to be remedial and coercive.	10 days in jail and/or fine of $50 per violation.

Constitutional Protections

	Civil Contempt	Criminal Contempt
Right to Counsel	**Yes if facing incarceration**	**Yes**
Notice	Civil contempt only requires that the contemnor be notified of the allegation and be given an opportunity to respond	Parties facing a criminal contempt charge must be given explicity notice that they are charged with criminal contempt and must also be informed of the facts giving rise to the charge. See Tenn R. Crim P. 42
Freedom from Double Jeopardy	No. Can be retried for same offense unless res judicata	Cannot be retried for same offense after a witness has been sworn and jeopardy has attached. Can be found in criminal contempt and have criminal charges on the same action
Trial by Jury	No	No
Stated Funded Court Reporter	No	No
Rights against self incrimination	Probably Not	Yes
Indictment	No	No

Be aware of a statute of limitations in contempt actions. In Proctor v. Proctor, No. M2018-01757-COA-R3-CV, 2020 WL 2764410 (Tenn. Ct. App. May 27, 2020) the parties **agreed** that the contempt action was governed by the 10 year limitation in Tenn. Code Ann. § 28-3-110. However, Tenn. Code Ann. § 28-3-110 has subsequently been amended as noted above, and the 10 year limitation no longer applies to judgments in domestic relations matters. There still exists an argument that the 10 year limitations on criminal misdemenors applies to contempt actions. No appellate Court has addressed this argument.

G. USE OF QUALIFIED DOMESTIC RELATIONS ORDERS TO ENFORCE JUDGMENTS FOR ALIMONY ARREARAGE

The federal ERISA law permits assignment of a portion of an employee's pension benefits to a spouse as child support, alimony payments, or marital property rights. Under ERISA, a Qualified Domestic Relations Order is defined as a "judgment, decree, or order

(including approval of a property settlement agreement)," which "is made pursuant to a State Domestic Relations Order" that provides child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant. ERISA § 206(d)(3)(B); 26 U.S.C. § 414(p)(1).

A little known aspect of this statute is that it can be used to collect a judgment for alimony arrearage. In cases where there are retirement funds available, a party may request that the court enter a Qualified Domestic Relations Order to award the aggrieved party a portion of the retirement funds sufficient to satisfy all or a portion of the arrearage.

Qualified Domestic Relations Orders can be used to access qualified pensions, profit sharing, stock bonus plans and church plans that elect to be covered under the minimum participation rules. ERISA permits the entire accrued benefit to be awarded if the court so orders in cases where the judgment is equal to or greater than the accrued benefit. I.R.C. § 414(p)(3); ERISA § 206(d)(3)(D).

H. USE OF TITLE IV-D CONTRACTORS

Tennessee participates in the federally-funded child and spousal support program created by Title IV-D of the Social Security Act, 42 U.S.C. 651, et seq.

In order to receive federal funds under Title IV-D, Tennessee is required to implement a plan for "spousal and child support" that must meet numerous requirements, including enactment of law improving child support enforcement effectiveness. To this end, federal law requires that the states have enacted, among other things, procedures through which "liens arise by operation of law against real and personal property for amounts of overdue support by a noncustodial parent who resides or owns property in the state." 42 U.S.C. § 666(a)(4)(a).

Tennessee has enacted law through which a lien will arise by operation of law against all real and personal property for overdue support owed by the obligor in child or spousal support cases enforced by the Tennessee Department of Human Services or its contractors under Title IV-D. T.C.A. § 36-5-901(a)(1)(2019) reads as follows:

> T.C.A. § 36-5-901. **Liens for child support arrearages** - In any case of child or spousal support enforced by the department of human services or its contractors under Title IV-D of the Social Security Act . . . in which overdue support is owed by an obligor

> who resides or owns property in this state, a lien shall arise by operation of law against all real and personal property, tangible or intangible, then owned or subsequently acquired by the obligor against whom the lien arises for the amounts of overdue support owed or the amount of penalties, costs or fees as provided in this chapter. The personal or real property, tangible or intangible, of the obligor that is subjected to the lien required by this part shall include all existing property at the time of the lien's perfection, or acquired thereafter, even if a prior order for overdue support or arrears only specifies a certain amount of overdue support or arrears that was owed by the obligor at the time of such order.

T.C.A. § 36-5-901(a)(2) (2019) defines "overdue support" as follows:

> "Overdue support" is defined, for purposes of this part, as any occasion on which the full amount of ordered support for or on behalf of a minor child, or for a spouse or former spouse of the obligor with whom the child is living to the extent spousal support would be included for the purposes of 42 U.S.C. § 654(4), is not paid by the due date for arrears as defined in § 36-5-101(f)(1) unless an income assignment is in effect and the payer of income is paying pursuant to § 36-5-101(g). "Overdue support" shall include all amounts of support that are in arrears as defined in § 36-5-101(f)(1) and that remain unpaid by the obligor at the time the lien is perfected or that become due as arrears subsequent to the perfection of the lien.

Services from the Title IV-D contractor or from the Tennessee Department of Human Services (DHS) are not automatic. Request must be made. Procedurally this is usually done in writing through a letter or on a form provided by DHS or its contractor.

In Tennessee a lien for overdue child support and alimony may be perfected in two (2) ways. The Department of Human Services may record or file the lien "in the appropriate place for the filing of a judgment lien or security interest in the property." T.C.A. § 36-5-901(b)(1)(A) (2019). In addition to the notice perfected by appropriate filing, a lien may be perfected by sending notice of lien "by any appropriate means, including by any automated means, by the commission of any authorized representative of the department . . . ." T.C.A. § 36-5-901(b)(1)(B) (2019). The department has broad power for enforcement of liens:

> T.C.A. § 36-5-904. **Enforcement of liens** – In cases where there is an arrearage of child or spousal support in a Title IV-D child support case or in which a lien arises pursuant to § 36-5-901, the department is authorized, without further order of a court, to secure

> the assets of the obligor to satisfy the current obligation and the arrearage by:
> (1) Intercepting or seizing periodic or lump-sum payments or benefits due the
> obligor:
> (A) From a state or local agency;
> (B) From judgments of any judicial or administrative tribunal, settlements
> approved by any judicial or administrative tribunal, settlements approved by any judicial or administrative tribunal, and lottery winnings;
> (2) By attaching or seizing assets of the obligor or other person or entity held in financial institutions as defined in § 36-5-910;
> (3) By attaching public and private retirement funds; and
> (4) By imposing liens in accordance with § 36-5-901, and, in appropriate cases, by forcing the sale of the obligor's legal or equitable interest in property and by distribution of the proceeds of such sale.

T.C.A. § 36-5-906 provides for exemptions from sale, which are similar to exemptions from executions.

In all Title IV-D child or spousal support cases where there is periodic payment of alimony, the order or decree of the court shall provide that payment must be made to the central collection and disbursement unit as provided by § 36-5-116.

I. FOREIGN SUPPORT ORDERS, JUDGMENTS, AND DECREES IN TENNESSEE

The Uniform Interstate Family Support Act ("UIFSA") provides procedure and jurisdiction for domesticating foreign judgments, decrees, or orders involving support in Tennessee. T.C.A. § 36-5-2601 (2019), et. al. Under Section 2602 of that Act, a registering party must file with the trial court of the county with jurisdiction the following documents and information:

> (1) A letter of transmittal to the tribunal requesting registration and enforcement;
> (2) Two (2) copies, including one (1) certified copy, of the order to be registered, including any modification of the order;
> (3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
> (4) The name of the obligor and, if known:
> (A) The obligor's address and social security number;

(B) The name and address of the obligor's employer and any other source of income of the obligor; and

(C) A description and the location of property of the obligor in this state not exempt from execution; and

(5) Except as otherwise provided in § 36-5-2312, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.

After the judgment, order, or decree is filed and named as a foreign decree, the registering court will notify the non-registering party of the status of registration, as well as mailing a copy of the decree and all documents and information filed. T.C.A. § 36-5-2605(a) (2019). The registering court should also inform the non-registering party of his or her ability to contest the enforcement of such order and consequences for failure to do so. T.C.A. § 36-5-2605(b) (2019). Failure to challenge the registration or enforcement within twenty (20) days of the notice of registration will confirm the order by operation of law. T.C.A. § 36-5-2606(a)—(b) (2019).

Registration of the order, decree, or judgment does not afford the registering court unlimited enforcement powers. Without the registering party following the proper Tennessee procedures for enforcement of a court order, a court does not yet have jurisdiction to impose equitable liens on the non-compliant party's property. Pickern v. Pickern, No. E2004-02038-COA-R3-CV, 2005 LEXIS 178, 2005 WL 711964 (Tenn. Ct. App. Mar. 29, 2005). Notice alone is not sufficient for the non-registering party to be held in contempt for non-compliance with the order; a petition for civil contempt must still be filed. Id.

Income-withholding statements are similar to the foreign support decrees. See T.C.A. § 36-5-2501 (2019). A party may send an income-withholding statement to the obligor's employer without first registering the statement with Tennessee. T.C.A. § 36-5-2501 (2019). No registration is necessary if the obligor does not contest the income-withholding statement. T.C.A. § 36-5-2507(b) (2019). The employer shall comply with the foreign order as if it were issued by Tennessee. T.C.A. § 36-5-2502(b) (2019). If, however, the obligor chooses to challenge the income-withholding statement, he or she should do so in the same manner he or she would if the withholding statement were not foreign. T.C.A. § 36-5-2506 (2019). In so challenging, the obligor shall give notice of contest to a support enforcement agency providing service to the obligee, each employer who has received an income-withholding order, and the person or agency designated to receive payments, and in the case of no person or agency, the obligee. Id.

After sending out the notice of contest, the obligor should register the income-withholding statement within twenty (20) days of his or her employer's receipt, following the same T.C.A. § 36-5-2601 procedures to register a foreign support orders. Pursuant to T.C.A. § 36-5-501(b)(1)(A), "[i]n all cases in which the court has ordered immediate income assignment, the clerk of the court, or the department of human services or its contractor in Title IV-D cases, shall immediately issue an income assignment to an employer once the employer of an obligor has been identified."

J. UNIQUE CASES

"Affidavit of Support"

In Baines v. Baines, Husband filed divorce complaint against Wife. No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761, 2009 WL 3806131 (Tenn. Ct. App. Nov. 13, 2009). Wife answered and counter-petitioned for support in accordance with an "affidavit of support." Husband filed with the Immigration and Naturalization Service as part of Wife's permanent residency application. That affidavit provided that Husband would financially support Wife at 125% of the poverty guidelines each year until either (1) Wife dies; (2) Husband dies; (3) Wife permanently departs the United States; (4) Wife is credited with 40 qualifying quarters of work; or (5) Wife becomes a United States citizen. None of these events had occurred at the time of the trial. The trial court held that Husband was bound to provide support in accordance with the affidavit, including back support and attorneys' fees, and ordered Husband to also provide Wife with health insurance for at least 18 months and as long as 36 months, or as long as his policy would allow.

The Court of Appeals noted that there were no Tennessee cases on point, but that other courts had considered and enforced "affidavits of support" in conjunction with divorce actions. The Baines Court cited to the Northern District of California that held:

> Certain classes of immigrants may be deemed inadmissible including but not limited to, those that may be likely to become a public charge. See 8 U.S.C. § 1182(a)(4). Family-sponsored immigrants seeking admission are admissible only if the person petitioning for the immigrants' admission signs an Affidavit of Support Form I-864. A Form I-864 is a legally enforceable contract between the sponsor and both the United States Government and the sponsored immigrant. See Schwartz v. Schwartz, 2005 U.S. Dist. LEXIS 43936 at *1-2 (W.D. Okla. 2005). The signing sponsor submits himself to the personal jurisdiction of any court of the United States or of any State, territory, or possession of the United States if the court has subject matter jurisdiction of a civil lawsuit to enforce the Form I-864. See 8 U.S.C. § 1182(a).

Id. (quoting Shumye v. Felleke, 555 F. Supp. 2d 1020, 1023–1024 (N.D. Cal. 2008)). The court also noted that the Form I-864 signed by the Husband stated that "I … acknowledge that a plaintiff may seek specific performance of my support obligation. . . . I may also be held liable for costs of collection, including attorney fees." Id. At *5. The Court of Appeals rejected Husband's defenses of lack of consideration and unconscionability, as well as his argument that his insurance did not allow him to keep Wife insured for any time after the divorce, as he did not raise this issue at trial.

"When Does it Start?"

Pope v. Pope has some interest because of a discussion concerning the credibility of a party, and a few other minor issues. No. M2011-00077-COA-R3-CV, 2011 Tenn. App. LEXIS 623, 2011 WL 5598896 (Tenn. Ct. App. Nov. 16, 2011). Of more interest is the finding by the Court of Appeals that, where a final decree was entered on December 3, 2009 which ordered the wife to pay alimony to the husband in the amount of $1,500 per month, and alimony was not paid in December 2009 and January and February 2010, the trial court erred in granting the Husband a judgment for alimony arrears for all three months, rather than two. The Court of Appeals held that

> We find the trial court's judgment for $4,500 problematic for reasons not raised by Wife. The court's final divorce decree, the source of Husband's alimony obligation, was entered on December 3, 2010. Tenn. R. Civ. P. 62.01 provides that, except in certain situations not applicable here, "no execution shall issue upon a judgment, nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry." Until the expiration of 30 days after December 3, 2010, the court's order did not become final. See Forgey-Lewis v. Lewis, 2011 Tenn App. LEXIS 29 (Tenn. Ct. App. 2011) (no Tenn. R. App. P. 11 application filed); Harden v. Harden, 2010 Tenn. App. LEXIS 419 (Tenn. Ct. App. 2010); Christmas v. Moore, 1998 Tenn App. LEXIS 457 (Tenn. Ct. App. 1998). In the absence of language in the order specifying a different start date, Wife's obligation to pay alimony began when the order became final. In ruling on the contempt petition, therefore, the court could not properly find Wife in arrears for three months; rather, she was in arrears for the months of January and February 2010 only.

Pope, 2011 Tenn. App. LEXIS at *7–8, 2011 WL 5598896 at *3.

K. ATTORNEY FEES ASSOCIATED WITH ENFORCEMENT

Tennessee follows the "American Rule" with regard to attorney's fees. Eberbach v. Eberbach, 535 S.W.3d 467, 474 (Tenn. 2017) (citation omitted). "This Rule provides that 'a party in a civil action may recover attorney's fees only if: (1) a contractual or statutory provision creates a right to recover attorney's fees; or (2) some other recognized exception to the American Rule applies, allowing for recovery of such fees in a particular case.'" Id. (quoting Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308 (Tenn. 2009)).

A common exception to the American Rule involves contracts that contain provisions permitting or requiring the recovery of reasonable attorney's fees incurred in the enforcement of the contract. Id.

> A marital dissolution agreement ("MDA") is a contract . . . . As a contract, a MDA generally is subject to the rules governing construction of contracts. If approved by the trial court, the MDA is incorporated into the decree of divorce . . . . Once incorporated, issues in the MDA that are governed by statutes, such as child

> support during minority and alimony, lose their contractual nature and become a judgment of the court. The trial court retains the power and discretion to modify terms contained in the MDA relating to these statutory issues upon sufficient changes in the parties' factual circumstances. However, on issues other than child support during minority and alimony, the MDA retains its contractual nature. Thus, a MDA may include enforceable contractual provisions regarding an award of attorney's fees in post-divorce legal proceedings.
>
> . . . .
>
> . . . Our courts long have observed at the trial court level that parties are contractually *entitled* to recover their reasonable attorney's fees when they have an agreement that provides the prevailing party in a litigation is entitled to such fees. In such cases, the trial court does not have the discretion to set aside the parties' agreement and supplant it with its own judgment. The sole discretionary judgment that the trial court may make is to determine the amount of attorney's fees that is reasonable within the circumstances.

Id. at 474–75, 478 (citations omitted); see also Connors v. Connors, 594 S.W.2d 672, 676 (Tenn. 1980) (setting out the appropriate factors to be used as guides in fixing reasonable attorney's fees). An agreement that is valid and enforceable must be enforced as written. Id. at 478. "In post-divorce modification proceedings, a marital dissolution agreement may create a right to recover attorney's fees. In the absence of an attorney fee provision in a marital dissolution agreement, there are both statutory and common law grounds for awarding attorney's fees in alimony modification cases." Jarman v. Jarman, No. M2017-01730-COA-R3-CV, 2018 WL 5778811, at *5 (Tenn. Ct. App. July 10, 2018) (citations omitted).

> Because fee provisions in marital dissolution agreements are binding on the parties, when confronted with a request for fees under both contractual and statutory authority, our courts should look to the parties' contract first before moving on to any discretionary analysis under statutes such as section 36-5-103(c) and section 27-1-122. Courts reviewing requests for fees pursuant to a MDA fee provision should first determine whether the parties have a valid and enforceable MDA that governs the award of attorney's fees for the proceeding at bar. If so, our courts must look to the actual text of the provision and determine whether the

> provision is mandatory and applicable. If so, the MDA governs the award of fees, and our courts must enforce the parties' contract.
>
> If the court determines the MDA is inapplicable to the case, it should so state on the record and then turn to the parties' statutory claims under which any award of fees is within the sound discretion of the trial or appellate courts unless otherwise specified in the statute. Even if the court determines that an award of attorney's fees is mandated by the terms of the MDA, the court still should also review the claims for fees or expenses under any applicable statutory authority.

Eberbach, 535 S.W.3d at 47879. Courts should "conduct an analysis under both the parties' contract and any applicable statutes or other equitable grounds. In the event the award is reversed on one ground, it may be upheld on another. Analyzing all applicable grounds for attorney's fee awards ensures judicial economy is maximized." Id. at 479 n.6.

> While we hold that our courts do not have discretion to deny an award of fees mandated by a valid and enforceable agreement between the parties, nothing in this decision affects or limits the discretion our courts have in determining the reasonableness and appropriate amount of such awards pursuant to the factors set out in Connors and Tennessee Supreme Court Rule 8.

Id. at 479; see Connors v. Connors, 594 S.W.2d 672, 676 (Tenn. 1980); Tenn. Sup. Ct. R. 8, RPC 1.5.

As stated above, in the absence of an attorney fee provision in a marital dissolution agreement, there may be a statutory or common law grounds for awarding attorney's fees in an alimony modification case. The decision whether or not to award attorney's fees is within the sound discretion of the trial court. Friesen v. Friesen, No. E2017-00775-COA-R3-CV, 2018 WL 5791954, at *3 (Tenn. Ct. App. Nov. 5, 2018). While the decision to award attorney fees lies within the discretion of the trial court, there must be an underlying basis to do so. Abner v. Abner, No. E2019-01177-COA-R3-CV, 2020 WL 5587411 (Tenn. Ct. App. Sept. 18, 2020).

One statutory ground, known as "Tennessee's Enforcement of Orders statute," is found at T.C.A. § 36-5-103(c) (2019). Id. (quoting Eberbach, 535 S.W.3d at 475). **This statute was significantly amended in 2018.** As discussed by Judge McBrayer in a concurrence opinion, T.C.A. § 36-5-103(c) was recently amended by the General Assembly:

> Effective July 1, 2018, the General Assembly revised the circumstances under which attorney's fees could be awarded in domestic relations cases. In contrast to the former version of [T.C.A. § 36-5-103(c)], which allowed "[t]he *plaintiff spouse* [to] recover . . . reasonable attorney fees incurred in *enforcing* any decree for alimony," [T.C.A.] § 26-5-103(c) (2017) (emphasis added), the current version allows "[a] *prevailing party* [to] recover reasonable attorney's fees . . . in *any . . . proceeding to enforce, alter, change, or modify any decree of alimony*." 2018-2 Tenn. Code Ann. Adv. Legis. Serv. 236 (ch. 905) (LexisNexis) (amending Tenn. Code Ann. § 36-5-103(c)) (emphaisis added).

Friesen v. Friesen, No. E2017-00775-COA-R3-CV, 2018 WL 5791954, at *4 n.1 (Tenn. Ct. App. Nov. 5, 2018) (McBrayer, J., concurring). In full, T.C.A. § 36-5-103(c) (2018), as amended effective July 1, 2018, provides:

> T.C.A. § 36-5-103(c) (2018). – A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the non-prevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

T.C.A § 36-5-103(c) (2019). According to the Tennessee Supreme Court, a "prevailing party" is one "who has succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Sexton v. Carden, 2020 Tenn. App. LEXIS 557, at *8 (Tenn. Ct. App. Dec. 9, 2020) (quoting Fannon v. City of LaFollette, 329 S.W.3d 418, 431)). "A court may find a litigant to be a 'prevailing party' if she succeeds 'on any significant issue in litigation.'" Id. at *7 (quoting Fannon v. City of LaFollette, 329 S.W.3d 418, 431 (Tenn. 2010)). Thus, to be a "prevailing party," a party need not prevail on every issue raised in the litigation. Id. at *8.

In addition to the above noted change with regard to the prevailing party, the amended statute now allows for an award of attorney fees in both criminal and civil contempt. Previously, fees could not be awarded for criminal contempt. The amendment also provided it will not only apply to actions to enforce but also to actions to alter, change or modify. Additionally, it applies not only to actions involving alimony, but also to actions involving child support, parenting plans, and custody. Finally, as amended in 2018, §103 allows for an award of fees to those required to defend against such actions. See *Jarman v. Jarman*, No. M2017-01730-COA-R3-CV, 2018 WL 5778811 (Tenn. Ct. App. July 10, 2018). The defending party, however, must still be the prevailing party.

VIII. APPENDIX

A. SAMPLE PROVISIONS FOR ALIMONY *IN SOLIDO*

1. ALIMONY IN SOLIDO

The parties agree that the purpose of the award of alimony *in solido* is to provide financial support to the Payee. The alimony is a form of support, the total amount of which is calculable on the date the decree is entered and is not modifiable. The parties agree that the Alimony in Solido of $_____shall be reduced to judgment upon entry of the Final Decree of Divorce.

Payor and Payee agree that alimony *in solido* is necessary for the support and maintenance of Payee based upon the factors of T.C.A. § 36-5-121(i)(1-12). The parties agree, understand, and intend that alimony *in solido* is non-modifiable and deemed not to be dischargeable in bankruptcy as the alimony payments are in the nature of support. Upon death of Payee, the remainder of said payments shall pass to the Payee's designated beneficiary.

Upon death of Payor, the remainder of alimony *in solido* payments shall be paid to Payee from the proceeds of Payor's life insurance policy and be a claim against the estate in the event the life insurance is not sufficient to cover the balance remaining. (See: Life insurance section).

Pursuant to the statute, the alimony *in solido* shall NOT terminate upon the death or remarriage of Payee or Payor.

Payment options:

Option I: Payor agrees to pay alimony *in solido* to Payee in the lump sum of $_____ by _____ [date].

Option II: Payor agrees to pay alimony *in solido* to Payee in the total sum of $_____. Said alimony *in solido* shall be paid at a rate of $_____ per month for a period of _____months, beginning _____ and continuing thereafter until _____.

NOTE: IF THE PARTIES AGREE TO OPTION II, THEY SHOULD ADD TO THE LUMP SUM AMOUNT THE AMOUNT OF POST-JUDGMENT INTEREST THAT WOULD APPLY AND THEN CALCULATE THE INSTALLMENT PAYMENTS.

LIEN:

Pursuant to T.C.A. 36-4-121 (f) (2), there shall be a lien placed against the payor's assets, namely, _____ to ensure the payment of alimony *in solido*.

NOTE: IF A LLC IS INVOLVED, THE PAYEE MUST PIERCE THE CORPORATE VEIL AND FULFILL THE *ALLEN* FACTORS TO SEEK TO PLACE A LIEN AGAINST THE ASSETS HELD BY THE LLC. BARTON V. BARTON, 2020 WL 6580562 (TENN. CT. APP. NOV. 10, 2020). ALTERNATIVELY, IF THE LLC IS OWNED 100% BY THE PAYOR, THE COURT MAY ORDER THAT THE PAYOR (SOLE OWNER) PLEDGE COMPANY ASSETS TO FULFILL THE ALIMONY *IN SOLIDO* OBLIGATION.

B. SAMPLE PROVISIONS FOR ALIMONY *IN FUTURO* (PERIODIC ALIMONY)

1. ALIMONY *IN FUTURO*

The parties agree that Payee is not a candidate for rehabilitation and that it is unlikely that Payee would be able to achieve a standard of living by her own efforts reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the Payor. Said alimony payments are necessary for Payee's support and maintenance and based upon the factors of T.C.A. § 36-5-121(i)(1-12). Had this case gone to court, the Payor agrees that the proof would be …… (list factors in the statute that apply to the case).

The parties agree that the alimony *in futuro* is non-dischargeable in bankruptcy as it is a domestic support obligation and the alimony is necessary for the support and maintenance of Payee.

Alimony *in futuro* is modifiable upon request of either party pursuant to Tenn. Code Ann. 36-5-121 (f)(2). However, the parties agree that these facts will not justify a material and substantial change in circumstances to support a petition to modify _____.

Alimony *in futuro* shall terminate upon Payee's death, remarriage or if Payee fails to comply with any provisions of the MDA or Permanent Parenting Plan. Payee shall immediately upon remarriage notify Payor. Failure of Payee to timely give notice of remarriage shall allow the Payor (obligor) to recover all amounts paid as alimony to Payee plus pre-judgment interest, after the date of marriage.

Alimony *in futuro* shall terminate upon Payor's death, but not upon his remarriage.

OR

Alimony *in futuro* shall terminate upon Payor's death, however, Payor shall obtain a life insurance policy on himself, naming Payee as owner and sole, irrevocable beneficiary of said policy in the amount of $_____ to provide to Payee.

Therefore, Payor shall pay to Payee beginning on _____ and continuing thereafter on the 15th day of each month, the sum of $_____ per month until the occurrence of one of these events: remarriage of Payee, death of Payee, or if Payee fails to comply with any provisions of the MDA or Permanent Parenting Plan, whichever occurs first.

C. SAMPLE PROVISIONS COMBINING ALIMONY *IN FUTURO* (PERIODIC) AND REHABILITATIVE ALIMONY

After considering all of the factors of Tenn. Code Ann. 36-5-121 (i), the parties agree and acknowledge that Payee is the economically disadvantaged spouse and can only be partially rehabilitated.

The rehabilitative alimony and alimony *in futuro* are domestic support obligations and are not dischargeable in bankruptcy.

Both the rehabilitative alimony and alimony *in futuro* are modifiable upon request of either party pursuant to Tenn. Code Ann. 36-5-121 (e)(2) and (f)(2).

Both rehabilitative alimony and alimony *in futuro* shall terminate upon the death of Payee.

Only alimony *in futuro* shall terminate upon Payee's remarriage.

Both rehabilitative alimony and alimony *in futuro* shall terminate upon the death of Payor, but shall NOT terminate upon his remarriage.

OR

Both rehabilitative alimony and alimony *in futuro* shall terminate upon the death of Payor, however, Payor shall obtain and maintain a life insurance policy on himself for $_____ and name Payee both owner and sole, irrevocable beneficiary of said policy to provide for Payee the full amount of the policy upon the Payor's death.

ADD

If Payee fails to comply with any provisions of the MDA or PPP, then both the rehabilitative and alimony *in futuro* shall terminate.

1. OPTION A

Payor agrees to pay the Payee, in addition to periodic alimony, the sum of $_____ per month as rehabilitative alimony for four (4) years to allow Payee to return to school and obtain a college degree. Both parties agree that after graduation from college, Payee will be partially rehabilitated, and will still need alimony *in futuro*.

2. OPTION B

The parties agree that even though Payee has a college degree, she requires additional training and education. In addition to periodic alimony of $_____ per month, Payor agrees to pay $_____ for two (2) years to allow her to complete this training. Said monies are rehabilitative support and maintenance that shall terminate upon the death of payee and shall remain within the control of the court for the duration of those two (2) years.

D. SAMPLE PROVISIONS FOR REHABILITATIVE ALIMONY

After considering all of the factors of Tenn. Code Ann. 36-5-121 (i), the parties agree and acknowledge that Payee is the economically disadvantaged spouse, but that she can be rehabilitated to an earning capacity that will permit her to enjoy a standard of living after the divorce that is comparable to the post-divorce standard of living expected to be enjoyed by the Payor or the standard of living enjoyed by the parties during the marriage or that the Payee can achieve self-sufficiency.

The rehabilitative alimony is a domestic support obligation and is not dischargeable in bankruptcy.

Rehabilitative alimony is modifiable upon request of either party pursuant to Tenn. Code Ann. 36-5-121(e)(2), and shall terminate upon the death of Payee. Such alimony may only be modified during its existence.

The rehabilitative alimony shall terminate upon the death of Payor.

OR

The rehabilitative alimony shall terminate upon the death of Payor, however Payor shall obtain and maintain a life insurance policy on himself for $_____ and name Payee both owner and sole, irrevocable beneficiary of said policy to provide for Payee.

The parties agree that Payee completed high school and __ years of college before going to work. She stopped working to care for the children, however recently returned to attend school part-time to complete a ____ degree. The parties agree that Payee is in need of support to complete her college education, and Payor has the ability to pay alimony. Therefore, Payor shall pay to Payee as Rehabilitative Alimony, the sum of $_____ per month for _____months beginning on _____ and continuing thereafter on the fifteenth day of each month for the next _____ months, or until Payee's death, whichever occurs first.

OR

The parties acknowledge that Payee has a college degree and desires to attend law school to be rehabilitated. Payor agrees to pay for Payee to further her education and attend and complete law school within the next five (5) years. Payee agrees that she shall only receive the law school tuition costs at the University of Memphis beginning _____ and continuing until she graduates but no longer than four and one-half years from _____. Payor agrees to pay this alimony and pay up to _____ for books until she graduates or _____, whichever occurs first.

Said payments shall not be modified nor extended if Payee has any illness or reasons for not completing law school during this period of time.

E. SAMPLE PROVISION TRANSITIONAL ALIMONY

The parties agree that Payee does not need rehabilitative alimony but needs assistance to adjust to the economic consequences of this divorce.

The Payee has skills that, with time, will enable her to overcome the economic consequences of her divorce. Payee is the economically disadvantaged spouse as compared to her Payor at the time of the divorce. Furthermore, Payor has the resources to pay a reasonable amount of transitional alimony for a reasonable period of time.

The transitional alimony is a domestic support obligation and is not dischargeable in bankruptcy.

Payor agrees to pay Payee $_____ per month for _____months, as Transitional alimony.

Modifiable options:

Option 1: The parties agree that said alimony is not modifiable.

OR

Option 11: The parties agree that transitional alimony is modifiable upon request of either party and a showing of a substantial and material change of circumstances and pursuant to Tenn. Code Ann. 36-5-121 (g)(2). Such alimony is only modifiable during its existence.

Termination options:

Option 1: Said alimony shall terminate upon the Payee's death, Payee's remarriage, Payor's death, and/or Payee's cohabitation with a third party, whichever occurs first.

Option 2: Said alimony shall terminate upon the death of Payee. Said alimony shall terminate upon the death of Payor.

OR

Option 3: Said alimony shall terminate upon the death of Payor, however Payor shall obtain and maintain a life insurance policy naming Payee as both owner and sole, irrevocable beneficiary so that upon Payor's death, Payee shall continue to receive the transitional alimony for the duration of the award.

F. SAMPLE PROVISIONS COMBINING ALIMONY IN FUTURO (PERIODIC) AND TRANSITIONAL ALIMONY.

After considering all of the factors of Tenn. Code Ann. 36-5-121 (i), the parties agree and acknowledge that Payee is not in need of being rehabilitated but is in need of assistance to adjust to the consequences of the divorce. However, after the period of time wherein Payor pays the transitional alimony to Payee, the Payee will still need spousal support as Payee will not be self sufficient nor will be living a standard of living comparable to that Payee enjoyed during the marriage or that which Payor enjoys after the divorce. The parties agree that Payor shall pay to Payee the sum of $_____ per month for _____months, or until the home sells, whichever occurs first, and then $_____per month as alimony *in futuro*. See Henry v. Henry, 2020 WL 919248 (Tenn. Ct. App. Feb. 26, 2020).

G. OPTIONAL ALIMONY PROVISIONS FOR COHABITATION (TO USE IN ALIMONY IN FUTURO OR TRANSITIONAL ALIMONY)

Payee shall immediately notify Payor if she is cohabitating with a third party for a period of more than thirty days. Failure of Payee to timely give notice of cohabitation shall allow the Payor (obligor) to recover all amounts paid as alimony to Payee plus pre-judgment interest after the date of cohabitation.

Said payments are subject to modification for unforeseen changes of circumstances that occur during the period of the payments. The parties intend that unforeseen changes of circumstances include _____.

H. SAMPLE PROVISION OF RESERVING ALIMONY

In light of Cardella v. Cardella, M2007-01522-COA-R3-CV, 2008 WL 4367306 (Tenn. App. Sep. 17, 2008), the practitioner should explain that the alimony *in futuro* is warranted and why it is warranted and the facts of why alimony *in futuro* can not be awarded at this time.

The parties agree that Payor lost his job through no fault of his own, and is without employment. Payee has needs and is a candidate for alimony *in futuro*. The parties agree that Payee should be awarded alimony in futuro of $100.00 per month until Payor obtains employment and then the alimony *in futuro* will be increased to the level of Payor's ability to pay.

Alimony *in futuro* of $100.00 per year is sufficient to allow the court to retain jurisdiction to increase alimony at a later date.

I. SAMPLE PROVISION OF WAIVER OF ALIMONY

The parties waive alimony, including but not limited to alimony *in futuro*, alimony *in solido*, rehabilitative alimony and transitional alimony.

If either party files a petition to modify and/or enforce alimony, then the prevailing party shall be awarded all of their reasonable and necessary attorney fees and suit expenses.

J. OTHER PROVISIONS

1. LIFE INSURANCE

Payor, at his expense, shall obtain and maintain in full force and effect, a life insurance policy on his life, naming Payee as both owner and sole, irrevocable beneficiary in the amount of

$_____ to cover the total alimony payments. Any failure to provide insurance as outlined above shall also be a claim against the estate of insured.

NOTE: FAILURE TO NAME THE PAYEE AS OWNER MAY RESULT IN PAYOR CHANGING THE BENEFICIARY OF THE POLICY. IF THE DISADVANTAGED SPOUSE (PAYEE) IS ILL DURING THE DIVORCE PROCEEDING, IT MIGHT BE HELPFUL TO ENSURE THE PAYEE IS THE OWNER OF THE POLICY BY MOTION TO THE COURT, EVEN BEFORE THE ENTRY OF THE FINAL DIVORCE DECREE, AS DEATH ABATES THE DIVORCE ACTION. SEE Coleman v. Olson, 2020 WL 290730 (Tenn. Ct. App. Jan. 21, 2020).

2. OPTIONAL LIFE INSURANCE (PAYEE AS OWNER OF POLICY)

It is agreed that the alimony payor shall obtain and/or maintain life insurance on himself/herself in the amount of $ _____, and shall name the payee spouse as sole and irrevocable beneficiary thereof for so long as the payor has any alimony obligation to the payee.

The payor spouse shall, within 30 days of the date of the granting of absolute divorce between the parties, provide the payee spouse with proof of the insurance required to be maintained by the payor spouse pursuant to the terms of this paragraph. The payor spouse shall also change the owner of the policy to Payee.

Payor is permitted to have the face value of the life insurance policy reduce annually as the alimony obligation reduces by that amount. However, in no event will Payee receive more than the amount of alimony remaining to be paid, if Payor predeceases her before the alimony terminates.

3. ATTORNEY'S FEES

Payor will pay to Payee the sum of $_____ as non-deductible, non-dischargeable alimony necessary for Payee's support and considered a domestic support obligation. Said sum is to be paid prior to entry of the Final Decree of Divorce.

4. DEATH

Should there be any obligation, alimony, child support, life insurance, or other outstanding upon the death of Payor which obligation is not satisfied by life insurance or by will or trust, then it will be a claim against the estate of the deceased for monies or things due or to

become due in the future under this Marital Dissolution agreement by the persons entitled to receive those monies or things.

5. HEALTH INSURANCE

The parties agree that Payor/Payee shall cooperate to allow the other spouse to obtain health insurance through the Participant's employer's health insurance plan. The Participant shall notify the Plan Administration no later than thirty (30) days of the date of the divorce that the other spouse may be a beneficiary of the health insurance plan.

Participant shall pay the premium of the qualified beneficiary as alimony necessary for his/her support for the entire thirty-six (36) months of coverage and the payment of the premiums are a domestic support obligation.

6. DEBTS AS SUPPORT OBLIGATIONS

The parties intend that Payor shall pay these debts, as a domestic support obligation and is necessary to Payee's support, maintenance and daily needs. Payor shall pay, indemnify and hold Payee harmless for the following debts:

_____

_____

_____.

7. OBLIGOR'S PAYMENT OF DEBTS TERMINATES ALIMONY PAYMENTS

The parties agree that Payor shall pay alimony to Payee and said alimony shall **not be** modified in amount or duration of alimony. The alimony can only be terminated if Payee remarries, Payee dies, Payee's creditors seek a judgment from Payor for debts Payee is ordered to pay, if Payor dies, or on _____. If Payee cohabitates with a third party, a rebuttable presumption as outlined in the statute may be raised to modify or terminate alimony.

8. EQUALIZE THE SOCIAL SECURITY PAYMENTS

ALIMONY *IN FUTURO TO EQUALIZE THE SOCIAL SECURITY PAYMENTS*

Beginning on _____, Payor shall pay to Payee as alimony *in futuro* the sum of _____ per month on the first day of each month and continuing thereafter on the first day of each month, until his death. Said money represents an

equalization of the parties expected Social Security Benefits so that they each receive the same amount of money for Social Security Administration at their expected retirement age of _____. Said alimony *in futuro* shall automatically increase upon the increase in social security benefits due to the cost of living adjustments.

Payor agrees that the _____paid to Payee is alimony *in futuro* and necessary for the support and maintenance of Payee and is a domestic support obligation. The parties agree, understand, and intend this alimony *in futuro*.

9. DISABILITY INSURANCE POLICY

Payor shall cause to be maintained disability insurance on himself as nondeductible, nondischargeable alimony necessary for the support and maintenance of Payee.

Payor currently has disability with his employer,_____, and thus, should Payor become totally disabled and unable to work, then Payee agrees that only her alimony *in futuro* will be reduced from _____ per month, to the equivalent percentage that Payor's salary has been reduced. For example, if his salary is reduced by thirty-three percent (33%) so will Payee's alimony so that the amount of alimony *in futuro* that Payor would pay to Payee would be _____ per month. However, if Payor is able to work in a different type of employment, or receives disability income from other sources, such as government, or otherwise, the Court will not necessarily reduce Payee's alimony *in futuro* as stated above.

10. PROTECTION AGAINST BANKRUPTCY DISCHARGE

In the event the Bankruptcy Court discharges the alimony obligation from Payor to Payee, the parties agree that such a decision by the Bankruptcy Court adversely affects the Payee and as such, Payee shall be entitled to apply to any court of competent jurisdiction for a modification of the support provisions of this Agreement, regardless of the waivers and/or limitations stated in this Agreement.

11. GUARANTOR AGREEMENT IN FAMILY BUSINESSes

The parties understand that Payor shall be required to pay the alimony payments to Payee. This Agreement shall be guaranteed by ___ and if _____is deceased, then _____. In the event that Payor fails to make any payments when due, then Payee shall

notify the Guarantor and within five days of receiving a certified notification that Payor failed to pay the alimony, said Guarantor shall pay Payee directly. In the amount any money is expensed for having to enforce this provision of the Agreement, then Payee shall receive all of her reasonable attorney fees and suit expenses from the Payor for his failure to timely pay alimony.

12. ENFORCEMENT PROVISION (in Marital Dissolution Agreement)

Noncompliance

Should either party incur any expense or legal fees in a successful effort to enforce or defend any portion of this Marital Dissolution Agreement, the Court SHALL award reasonable attorney's fees and suit expenses to the nondefaulting party. No breach, waiver, failure to seek strict compliance, or default of any of the terms of this agreement shall constitute a waiver of any subsequent breach or default of any of the terms of this agreement.

OR

In the event it becomes reasonably necessary for either party to institute or defend legal proceedings relating to the enforcement of any provision of this Agreement, the successful party shall also be entitled to a judgment for reasonable expenses, including attorney's fees, incurred in connection with such proceedings.

See Proctor v. Proctor, 2020 WL 2764410 (Tenn. Ct. App. May 27, 2020).

13. MILITARY RETIREMENT AND PROVISION IF VETERAN WAIVES RETIREMENT.

The parties recognize that the veteran may elect to increase his or her after-tax income by converting all or a portion of the military retirement into disability benefits. Thus, the parties understand that the former spouse would not be entitled to receive a portion of the veteran's disability benefits. Therefore, the parties agree that there would be a material and substantial change of circumstances to warrant a modification in the award of spousal support. Thus, the parties reserve a right to a modification in the award of spousal support as the former spouse may have a need for more spousal support if the former spouse does not receive the amount of military retirement that this court/parties contemplated at the time of the Final Divorce

of Divorce. While the veteran's election is a foreseeable event, it is not foreseeable which election he or she would take.

ALIMONY BENCH BOOK
TENNESSEE PUBLISHED AND UNPUBLISHED CASES
AUGUST 8, 2003 - DECEMBER 31, 2020

Length of Marriage	Age	Wife's Monthly Income	Husband's Monthly Income	Standard of Living	Education/ Training	Grounds/ Other Factors	Health/ Other Factors	Alimony	Case
56	H-78 W-77	$3,334	$3,364	Unstated	Unstated	H adultery	W deteriorating	H's interest in residence *in solido*	Slocum v. Slocum, No. M2009-00040-COA-R3-CV (December 15, 2009)
44	H-61 W-60	$867	$3,984	NR	H-US Navy, Tenn. Dept. Corrections W-HS, 1 yr. of college	H has pinched nerve in back W physical labor limited 2 adult children	Asthma attacks, osteoporosis, chronic obstructive pulmonary disease	Permanent periodic: $600/mo. Increased to $1,000/mo. when W med. coverage ends. Atty. Fees: $3,204	Whalen v. Whalen, No. E2004-01008-COA-R3-CV (Dec. 17, 2004), 2004 WL 2916140 (Tenn. Ct. App.)
43	H-61 W-59	$0	$16,300	NR	H-HS W-GED	NR	Both parties had illnesses	$2,000 mo. remanded to increase	Hill v. Hill, No. M2007-00471-COA-R3-CV (Tenn. Ct. App. 2008)
43	H-64 W-63	$0	$6,216/mo. (not including occasional bonuses)	NR	W-had not worked outside of the home for the last 18 yrs. of marriage	W received portion of H's pension in division Adult child	H-Good health W-Unlikely to obtain employment	$1,644/mo. *in futuro*	Naylor v. Naylor, No. W2016-00038-COA-R3-CV (Tenn. Ct. App. July 15, 2016.)
42	NR	NR	NR	NR	NR	Divorced and remarried No minor children	Mental conditions	Periodic: $50/mo. Until turns 65 yrs. Atty. Fees.	Parchman v. Parchman, No. W2003-01204-COA-R3-CV (Nov. 17, 2004), 2004 WL 2609198 (Tenn. Ct. App.)
42	H-66 W-65	$2,408/mo.	> $8,000/mo.	High level	H-Masters W-Bachelors	His fault	W-Good H-Disability but side income	$1,000/mo. *in futuro* + $5,500 to atty. fees	Rodgers v. Rodgers, E2011-02190-COA-R3-CV (Tenn. Ct. App. September 10, 2012)
42	Both parties reached the age of 65 since trial	$0	2,060/mo.	NR	H-Retired Dentist W-NR	NR	H- suffers from heart disease, forced to retire and sell dental practice W- lives with elderly mother	$4,500/mo. *in futuro* and transitional alimony "in the nature of W's health insurance until age 65. Reduced to 500/mo.	Wilhoit v. Wilhoit, 2018 Tenn. App. LEXIS 91, 2018 WL 934582
41	W-62	$1,184	$2,800	NR	NR	H had prostate surgery	NR	*in futuro*: $1,300/mo.	Harris v. Harris, No. W2003-02112-COA-R3-CV (Nov. 16, 2004), 2004 WL 2607541 (Tenn. Ct. App.)

41	H-68 W-64	$0	Private & VA disability	NR	H-Dentist W-Masters	Adult children	H was disabled & received disability Due to disability, H retired from dental practice	Unequal 60/40 division in favor of W of net rental income from commercial property as transitional alimony pending sale of property	Kuhlo v. Kuhlo, No. M2015-02155-COA-R3-CV (Tenn. Ct. App. June 23, 2016.)
40	H-NR W-57	$125	$2,400	NR	H-BS W-GED	W operated small business that provided housing and insurance	Yes, but NR	$865/mo. *in futuro*	Rogers v. Rogers, No. E2005-02645-COA-R3-CV (Tenn. Ct. App. September 12, 2007)
40	W-58	$750	$5,522	NR	H-Senior vice pres., Appraiser W-Part-time clerical asst.	3 adult children	Meniere's disease and rheumatoid arthritis	*in futuro*: $2,200/mo. *in solido*: Atty. fees: $21,599.91	Cain v. Cain, No. W2003-00563-COA-R3-CV (Mar. 3, 2004), 2004 WL 404489 (Tenn. Ct. App.)
40	W-64	$0.00	$4,166.00	NR	H-President of family-owned oil company W-Homemaker	H had significant separate property	W diagnosed bipolar, suffered from severe depression and anxiety, and other issues	Unequal 60/40 division in favor of W of proceeds from sale of property; $2,500 *in futuro* for two years and $1,00.00 *in futuro* thereafter	Gant v. Gant, No. M2015-02160-COA-R3-CV (Tenn. Ct. App. Jan. 31, 2017).
40	H-60 W-59	$0	NR	NR	H-NR W-HS	NR	Myriad of problems	$2,970/mo. *in futuro*, $55,000 atty. fees	Lofton v. Lofton, No. W2007-01733-COA-R3-CV (Tenn. Ct. App. 2008)
39	NR	$2,500-3,333/mo.	$18,000/mo.	Multimillion dollar marital estate	H-MD W-MBA	H inappropriate conduct	NR	$3,000/mo. until W reaches 66 plus "additional" property award of $300,000	Hubbard v. Hubbard, No. M2009-00780-COA-R3-CV (Tenn. Ct. App. September 28, 2010)
39	H-NR W-61	$0	$6,936 (VA disability & SS) plus $1,000/mo. from another source.	NR	H-Bachelor's in Engineering W-Nursing (level NR)	Stipulated pursuant to TCA §36-4-129.	H-Disability W-Significant health issues	$1,500/mo. plus her health insurance premiums until she turns age 65.	Phipps v. Phipps, E2014-00922-COA-R3-CV (January 27, 2015)

38	H–59 W–59	$951/mo. long-term disability	$4,470/mo. pension	W received $114,779 in separate property + more than $356,000 in marital property + $2,235/mo. from H's pension.	H–HS W–college	Divorce granted to W based on H's inappropriate marital conduct	W–ongoing depression; good physical health H–good physical & mental health	None	Tomes v. Tomes, M2012-02441-COA-R3-CV (Tenn. Ct. App. November 22, 2013)
38	H–59 W–58	$4,924/mo.	$11,163/mo. in 2013; capacity > $8,333/mo.	NR– W received $400,000 more than H from marital estate	H–HS diploma + welding inspector school; W-Bachelor's, Master's & Ed.S	H's adultery	H–medication for various ailments W-two surgeries for perforated ulcers	One-half of equity in the marital residence as alimony *in solido*; no other alimony nor atty. fees	Calloway v. Calloway, E2014-00558-COA-R3-CV (Tenn. Ct. App. 2014)
37	H- 60 W- 60	$2,326 (earning ability)	$29,000	NR	H- general surgeon W-nursing license (worked as nurse and teacher then homemaker)	W- capable of earning income as a nurse	W- awarded primarily non-liquid & non-income assets	$5,674 /mo. *in futuro* Ellis II CoA reduced the alimony *in futuro* award of $9,000/mo. based on W's need of $8,000 less her earning capacity of $2,326/mo. $91,873.81 *in solido* (atty fees) Ellis II CoA reduced atty fee award of $121,874 as it would be inequitable bc *pendente lite* support H paid to W was used to pay a portion of her atty's fees	Ellis v. Ellis, No. W2019-01869-COA-R3-CV, 2020 Tenn. App. LEXIS 387 (Ct. App. Aug. 27, 2020).
37	H-58 W-57	$0	$41,667	H-Orthopedic surgeon, $6 mil. estate	H-MD W-2 yrs. college	2 adult children	NR	$10,000/mo. *in futuro*	Odom v. Odom, No. E2007-02250-COA-R3-CV (Tenn. Ct. App., 2008)
37	H-NR W-56	$0	$12,600	H lavish life style	H-college W-HS	H adultery	W significant health problems	$6,400/mo. for 4.5 yrs.; $4,400/mo. thereafter, *in futuro*; $30,037 atty's fees	Head v. Head, No. M2009-01351-COA-R3-CV (Tenn. Ct. App. September 30, 2010)

36	H-64 W-58	$150	$5,209 $1,542 retirement $3,667 income	$1.6 mil. in assets	H-Degree in Engineering W-HS	W awarded $962,007 in marital assets	NR	One half of H's SS when he begins receiving it & medical insurance	Morton v. Morton, et al., No. 2005 WL 1950125 (Tenn. Ct. App. August 15, 2005)
36	H–61 W–61	No recent employmen t history; her expense claims were not	Significantly better than W	Total marital estate of approximately $3.1 mil.	H–GED & auctioneer's license W–HS diploma	Both guilty of inappropriate marital conduct	H–history of cancer & heart problems; neither party is in the best of health but both are capable of earning an income	$500/wk. *in futuro*; each pay own atty's fees & litigation expenses	McCarter v. McCarter, E2013-00890-COA-R3-CV (Tenn. App. 2014)
35	H-55 W-55	$3,900	$9,667	NR	H-HS, +1yr. College, USDA W-HS, 2 yrs. Business. College	H-adultery W-ran business worth $225,000 No children	NR	NR	Watkins v. Watkins, No. E2003-03050-COA-R3-CV (Dec. 14, 2004), 2004 WL 2866976 (Tenn. App. Ct.)
35	H-NR W-54	$1,160	$9,000	H-most comfortable, extensive travel "lavish & extravagant" W-frugal, non lavish	H-NR W-HS	H-adultery, H took adulteress on lavish trip W-frugal by necessity 2 adult children	NR	$2,800/mo. *in futuro*, atty's fees $6,581	Bottorff v. Bottorff, No. M2007-01792-COA-R3-CV (Tenn. Ct. App. 2008)
34	H- 59 W- 62	$1,690 (gross) $1,200 (net)	$5,000 (at a min)	NR	H- HS educ.; operates business inherit from H's F W-daycare worker	H- 47% of ME W- 53% of ME	H - $330k sep prop W - no sep prop	$1,500/mo. *In futuro* W awarded atty fees	Climer v. Climer, No. W2018-01910-COA-R3-CV, 2020 Tenn. App. LEXIS 33 (Ct. App. Jan. 29, 2020).
34	NR	$932	$3,358	Limited, live paycheck to paycheck	H-BS W-HS	H-adultery "financial status less than sound" 2 adult children	Not disabled	$600/mo. *in futuro* + COBRA ($401/mo.) for 36 mos.	Cole v. Cole, No. M2006-00425-COA-R3-CV (Tenn. Ct. App. 2008)
34	50's	$0	Potential of $8,333/mo. + existing military retirement	Relatively High	H-5 Advanced Degrees W-HS	H's inappropriate marital conduct	Both relatively good health	$500/mo. *in futuro* + $10,000 to atty's fees + division of H's retirement pay	Smarsh v. Smarsh, E2011-01767-COA-R3-CV (Tenn. Ct. App. April 23, 2012)

33	NR	$2,400.00	$4,583.33	NR	W worked at veterinary clinic H ran a gym he co-owned with W	Divorce stipulated Court found vocational skills, education, employability, earning capacity, estate, financial liabilities, and financial needs of parties are substantially comparable	Substantially comparable physical and mental health H misrepresented his income (his tax return did not fully represent his income)	If H did not pay liabilities, assessed to H in property division, then the division would not be equitable and W would not have means to support herself. Appellate court reclassified H's obligation to pay liabilities in amount of $481,691.81 as *in solido* alimony (as opposed to transitional alimony).	Mitzi Sue Garner v. Robert Allen Garner, No. E2019-01420-COA-R3-CV (July 29, 2020)
33	H-55 W-53	$2,876	$5,417	NR	H-Insurance salesman W-Teacher	No minor children	None	$1,000/mo. alimony *in futuro*	Hixson v. Hixson, No. E2005-01039-COA-R3-CV, (Tenn. App. June, 19, 2006)
33	H–56 W–56	Casually employed; little contribution financially or as a homemaker; earning capacity of $60,000/annum	Casually employed; living on passive income from family businesses; 5-yr. average was $37,765/mo.	Standard of living often exceeded their income	H-Bachelor's degree in business W-Bachelor's degree in economics + real estate license	W's adultery and inappropriate marital conduct	H-diabetes and serious neurological problems W–reasonably good except for trial related stress	Rehabilitative alimony of $8,000/mo. for 10 yrs.	Berg v. Berg, M2013-00211-COA-R3-CV (Tenn. Ct. App. 2014)
33	H-65 W-62	$1,720/mo. (SS)	Approximately $24,083/mo. (gross)	Large estate	H-Salesman W-Nurse anesthetist (retired due to physical disability)	4 adult children	W was forced to retire due to physical disability	Alimony *in futuro* (remanded to set specific amount)	Bettis v. Bettis, No. E2016-00156-COA-R3-CV (Tenn. Ct. App. Oct. 24, 2016.)
32	NR	$0	$6,417	NR	H-College Degree W-BS	Sizeable assets Only child committed suicide	Agoraphobia	$1,000/mo. alimony *in futuro* + atty's fees & life insurance	Kyle v. Kyle, No. 2005 WL 326892 (Tenn. Ct. App. February 10, 2005)
32	H-49 W-50	$3,607	$9,494	NR	H-Retired Air Force; TVA W-Secretary	Two adult children	W was homemaker for majority of marriage	$500/mo. transitional alimony for 144 mos.	Roby v. Roby, No. M2015-01987-COA-R3-CV (Tenn. Ct. App. Oct. 4, 2017).

32	H–52 W–NR	Minimum wage	>$4,166	No significant marital estate; lifestyle not extravagant	H–GED W–GED + cosmetology license	Divorce granted to W	W–treatment for depression	$1,000/mo. alimony *in futuro*	Fogle v Fogle, E2013-00997-COA-R3-CV (Tenn. Ct. App. 2014)
31	H-64 W-58	$13,491/mo. as pharmacist with the VA	$1,733/mo. as custodian and $832/mo. in social security benefits	"We just purchased what we needed"	W- Two bachelor's degrees and a doctorate in pharmacy H – did not finish his associate's degree and was a pharmacy technician when married	H – did the lion's share of the household work; involved with raising children; standard of living decreased upon separation; even if he had taken more job opportunities, his earning potential was much less than W's	NR	Court abused its discretion in declining to award alimony to H until W retires and her VA pension is activated. Remanded – trial court to determine the type and amount of alimony to award to H based on his need.	Shackelford v. Shackelford, No. M2018-01178-COA-R3-CV (Tenn. Ct. App. May 16, 2019).
31	NR	$309 SS	$1,598	NR	NR	Married 2 times	Disabled, poor health	$150/mo. alimony *in futuro* + H-pay mortgage of $430/mo.	Brooks v. Brooks, No. E2002-02458-COA-R3-CV (Oct. 31, 2003), 2003 WL 22469812, (Tenn. Ct. App.)
31	H-74 W-56	$2,500	$4,634	NR	H-JD, masters business admin and financial services, varied employment experience W- associates degree, BS in finance, no significant employment history; W greater employability than H	H at fault (evid. of phys. & emot. Abuse) H & W had significant income to draw without consideration of employment W received all income from busin. H & W each rec. ½ of trust income	H-excellent physical condition W-no significant physical ailments	None	Disterdick v. Disterdick, No. E2017-00743-COA-R3-CV, 2018 Tenn. App. LEXIS 325 (Tenn. Ct. App. June 18, 2018)
31	H-55 W-54	$4,406	$6,416	Marital estate-$707,000	Both have Masters	H adultery	H-problems under control W-good	$400/mo. *in futuro* + $20,000 atty's fees	Antrican v. Antrican, No. E2009-01028-COA-R3-CV (Tenn. Ct. App. March 22, 2010)

31	H-64 W-54	$0	$35,000 severance package	NR	H-"Highly Educated" W-Masters	TCA §36-4-129	NR	Atty's fees; 7 yrs. periodic alimony starting at $4,500/mo. in yr. 1, reducing by $500/mo. each yr. thereafter	Pettigrew v. Pettigrew, E2011-02706-COA-R3-CV (Tenn. Ct. App. November 15, 2012)
30+	H-67 W-57	NR	Substantially greater than W	NR-Substantial marital assets	H-NR W-Bachelors	H's inappropriate marital conduct	No current issues	$3,200/mo. *in futuro* + $73,000 atty's fees	Slagle v. Slagle, E2011-00785-COA-R3-CV (Tenn. Ct. App. April 30, 2012)
30	H-59 W-55	$1,336 (net) (earning ability)	$46k (net) +SH loans	Extravagant lifestyle	H built a successful business W- homemaker & stay-at-home M 2 children	W awarded divorce IMC	H- healthy W- had been treated for cancer	$8,308/mo. *in futuro* Portion of W's atty fees	Sima Khayatt Kholghi v. Aliabadi, No. M2019-01793-COA-R3-CV, 2020 Tenn. App. LEXIS 417 (Ct. App. Sep. 18, 2020).
30	H-60 W-57	Anticipated $3,333.33 – 4,166.66 per mo.	$17,526.92 per mo. (5 year average)	W - spending habits "successful business couple" AZ Condo	W – High school diploma and some college courses H – College degree; greater earning capacity	Both parties at fault; H's reasonable future horizon for working at his comp. level was 6-7 years W- earned income during marriage, but also homemaker	W- in excellent health; able bodied; enjoyed working	$2,00.00/mo. for 24 months and $1,000.00/mo. for the next 24 months Transitional	Nisenbaum v. Nisenbaum, No. M2017-02330-COA-R3-CV (Tenn. Ct. App. May 23, 2019)
30	NR	NR	NR	NR	NR	W-received 75% of one wk. timeshare H-received 25% of one wk.	NR	$1,500 in atty's fees	Flowers v. Flowers, No. 2005 WL 1833207 (Tenn. Ct. App. August 3, 2005)
30	H-54 W-51	$1,200	$6,667	Comfortable	H-BS W-HS	2 adult children	Clinical depression, heart murmur	$2,100 for 47 mos., $1,300 for 1 mo. for a total of $100,000 rehabilitative, $250 for 24 mos. for atty's feesof $6,000	Strode v. Strode, No. M2007-00265-COA-R3-CV (Tenn. Ct. App., 2008)

30	H-55 W-52	$1,600	$3,068	NR	H-HS/iron worker W-Office Assistant	2 adult children	NR	$600/mo. *in futuro*	Shettleworth v. Shettleworth, No. M2005-01238-COS-R3-CV (June 1, 2006) (Tenn. Ct. App.)
30	NR	NR	NR	NR	NR	W had a live in 2 adult children	None	$1,800/mo. *in futuro*	Payne v. Payne, No. E2006-02467-COA-R3-CV (Tenn. Ct. App. September 12, 2007)
30	H-53 W-49	NR	$1,000	NR	W-interior design degree	H -adultery W-hadn't had sex w/ H for 10 yrs. 2 adult children	Chemical imbalance, depression, breakdown, anxiety attacks.	Remanded for rehabilitative alimony. *in solido*: Atty. fees: $3,721.11	Morrissett v. Morrissett, No. W2003-01052-COA-R3-CV (Jul. 23, 2004), 2004 WL 1656479 (Tenn. Ct. App.)
30	H-53 W-45	$820	$8,334	NR	H-Chiropractor W-Teacher's assistant	W received $125,530 in marital property, W occasionally helped with H chiropractic practice No minor children	NR	$500/mo. alimony *in futuro* for 20 yrs. or until remarriage	Hartman v. Hartman, No. E2005-00010-COA-R3-CV (Tenn. Ct. App. July 31, 2006)
30	H-54 W-53	$0	NR	NR	H-MD W-MS	$2.8 mil. dollar estate	None	$9000/mo. *in futuro*	Jekot v. Jekot, No. 232 S.W.3d 744 (Tenn. Ct. App., 2007)
30	H-51 W-52	NR	NR	High standard of living	W-HS	W received 50% of marital estate - $170,000	NR	$1,840/mo. Alimony *in futuro*	Barlew v. Barlew, No. 2005 WL 954797 (Tenn. Ct. App. April 26, 2005)
30	H-56 W-55	$3,333	$14,600	$1 mil. + estate, 6,400 sq. ft. home, Florida condo	H-BS W-NR	W $600,000 assets 2 adult children	Chronic Leukemia	$4,000/mo. *in futuro* + COBRA benefits	Guiliano v. Guiliano, No. W2007-02752-COA-R3-CV (Tenn. Ct. App., 2008)
30	NR	NR	Prison, refusal to work	NR	NR	No record on appeal. H-dissipates marital assets. No support since 1992.	NR	Alimony *in solido* 100% property	Dotson v. Dotson, No. M2004-01141-COA-R3-CV (Tenn. Ct. App. Feb. 21, 2006)
30	H-NR W-53	$2,279.00	$6,166.00	"Frugal"	H-Bachelor's W-High school, employed until retirement	Parties adult daughter lived with W	Two adult children; W had serious health problems; H guilty of adultery	$1,800/mo. *in futuro*; attorneys' fees to W of $29,060.00 and H to maintain $500,000.00 life insurance policy to secure alimony	Talley v. Talley, No. E2016-01457-COA-R3-CV (Tenn. Ct. App. May 1, 2017).

30	H-53 W-51	NR	NR	NR	H-own business	H depression SS disability 2 adult children	NR	*in futuro*: $50/mo. atty's fees: $15,000	Martin v. Martin, No. W2004-01968-COA-R3-CV (Jul. 14, 2004), 2004 WL 1575057 (Tenn. Ct. App.)
30	H-55 W-55	$1,600	$4,258	NR	H-GED W-CNA	H receives military disability of $2,552/ mo. not subject to division	NR	$1,200/mo. *in futuro* + atty's fees	Oakes v. Oakes, No. 235 S.W.3d 152 (Tenn. Ct. App., 2007)
30	H-58 W-59	Minimal	History of $22,916/mo.	High	H-College W-College	H adultery & inappropriate	H-NR W-treatment for breast cancer	$800/mo. + $31,000 atty. fees *in solido*	Wilkinson v. Wilkinson, 2011 Tenn. App. 2011 LEXIS 639
30	H–54 W–49	No material work experience outside the marriage; imputed at $1,333/ mo.	$10,933/mo.	NR, but total marital estate was $300,000	Both–HS; H had military training to work on boilers	NR	H–generally in good health W-had various surgeries, alcoholic in recovery, disputed as to whether she could work	$1,000/mo. *in futuro* + remanded for atty. fees at trial & on appeal	Ruiz v. Ruiz, E2013 -02142-COA-R3-CV (Tenn. Ct. App. 2014)
30	NR	$1,183 from her separate assets	NR	Estate was approximately $6.5 mil.; W had $1.0 mil. in separate assets; W claimed normal and recurring monthly expenses of $17,088/mo.	NR	Conservatorship of no-longer competent H; applying TCA §36-5-121	H-Declining health W-NR	$9,010/mo.	In re Conservatorship of King, M2014-01207-COA-R3-CV
29	H-54 W-54	$1,000	$12,000+	NR	H-MBA W-HS	$180,000 IRS debt	Celiac Sprue	$2,500/mo. *in futuro* $62,000 *pendente lite*	Jackson v. Jackson, No. W2006-00182-COA-R3-CV (Tenn. Ct. App. February 22, 2007)
29	H-47 W-48	$3,600	$11,800	NR	W-10th grade	Couple owned successful pest control business W has no marketable skills	NR	$2,900/mo. alimony *in futuro* + atty's fees	Smiley v. Smiley, et al., No. 2005 WL 263871 (Tenn. Ct. App. February 2, 2005)
29	H-49 W-48	$2,486	$7,382	Marital estate of $223,000	W-HS	H fault	Unstated	$600/mo for 84 mo. *in solido* plus $6,000 atty. fees	Moses v. Moses, No. E2008-00257-COA-R3-CV (Tenn. Ct. App. March 31, 2009)

29	H-49 W-47	$1,200	$5,75/mo.	Marital estate of $205,667	W-GED	Unstated	Both able to work	Rehab. alimony for 3 yrs. (apparently $200/wk.)	Smith v. Smith, No. M2008-00732-COA-R3-CV (Tenn. Ct. App. August 27, 2009)
29	H-49 W-47	$200/mo. in food stamps; lives rent free	$5,062/mo.	NR	H–8th grade W-10th grade	H was granted the divorce on stipulated grounds	W has "many physical and educational limitations preventing her from being gainfully employed" H – much better than W	W awarded $850/mo. alimony *in futuro*	Parrish v. Parrish, W2013-00316-COA-R3-CV (Tenn. Ct. App. June 21, 2013)
29	H-51 W-52	$3,111/mo.	$15,707.35/mo.	NR	H-some college W-college degree	Both parties contributed to the collapse of the marriage.	H abused the discovery process throughout the case.	$200,000 *in solido*; $1,500/mo. *in futuro* until the youngest child graduates from HS in 2021, at which time H's alimony obligation will increase by the same amount that H had been paying in child support to a total of $2,832/mo. until December 2031.	Tarver v. Tarver, 2019 Tenn. App. LEXIS 128
29	H–58 W–54	No material work experience outside the marriage; imputed at $1,257/mo.	$45,833/mo.	Commensurate with H's income; i.e. very high	H–D.O W–B.S., certified as medical technician	H's adultery	Neither has significant health issues W taking medication for situational depression	$10,850/mo. *in futuro*	Salvucci v. Salvucci, W2013-01967-COA-R3-CV (Tenn. Ct. App. 2014)
29	H–52 W–50	$4,166	$33,333+/ mo.; could easily exceed $40,000/mo.	Sizable marital estate; lavish lifestyle	H–D.D.S. W–nursing degree	Awarded to both parties on the grounds of adultery	Both are healthy and physically active	$6,000/mo. alimony *in futuro*	Barnes v. Barnes, M2012-02085-COA-R3-CV (Tenn. Ct. App. 2014)
29	NR	$0.00	$32,824/mo.	$4 mil. marital estate; money was no object but they had lived relatively frugally	H–medical degree W–college degree	H stipulated inappropriate marital conduct	H–overweight and two knee surgeries, but otherwise good W–multiple foot surgeries, chronic back pain, advanced degenerative disc disease	$7,500/mo. in alimony *in futuro* + $19,395 in atty. fees & litigation expenses	Layman v. Layman, E2013-00429-COA-R3-CV (Tenn. Ct. App. 2014)
29	H-60 W-63	$1,018.51/ mo.	$4,761/mo.	NR, though marital estate exceeded $400,000.	NR	NR	H-Good W-Poor	$1,900/mo. *in futuro* to Wife	Inman v. Inman, E2014-01163-COA-R3-CV (Tenn. Ct. App. May 26, 2015)

28	NR	$1,165	$4,167	NR	W-HS	1 child Child support: $655/mo.	NR	*in futuro*	Britt v. Britt, No. W2003-00430-COA-R3-CV (Dec. 17, 2003), 2003 WL 22999418 (Tenn. Ct. App.)
28	H-51 W-51	$348	$26,667	NR	H-financial advisor, M. Degree W-retail sales, fashion degree	H adultery 2 children	Cancer-remission, osteoporosis, diverticulosis, thyroid disorder.	*in futuro*: $5,215/mo.	Wiltse v. Wiltse, No. W2002-03132-COA-R3-CV (Aug. 24, 2004), 2004 WL 1908803 (Tenn. Ct. App.)
28	H-52 W-53	$0	$5,167	NR	H-BS W-BS	NR	Severe depression	$250/wk. *in futuro*	Jackson v. Jackson, No. E2005-01690-COA-R3-CV (Tenn. Ct. App. March 13, 2006)
28	W-46	SSD	Significant	Unstated	Unstated	H fault	W on disability	$3,000/mo. *in futuro* + $8,000 *in solido*	Colston v. Colston, No. M2007-02757-COA-R3-CV (Tenn. Ct. App. August 21, 2009)
28	NR	$1,666-2,083/mo.	$10,416/mo.	H unchanged since divorce	H-MBA W-NR	Modification	H-heart surgery W-psychological	$3,000/mo. *in futuro* until H reaches age 65; H to pay medical insurance plus atty. fees on remand	Church v. Church, No. M2009-02159-COA-R3-CV (Tenn. Ct. App. December 20, 2010)
28	H-NR W-51	$1,138/mo but with deemed capacity to earn more	NR	NR	W–college degree in accounting	H was granted the divorce on stipulated grounds under TCA §36-4-129	Neither has relevant health condition	Alimony *in solido* by award of rental property – value was $22,500	Brown v. Brown, M2012-01796-COA-R3-CV (Tenn. Ct. App. June 28, 2013)
27	H-47 W-45	$3,416	$4,917	NR	H-BS & MS	2 adult children	NR	Rehabilitative $500/mo. x 60 mos. *in solido*	Booker v. Booker, No. M2005-01455-COA-R3-CV (Tenn. Ct. App. October 26, 2006)
27	H-73 W-62	NR	NR	NR	NR	H-awarded 54% of marital assets $600,000 W-awarded 46% of marital assets $511,000 & had $313,000 separate assets	NR	None	Hirt v. Hirt, No. 2005 WL 292414 (Tenn. Ct. App. February 8, 2005)

27	H-54 W-53	$3,682	$20,000	Very high, addressed specifically on page 12, $1 mil. + estate	H-J.D. W-M.S.	H-affair, dissipation of assets W-more credible	NR	$5,500/mo. 10 yrs, $4,000/mo. next 10 yrs. *in futuro*, $51,030 atty's fees reversed	Carpenter v. Carpenter, No. W2007-00992-COA-R3-CV (Tenn. Ct. App., 2008)
27	H-57 W-49	$1,625	$2,100	NR	H-FBI (retired W-Office Manager	Financial potential W moved many times with H	NR	$1,000/mo. x 15 yrs. $500/mo. thereafter *in futuro* $7,600 atty's fees	Eganey v. Eganey, No. M2005-01755-COA-R3-CV (Tenn. Ct. App. December 19, 2006)
27	W-49	$1,850	NR	Affluent life style	W-BS	$3 mil. estate W-$250,000 cash; $400,000 note at 6% 4 children - 1 minor	NR	$3,000 *in futuro*	Hiscock v. Hiscock, No. M2005-01489-COA-R3-CV (Tenn. Ct. App. October 19, 2006)
27	H-63 W-55	$0	$2,777	NR	H-Retired from Navy	NR	Cancer of uterus, life expectancy 10-18 mos.	$2,500 atty's fees Alimony remanded to trial court	Rivers v. Rivers, No. 2005 WL 819736 (Tenn. Ct. App. April 8, 2005)
27	NR	$2,500	$6,250	$775,000 estate	H-HS W-BS	1 minor child, 1 adult	NR	$750/mo. *in futuro*	Williams v. Williams, No. 2005 WL 2205913 (Tenn. Ct. App. September 12, 2005)
27	NR	$50.75-$833.33/mo.	$10,416/mo.	NR	H-MBA/CPA W-HS	H guilty of inappropriate marital conduct 2 adult children	W diagnosed with bipolar disorder & no longer able to work full-time W was denied SS benefits	$2,000/mo. *in futuro* W's remarriage, W reaching the age of 67, or either party's death	Longstreth v. Longstreth, No. M2014-02474-COA-R3-CV (Tenn. Ct. App. Apr. 20, 2016.)
27	NR	$4,166/mo.	$8,333/mo.	NR	W-flight attendant	2 minor children 2 adult children	W suffered from a pancreatic attack that caused her to only feel comfortable flying 75 hrs./mo.	$1,000 mo. for 48 mos. in transitional alimony $1,000 mo. for 12 mos. in alimony *in solido*	Jeronimus v. Jeronimus, No. M2014-02207-COA-R3-CV, (Tenn. Ct. App. Apr. 15, 2016.)
27	H-52 W-50	$1,500	$6,667	NR	H-hospital W-works at physicians office	H adultery H was a pharmacist but lost his license due to addiction to prescriptions & depressants	Signs of osteoporosis	*in futuro*: Ins. Premiums: $1,000/mo. $1,500/mo. atty's fees: $8,162	Evans v. Evans, No. M2002-02954-COA-R3-CV (Jul. 6, 2004), 2004 WL 1514843 (Tenn. Ct. App.)

27	NR	$680	NR	NR	W-Assoc. Degree licensed barber	No pleading re alimony 1 minor child	Not proven	$0[1]	Armstrong v. Armstrong, No. M2006-02713-COA-R3-CV (Tenn. App. 2008)
27	Unstated	$5,447	>$12,500	Marital estate > $411,000	Unstated	W fault	Good for both	$1,000/mo. *in futuro*	Bonner v. Bonner, No. E2008-01102-COA-R3-CV (Tenn. Ct. App. July 31, 2009)
27	H-52 W-50	$4,704.57/ mo.	$16,666.66/mo.	Even though W was not scraping by, Court had to consider standard of living during marriage	W – Registered nurse and x-ray technologist H – financial planner	W – economically disadvantaged compared to H W needed $1,500/mo. and H had ability to pay that amount	W- good health	$1,500/mo. *in futuro*	Fuller v. Fuller, No. E-2018-01003-COAT-R3-CV, (Tenn. Ct. App. July 10, 2019.)
26	H-57 W-50	NR; lost money when she was selling Mary Kay	$41,666/mo.		H-radiologist W-High school; stay at home parent W desire to get 2 year degree	W was having adulterous relationship since 2012	W in excellent health H had planned to retire in 5 years W received alimony during the case	Rehabilitative to W $3,500/mo. for 60 months	Santee v. Santee, No. E2016-02535-COA-R3-CV (Tenn. Ct. App. November 14, 2017)
26	H-46; W-53	Minimal	$5,833	Marital estate of $70,000	H-HS W-HS	Stipulated both	W potentially serious	$1,500/mo. *in futuro* + health insurance	Shooster v. Shooster, No. E2008-00877-COA-R3-CV (Tenn. Ct. App. March 6, 2009)
26	NR	$43,690	$6,780	Substantial separate & marital property	H-bachelors W-dentist	H in appropriate conduct	H failed to provide records	H denied alimony	McKee v. McKee, M2009-01502-COA-R3-CV (Tenn. Ct. App. August 17, 2010)
26	H-62 W-67	$7,333.33 + housing allowance $11,893.51/ mo.	$0	NR	H-Bachelor's, unemployed since 2005 W-Maintained employment throughout marriage	W fnd guilty of adultery H-homemaker -H: 48.3% of ME -W: 51.7% of ME	H-serious health issues W-good health	$2k/mo. transitional 60 mos +atty's fees to H	Barron v. Barron, No. E2018-02257-COA-R3-CV, 2019 Tenn. App. LEXIS 566 (Ct. App. Nov. 20, 2019).

[1]This case indicates the case was not well tried.

26	H-51 W-52	$1,708	NR but at least $300,000 of the assets awarded to him produced income	"Comfortable but not extravagant"	H-pilot W-retired teacher	2 adult children	W-retired from teaching due to health issues H-had income-producing separate assets	*in futuro* (remanded to determine amount); $16,200 *in solido*; H would pay W's COBRA for 3 yrs.	Davis v. Davis, No. M2015-02106-COA-R3-CV (Tenn. Ct. App. Dec. 29, 2016.)
26	H-75 W-59	$260	$4,000	Relatively high	H-BA W-GED	NR	H-normal W-some problems	$1,500/mo. transitional until sale of assets + atty. fees $66,500	May v. May, et. al., 2011 Tenn. App. LEXIS 635
26	H-50 W-51	$1,916	$2,916	Apparently modest	H-NR W-AA	H inappropriate	NR	$450/mo. until c/s, $700/mo. thereafter + $15,000 *in solido*	Raper v. Raper, 2011 Tenn. App. LEXIS 45
26	H-NR W-59	NR	NR, but more than 2X's W's	NR	NR	H's fault	Both have significant issues	$1,000/mo. *in futuro*	Poindexter v. Poindexter, M2011-02282-COA-R3-CV (Tenn. Ct. App. August 7, 2012)
26	H-62 W-58	$0	$50,000	High, including $5,000-square foot home on Lookout Mountain	H-Cardiologist W-Bachelor's and in process of obtaining Master's	Large marital estate; W would receive income from investments received in divorce	W inherited funds which were contributed to the marital estate; W spent excessively; W received child support	$5,000.00/mo. alimony *in futuro* plus $4,500.00/mo. alimony *in solido* for 120 mos.	Stratienko v. Stratienko, No. E2016-00542-COA-R3-CV (Tenn. Ct. App. Mar. 31, 2017).
26	H-NR W-60	$2,741 *unemployed* (pension, social security disability benefits & rental income)	$3,861	"Middle class standard of living" –able to buy a home, other real estate, cars,	W-3 yrs of college	H at fault	W- disabled (injured in car wreck that caused debilitating physical issues preventing her from working) W-rec. prop. that would generate income (W's expenses exceeded mo. income) H awarded more assets	$800/mo. alimony *in futuro* + $7,500 atty. fees	Ingram v. Ingram, No. W2017-00640-COA-R3-CV, 2018 Tenn. App. LEXIS 315 (Tenn. Ct. App. June 7, 2018)
26	H–63 W–51	Incapable of employment	$12,777	$1,175,132 marital estate	H–dental degree	Awarded to W against H; his physical abuse, use of prostitutes & other inappropriate behavior outweighed her inappropriate relationship	W–major depression, recurrent with psychosis; had been hospitalized	$3,800/mo. alimony *in futuro* + health insurance premiums of approx. $500 + atty. fees to be clarified	Hartline v. Hartline, E2012-02593-COA-R3-CV (Tenn. Ct. App. 2014)

26	H-52 W-51	Held some bookkeeping jobs; homemaker ;"Flipped" properties with H; capable of $2,916.00 per month	$90,000	Extravagant lifestyle; vacation home in CA; vacations to most states as well as abroad; $5,526,811.00 marital estate	H-Executive Vice President of Laytno Construction, manages healthcare construction unit W-accounting degree; real estate license in TN and CA	Awarded to W; H guilty of adultery and inappropriate marital conduct	Alimony award considered in conjunction with assets awarded to W ($2,698,091.00) W's expenses in range of $17,500/mo.	$15,000/mo. in *alimony in futuro* + health insurance premiums in the amount of $650.00 per month for 18 months - affirmed No attorney fee award Rehabilitative award of $3,500/mo for 18 months was reversed; exceeded W's need	Brecker v. Brecker, No. M2018-00120-COA-R3-CV (Tenn. Ct. App. August 21, 2018)
25	W-46	$0	$14,508	NR	W-BS	Children, W-70%, H-30%	NR	$3,000/mo. *in futuro*, $26,000 atty. fees	Hill v. Hill, Slip Copy, No. 2008 WL 5100925 (December 03, 2008), (No. M2007-00049-COA-R3-CV) (Tenn. Ct. App.)
25	H-59 W-58	$1,237	$10,600 disability	NR	H-disabled W-nurse	W used alimony to help daughter w/heart problems 2 adult children	Health problems	*in futuro*: $3,200/mo.	Evans v. Evans, No. M2002-02947-COA-R3-CV (Aug. 23, 2004), 2004 WL 1882586 (Tenn. Ct. App.)
25			$7,051 reduced after he was fired $2,080 (H fnd willfully underemployed)		H-high school degree; highly trained automotive employee with marketable skills W-certification from an exec. Assit. program -DOM: H & W worked then after move to TN – W= full-time homemaker -no evid . that additional education and training would inc. W's earning capacity	H at fault (heavy drinker & verbally abusive)	W injured in car wreck -marriage of long duration -disparity in earning capacity -standard of living -W lacks suff. resources to pay for her atty fees/wld be forced to deplete assets	$2,750/mo. alimony *in futuro* $17,998.10 atty fees	Kanka v. Kanka, No. M2016-01807-COA-R3-CV, 2018 Tenn. App. LEXIS 37 (Tenn. Ct. App. Jan. 25, 2018)

25	H-45 W-45	$1,583	$5,083	NR	H-HS W-HS	$450 child support 3 children	NR	$1,500 x 12 mos. rehabilitative	Matlock v. Matlock, No. M2004-01379-COA-R3-CV (Tenn. Ct. App. May 16, 2007)
25	NR	NR	NR	NR	H-pharmacist own drugstore W-pharmacist has not worked in yrs.	2 adult children	Back surgery & lingering disabilities prevent her from standing for long periods of times	*in solido*, $3,500 x 60 mos.	Blevins v. Blevins, No. M2002-02583-COA-R3-CV (Dec. 30, 2003), 2003 WL 23094162 (Tenn. Ct. App.)
25	H-61 W-57	$0	$2,500	NR	W-10th grade	NR	W not very good	½ of the value of H's VA disability	Boyatt v. Boyatt, No. E2008-00934-COA-R3-CV (Tenn. Ct. App. May 18, 2009)
25	H-86 W-75	NR	NR	NR	NR	W inappropriate conduct	NR	$250/mo. *in futuro*	Miller v. Miller, No. E2010-00492-COA-R3-CV (Tenn. Ct. App. November 9, 2010)
25	NR	$1,280/mo.	Not determined	NR	NR	H's inappropriate marital conduct	NR	$5,847/mo. until debt reduced by $150,000; then $4,000/mo. *in futuro* + $24,905 for atty. fees	Burton v. Mooneyham, M2011-00909-COA-R3-CV (Tenn. Ct. App. March 28, 2012.)
25	H-67 W-NR	$0	Soc. Sec. + part time retail	NR	H-JD W-BA	H's inappropriate marital conduct	W-Problems do not preclude from working	$200,000 *in solido* + $12,000 for health insurance	Ritchie v. Ritchie, E2011-01049-COA-R3-CV (Tenn. Ct. App. March 26, 2012)
25	NR	$4,166/mo.	$44,524/mo.	NR	NR	H's inappropriate marital conduct	H-Good W-Degenerative back disease	$5,000/mo. until wife turns 65; $2,000/mo. thereafter + $5,000 moving expense + $50,000 atty. fees	Rooney v. Pollan, M2011-01896-COA-R3-CV (Tenn. Ct. App. July 3, 2012)
25	NR	NR but apparently $0	H deposits into his account of $23,577/mo.	Marital estate of $2.7 mil.	NR	Stipulated per TCA §36-4-129	NR	$5,000/mo. transitional for 24 mos.; $3,000 thereafter until W turns age 67; $25,000 *in solido* toward atty. fees.	Pair v. Pair, M2014-00727-COA-R3-CV (Tenn. Ct. App. May 29, 2015)
24	H-45 W-41	$6,250	$7,167	NR	H-Retired Air Force (AEDC) W-Realtor	W awarded $373,000 property & $886 mo. of H Air Force retirement	NR	$0	Campbell v. Campbell, No. M2005-00288-COA-R3-CV (Tenn. Ct. App. August 8, 2006)

24	NR	$1,250 - imputed	$9,834	NR	W-BA	homemaker for 18+ yrs. $1,334 child support 5 children, 1 minor	NR	$2,500 *in futuro* plus atty. fees	Gamble v. Gamble, No. M2006-00797-COA-R3-CV (Tenn. Ct. App. May 16, 2007)
24	NR	$2,711	$10,000	Large marital estate	H-JD W-CPA	Large marital estate H's conduct was "egregious" 1 adult child	W was awarded a $1.1 mil. marital home	$3,000/mo. in "temporary alimony" while the appeal was pending	John-Parker v. Parker, No. E2014-01338-COA-R3-CV (Tenn. Ct. App. May 17, 2016.)
24	H-55 W-51	$3,650	$4,166 (capacity)	Marital estate of $1.8 mil.	Both-college	H fault	H alcoholism stabilized	H denied alimony	Deakins v. Deakins, No. E2008-00074-COA-R3-CV (Tenn. Ct. App. September 30, 2009)
24	NR	$0	$2,106	"Getting by"	NR	Modification	W diabetic but never filed for disability	$100/wk. *in futuro*	Keith v. Keith, No. E2009-02201-COA-R3-CV (Tenn. Ct. App. March 30, 2010)
24	H-47 W-46	$3,037	$4,037	NR	H-2 yr. college	TCA §36-4-129	H totally disabled	$0	Schroer v. Schroer, 2011 Tenn. App. LEXIS 461
24	H-49 W-46	$1,671	$7,965	Traveled & recreation	Both-Some College	H inappropriate conduct	W-arthritis + asthma H-no problems	*in futuro* $750/mo.; $1,750/mo. after c/s; +$87,500 *in solido*	Pettijohn v. Pettijohn, 2011 Tenn. App. LEXIS 93
24	W-46 H-46	$690	$8,000	NR–marital estate totaled $282,000; W separate assets of $87,000	W–HS + 3 yrs. college	H's adultery	NR	W awarded transitional alimony of $1,200/mo. for 5 yrs.	Hatfield v. Hatfield, M2012-00358-COA-R3-CV (Tenn. Ct. App. February 7, 2013)
24	H-54 W-48	$6,17	$2,500	NR	H-Operated family business W-Nurse Both held Bachelor's	One minor child; H awarded business that would allow him to generate additional income	NR	$0.00	Morelock v. Morelock, No. E2016-00543-COA-R3-CV (Tenn. Ct. App. Aug. 18, 2017).

24	H-51 W-46	$1,733	$5,000	NR; total marital estate exceeded $500,000	Both are high school graduates	H's adultery	Both are in good health, but W had some limitations.	$1,400/mo. *in futuro*, $9,058.75 toward atty. fees *in solido*, atty. fees on appeal to W.	Chumley v. Chumley, M2015-00378-COA-R3-CV (Tenn Ct. App. Dec. 23, 2014)
24	NR	Never earned more than $1,000.00	Generally earned at least $8,333.00 and, at most, $55,000.00	NR	W-Homemaker/ Part time sales clerk	H was not credible and dissipated marital funds	Two adult children	$2,000.00/mo. *in futuro*	Street v. Street, No. E2016-00531-COA-R3-CV (Tenn. Ct. App. Mar. 29, 2017).
24	H-55 W-46	$15,573.77 (gross)	$2,769 (gross)	NR	H-College; employed at Trader Joe's W-Doctor	W to pay H c/s 2 minor children, 1 adult child	H was stay-at-home parent for majority of marriage	$2,400/mo. *in futuro* to H $10k *in solido/atty fees to H*	Cain-Swope v. Swope, No. M2018-02212-COA-R3-CV, 2020 Tenn. App. LEXIS 76 (Ct. App. Feb. 21, 2020)
24	H-49 W-45	$1,892/mo.	$10,040/mo. (includes military retirement, $2,307/mo. & disability, $3135.80)	NR	H-NR W-German equivalent of HS education	TCA § 36-4-129	H-disabled from military W-no disability	$1,000/mo. *in futuro.*	Eckley v. Eckley, 2019 Tenn. App. LEXIS 105, 2019 WL 990773
24	H-47 W-58	$2,256/mo.	$3,302/mo.	Not lavish; fiscally responsible	NR	Any more alimony would have put H into a deficit.	H-Fair W-Good	$43/mo. transitional alimony, modifiable with a change in circumstances.	Ezekiel v. Ezekiel, W2014-02332-COA-R3-CV (Tenn. Ct. App. Aug. 17, 2015)
24	NR	$1,000/mo. self-employment	$12,000/mo.	NR, but marital estate was nearly $600,000.	H-At least some graduate school W-Bachelor's Degree	H's inappropriate marital conduct.	H-Good W-PTSD, depression & anxiety	$3,500/mo. until child support terminated, $4,500/mo. thereafter *in futuro*; $5,000 *in solido* toward atty. fees; reasonable atty. fees on appeal.	Jenkins v. Jenkins, E2014-02234-COA-R3-CV (Tenn. Ct. App. September 25, 2015)

23	W – 58	$0	$11,000/mo. (H was not found to be credible re his income)	"Comfortable"	W-tenth grade education and GED No transferable job skills Rehabilitation not feasible H- salesman	W – did not work outside home historically	W – health problems W-60% of ME H-40% of ME	$15,000 *in solido* – attys fees for prosecution of motion for criminal contempt $5,500/ mo. transitional alimony for 30 mos. H required to continue to pay premium on his life insurance policy (W beneficiary until she turns 67) $4,000/mo. *in futuro* alimony (beginning after transitional alimony ends)	Michelle Henry v. Richard H. Henry, No. M2019-01029-COA-R3-CV (February 26, 2020).
23	W-44	NR	$3,000	NR	H-HS W-Assoc. Business	$762 child support	Good health	Property division adjustment of $60,000 plus $5,000 atty. fees	Morrow v. Morrow, No. M2003-02448-COA-R3-CV (Tenn. Ct. App. July 14, 2005)
23	H-52 W-47	$0	$13,436	Based on $161,000/yr.	W-HS, Real Estate License	58% property to W 42% property to H	W-pre-diabetic, depression, obesity	18 mos. at $3,000 42 mos. at $2,000 + rehab	Carpenter vs. Carpenter, No. 2005 WL 2240977 (Tenn. Ct. App. September 15, 2005)
23	NR	$0	NR	NR	NR	NR	Mental health issues	$800 for 36 mos.	Failey v. Failey, No. M2006-02510-COA-R3-CV (Tenn. Ct. App., 2008)
23	NR	$1,323	$2,134	$540,000 in net assets	H-HS Diploma W-Associates Degree in Business	W awarded $335,940 in marital assets H awarded $203,828 in marital assets 1 minor child	NR	$5,000 in atty. fees	Morrow, Jr. v. Morrow, No. 2005 WL 1656825 (Tenn. Ct. App. July 14, 2005)
23	H-54 W-49	NR	$6,833	NR	H-HS W-HS	2 adult children	NR	$1,000/mo. *in futuro* + atty. fees	Thacker v. Thacker, No. M2005-00930-COA-R3-CV (Tenn. Ct. App. April 23, 2007)
23	W-46	$3,964	$4,661	good & comfortable	H-BS, FBI, W- BS, M, Speech pathology	Child support: $2,200 4 children: 2 minor	NR	NR	Hazen v. Hazen, No. W2003-00778-COA-R3-CV (Jun. 14, 2004), 2004 WL 1334517 (Tenn. Ct. App.)

23	NR	NR	NR	NR	NR	4 children & 2 adults	NR	$1,000/mo. after child support ends, *in futuro*	Orten vs. Orten, No. 2005 WL 2051293 (Tenn. Ct. App. August 26, 2005)
23	H-60	NR	NR	NR	NR	Stipulated both	NR	$1,100/mo. *in futuro*	Lund v. Lund, No. E2008-00415-COA-R3-CV (Tenn. Ct. App. March 19, 2009)
23	H-56 W-53	$0	$16,916	"Luxury"	H-NR W-Bachelor	H's inappropriate marital conduct	W-"Some health issues" H-NR	Transitional 4 yrs. at $2,000/mo. + 18 mos. COBRA	Edwards v. Edwards, M2010-02223-COA-R3-CV (Tenn. Ct. App. June 19, 2012)
23	H-47 W-60	$815.74 (SS)	$5,166.67 (gross)	NR	H-Owned drywall business W-Not worked full-time in over 20 years	NR	English not W's first language	$1,000/mo. *in futuro* for 60 mos.	Kucinski v. Ortega, No. M2015-00481-COA-R3-CV (Tenn. Ct. App. Aug. 24, 2016.)
23	W–50	No material work experience outside the marriage	$10,416	NR, but total marital estate was $600,000	H–BS + various licenses W–HS + cosmetology license	Irreconcilable differences	W–"some" health issues	$2,100/mo. *in futuro* + ½ of fees incurred on appeal	Henderson v. Henderson, M2013-01879-COA-R3-CV (Tenn. Ct. App. 2014.)
23	NR	$0; unable to maintain employmen t	$5,852	Comfortable	NR	H's inappropriate marital conduct.	H-good W-significant health problems	$2,000/mo. *in futuro*; may be reconsidered if W gets SSDI.	Fabrizio v. Fabrizio, E2014-02067-COA-R3-CV (Tenn. Ct. App. August 27, 2015)
23	H-58 W-47	$0	$3945.50	Modest	H-HS W-3 years of college	NR	W's care for and conservatorship of the parties' disabled adult daughter precludes her from entering work force. W also undergoing reconstructive treatments following breast cancer.	1300/mo. *in futuro*	Tooley v. Tooley, 2018 Tenn. App. LEXIS 125, 2018 WL 1224946

23	NR	$0	NR	Extravagant Lifestyle $44,339,611 Marital Estate	H-BS W-BS H is a very successful real estate entrepreneur	Parties declared divorced pursuant to Tenn. Code Ann 36-4-129, with both parties acknowledging post-separation marital fault.	NR	$7,500,000 in alimony *in solido*; 25,000/mo. for 72 months then $20,000/mo. thereafter in alimony *in futuro*; $464,890.92 for ½ of W's legal fees, vacated and remanded for consideration in light of a proper valuation and distribution of the marital estate	Trezevant v. Trezevant, 2018 Tenn. App. LEXIS 213, 2018 WL 1956486
23	NR	Modest	Modest	Marital estate was $2,667,828; W had substantial separate property.	NR	Stipulated grounds	NR	$500,000 alimony *in solido* to H to equalize the division of marital property to be paid in equal installments of $4,166.67/mo.	Hardin v. Hensley-Hardin, E2014-01506-COA-R3-CV (Tenn. Ct. App. December 18, 2015)
22	NR	NR	NR	NR	NR	2 adult children	NR	$33,000 *in solido* from retirement	Caldwell v. Caldwell, Slip Copy, No. 2008 WL 4613586, (Tenn. Ct. App., October 13, 2008) (No. M2007-01205-COA-R3-CV.)
22	H-NR W-53	Never more than $20,000 annually	$27,000/mo. (imputed)	NR	H- investor, operations manager for family business W- associates degree, sporadic work selling real estate	W granted divorce on grounds of H's inappropriate marital conduct	Both parties in good physical health.	$300,000 *in solido* for atty. fees; remanded to see if rehabilitative or transitional alimony is also warranted.	Lucchesi v. Lucchesi, 2019 Tenn. App. LEXIS 27, 2019 WL 325493
22	W-43	NR	NR	NR	NR	W-BS	Vocationally limited	$1,950/mo. for 10 yrs. rehabilitative alimony	Jewett v. Jewett, No. M2005-00282-COA-R3-CV (Tenn. Ct. App. July 31, 2006.)
22	H-49 W-44	Ability to earn $3,583.00	$20,000.00	NR	H-NR W-Bachelor's and Master's	H was awarded business, which was parties sole source of income	Both parties in good health; two adult children; W needed additional education to obtain teacher's license	$3,000/mo. *in futuro*; $2,000/mo. rehabilitative for 2 years; $115,120.39 *in solido*.	Norman v. Norman, No. M2015-02364-COA-R3-CV (Tenn. Ct. App. Aug. 28, 2017).

22	H-48 W-47	$0	$11,570	NR	H-MD W-BS Ed	H alcoholism Child Support $1,600/mo.	Breast cancer	$1,500 *in futuro* + atty. fees	Heikkenen v. Heikkenen, No. M2005-01084-COA-R3-CV (Tenn. App. May 11, 2007)
22	H-48 W-47	$3,500	$8,000 + bonus	NR	H-Bus. Degree, CPA W-teacher	H adultery (2), reconciled 1st divorce reconciled H high liver enzymes 2 children: 1 minor Child support	Melanoma (10 yrs. ago)	H pays for all tuition & book for W to get M. Degree w/in 60 mos. Atty. Fees	Igou v. Igou, No. E2003-00253-COA-R3-CV (Feb. 25, 2004), 2004 WL 350647 (Tenn. Ct. App.)
22	H-56 W-73	$600 SS	$6,096	NR	H-engineer, consulting engineer W-part-time teacher	H-relative fault No children	Poor physical health	*in futuro*: $1,500/mo.	Glanzman v. Glanzman, No. W2003-03067-COA-R3-CV (Dec. 2, 2004), 2004 WL 2791624 (Tenn. Ct. App.)
22	W-53	$0	$50,000/mo. (net)	The parties enjoyed a "good standard of living"	H-HS W-HS	H adultery Large marital estate W received as an asset a promissory note of $1,845,435 payable by H's business	H awarded all income producing assets No health problems	$10,000/mo. *in futuro*	Grant v. Grant, No. M2014-01835-COA-R3-CV (Tenn. Ct. App. May 12, 2016.)
22	NR	$2,444.26	NR	NR	NR	NR	Wife began living with fiancé	2,000/mo. in transitional alimony for 8 years obligation suspended	Scherzer v. Scherzer, 2017 Tenn. App. LEXIS 849, 2018 WL 2371749
22	W-40	$8/hr.	$0	Negative marital estate	Both – HS	H fault	Unstated	Nominal *in futuro*	Hunsinger v. Hunsinger, No. M2008-02434-COA-R3-CV (December 21, 2009)

22	H-46 W-43	$0/mo.	$16,131/mo. (net)	NR	H-financial advisor W-HS; attending cosmetology school	Adult children	W's income & expense statement evidenced an actual need of approximately $5,000/mo. (less than the alimony award)	$5,400/mo. *in futuro*; Vacated & remanded to TC to make an award consistent with W's actual need	Willis v. Willis, No. M2015-01639-COA-R3-CV (Tenn. Ct. App. May 16, 2016.)
22	NR	$1,941	$6,023	NR	W-Associates	W inappropriate conduct	W some physical issues	$350/mo. transitional for 24 mos.	Sheppard v. Sheppard, M2009-00254-COA-R3-CV (September 27, 2010)
22	NR	Much less than H	$20,000/mo.	"Nice"	W-limited	H inappropriate	H-good W-good	Rehab $3,000 for 60 mos. + $2,000 for 36 mos.	Stolze v. Stolze, 2011 Tenn. App. LEXIS 164
22	H-58 W-57	$2,333/mo. over the prior three yrs.; currently $1,750/mo.	$15,833/mo.	H controlled a nonprofit corporation with net worth of $1.3 mil. & gross revenue of $2.2 mil. in 2012; the corporation was not considered marital asset; very high standard of living.	H-2.5 yrs. of college W-Bachelor's degree + some courses towards a master's degree.	Both at fault special needs child	H-Good W-Excellent	$2,075/mo. *in futuro* + *in solido* to be determined.	Lubell v. Lubell, E20104-01269-COA-R3-CV (November 12, 2015)
22	NR	$2,666	$23,622	Very comfortable.	H-MD W-Nurse, Masters in Divinity	Both at fault, but H more at fault.	Both in good health	$4000/mo. *in futuro* $4,000 atty. fees as alimony *in solido*	Williams v. Williams, 2019 Tenn. App. LEXIS 148, 2019 WL 1375218
21	H-53 W-46	NR	$10,000	NR	H-JD W-2 yrs.	NR	NR	$1,600 mo., $5,000 atty. fees	Camp v. Camp, No. W2006-02644-COA-R3-CV (Tenn. App. February 28, 2008)
21	H-43 W-44	$760 Unemp.	$1,330	NR	H-GED W-some college, full time student	2 adult children	NR	Rehabilitative: $400 x 36 mos. *in solido*: Atty. fees: $1,500	Cox v. Cox, No. M2003-01622-COA-R3-CV (May 5, 2004), 2004 WL 1562516 (Tenn. Ct. App.)

21	H-76 W-57	$1,586/mo. (disability income)	$7,056/mo. (combination of disability, retirement, and business income)	NR	H-3 yrs. of college W-Masters	Most factors weighted equally except H's age, increased earning capacity, and separate property Adult children	H-prostate cancer W-fibromyalgia and chronic fatigue	$2,000/mo. *in futuro* until she was able to access her retirement benefits at age 67.5	Jackson v. Jackson, No. W2016-00007-COA-R3-CV (Tenn. Ct. App. Nov. 4, 2016.)
21	Both 43	$6,000	$11,451	Marital estate - $391,000	Both college grads	H inappropriate conduct	NR	$1,250/mo. *in futuro* + atty. fees on reman	Gonsewski v. Gonsewski, No. M2009-00894-COA-R3-CV (February 17, 2010)
21	H-64 W-58	$3,750/mo.	$30,000/mo. (gross) $11,666/mo. (net)	Enjoyed an "upper middle class lifestyle"	H-College W-Post-Graduate in banking	W's portion of marital estate included mostly liquid assets	W suffered from health problems including a neck condition	$4,000/mo. transitional for 40 mos.	Folger v. Folger, No. E2014-02069-COA-R3-CV (Tenn. Ct. App. Jan. 28, 2016.)
21	H-48 W-54	$1,666	$10,500	Parties lived far beyond their means	Both college grads	H inappropriate conduct	NR	$3,000/mo. transitional until house sold; $2,000/mo. thereafter until March 1, 2015; $25,024 atty. fees	Covington v. Covington, No. E2009-01583-COA-R3-CV (Tenn. Ct. App. June 18, 2010)
21	NR	$4,583	NR	NR	NR	TCA §36-4-129	NR	$850/mo. for 24 mos.	Bryant v. Bryant, No. E2009-01838-COA-R3-CV (January 11, 2010)
21	H-43 W-43	$6,083	$11,416	N/R–Marital Estate $400,000	Both College	H inappropriate	NR	$0	Gonsewski v. Gonsewski, 350 S.W.3d 99; 2011 Tenn. LEXIS 872
21	NR	NR	$3,129 (deemed)	NR	H-Associates W-HS	H inappropriate	NR	Equity in home as alimony	Winkler v. Winkler, 2011 Tenn. App. LEXIS 583
21	H-70 W-59	$1,442/mo ($800 from Walmart and $642 from social security)	$15,000/mo.	Comfortable; nice house on Signal Mountain, private education for children, declined during divorce	H-investment manager at Robbins Capital Management; Dartmouth education W-paralegal before the marriage	H's fault: domestic violence; OP against him; alcoholism	H asked W not to work during marriage H alcoholism	W awarded *in futuro* alimony $1,200/mo.	Robbins v. Robbins, No. E2017-01427-COA-R3-CV (June 5, 2018)

20	NR	$1,251	$2,860	NR	W-HS + 3.5 yrs. college	$172,000 inheritance child support $914 mo. 3 minor children	None	$400 x 36 mos. transitional + $5,000 atty. fees + health & dental insurance	Anzalone v. Anzalone, No. E2006-01885-COA-R3-CV (Tenn. App. October 30, 2007)
20	NR	$3,600	$9,800	NR	H-MD	2 children: 1 adult	None	$1,000 x 48 mos. rehabilitative	Misra v. Misra, No. M2006-01452-COA-R3-CV (Tenn. App. July 20, 2007)
20	NR	$2,380	$10,000	NR	W-HS	W awarded $976,793 from marital estate (55%) Children: 17 and 16	NR	$0	Tait v. Tait, No. 207 S.W. 3d. 270, (Tenn. Ct. App. May 18, 2006)
20	H-51 W-42	NR	$15,257	NR	H-dentist W-CN, A.S. degree	W-fault, 2 affairs H-primary care giver of 11 yr. son W-pay child support after 1 yr. 3 children: 11, & 2 adults	Back problems -limits ability to lift, bend, squat	Rehabilitative: $1,000 x 60 mos.	Elrod v. Elrod, No. E2003-00252-COA-R3-CV (January 15, 2004), 2004 WL 66683 (Tenn. Ct. App.)
20	NR	NR	$5,917	NR	NR	NR	NR	Rehabilitative: $3,000/mo. X 11/mos. $1,500/mo. X 11/mos. $1,000/mo. X 11/mos.	Silvey v. Silvey, No. E2003-00586-COA-R3-CV (March 16, 2004), 2004 WL 508481 (Tenn. Ct. App.)
20	W-48	$1,167-$1,500	$4,000	NR	H-HS W-HS	W earned income doing housekeeping	Cancer - Hysterectomy	$1,000 transitional alimony for 7 yrs.	Lewis v. Lewis, No. 2005 WL 366894 (Tenn. Ct. App. February 15, 2005)
20	NR	NR	NR	NR	NR	Separated for half the time they were married. 1 child: adult	NR	NR	Alford v. Alford, No. 120 S.W. 3d. 810, (November 6, 2003)
20	H-47 W-46	W had not worked outside of the home	$135,000	High standard of living	H managed artists and owned management	Marital Estate: $4.4 m 50/50 division	W stopped working to care for the parties' 4 children	$17,500/ mo. *in futuro*	Egan v. Egan, No. M2018-01858-COA-R3-CV, 2020 Tenn. App. LEXIS 249 (Ct. App. May 28, 2020)

20	H-46; W-43	$2,000	$7,083-7,916	Negligible marital estate	Unstated	H fault	W medical problems	$2,200/mo. for 10 mos. then $2,500/mo. *in futuro* + 24 mos. COBRA	Willmore v. Willmore, No. M2007-02146-COA-R3-CV (May 6, 2009)
20	H-49 W-50	SS benefits	$3,500	Unclear	W-2 yrs. college	Unstated	W unable to work	$600/mo. Rehab for 2 yrs. & $400/mo. thereafter *in futuro*	Brewer v. Brewer, No. W2008-02041-COA-R3-CV (September 3, 2009)
20	NR	NR	$11,162/mo.	NR-marital estate $750,000	NR	TCA §36-4-129	W continued back pain	$250/mo.	Forbess v. Forbess, 2011 Tenn. App. LEXIS 654
20	H-NR W-41	$0	>$83,333	NR	H-MD W-RN (Bachelors)	H's inappropriate marital conduct	H-Addiction issues W-NR	Rehab alimony of $8,000/mo. for 8 yrs. + $309,167 atty. fees	Duke v. Duke, M2009-02401-COA-R3-CV (June 1, 2012)
20	NR	$750/mo. part time	$7,376/mo.	NR	H-MD W-HS	H's inappropriate marital conduct & adultery	NR	$1,700/mo. rehab vacated by Ct of Appeals; Remanded for affordable amount	Hattaway v. Hattaway, M2011-01165-COA-R3-CV (May 16, 2012)
20	H-56 W-59	$1,000/mo.	$3,480/mo.	NR	H-Associates of Art Degree W-Masters	H-Adultery	NR	$1,278/mo. transitional for 3 yrs. then $1,028/mo. *in futuro*	Edwards v. Edwards, W-2011-02305-COA-R3-CV (December 12, 2012)
20	H-NR W-54	$600/mo.	$0–H involuntarily unemployed for prior yr.	NR	W–college degree	Irreconcilable differences, but alimony had been reserved	W suffers from various physical infirmities and conditions	Alimony *in futuro* of $50/mo + $4,000 toward W's atty. fees (nominal amount to permit later modification)	Hernandez v. Hernandez, E2012-02056-COA-R3-CV (September 27, 2013)
20	H–47 W–45	NR	NR	Separated 7 yrs., W received no support but built up savings of $17,000	H–HS W–HS	TCA §36-4-129	H–insulin-dependent diabetic W–no physical or mental disabilities	None	Terry v. Terry, M2012-01784-COA-R3-CV (November 20, 2013)
19	NR	NR	NR	NR	NR	H 5 affairs W-STD diseases from affairs C/N determines assets	STD disease	T/C $2,000 x 24 mos. $3,000 x 72 mos. Remanded	Disher v. Disher, No. W2002-01421-COA-R3-CV (December 22, 2003), 2003 WL 23100334 (Tenn. Ct. App.)

19	H-82 W-73	$405 SS	$1,145	Good	NR	H many health problems	Colitis nervous stomach, problem with kidney & allergies	*in futuro*: $750 x 24 mos. $500/mo.	Stagner v. Stagner, No. E2003-00610-COA-R3-CV (Feb. 27, 2004), 2004 WL 367624 (Tenn. Ct. App.)
19	NR	NR	NR	Extensive real estate holdings	NR	NR	NR	$2,000/mo. for 120 mos. Alimony *in solido*	Cheryl Smith Graves v. Richard C. Graves, Sr., No. 2005 WL 1412109 (Tenn. Ct. App. June 16, 2005)
19	H-46 W-42	$1,265 disability	$20,000	NR	H-Attorney W-Degree in Sec. Educ. - part-time Teacher	W disabled but can work part-time Child support awarded to both 2 minor children	Quadriplegic due to auto accident; developing pressure sores	$3,500/mo. *in futuro* & $5,701.35 in atty. fees	Crowe v. Crowe, No. 2005 WL 1651650 (Tenn. Ct. App. July 14, 2005)
19	H-57 W-64	$573 SS	$4,167	NR	NR	Married 2 times H adultery No children	Pancreatitis, Failed stomach stapling, hypothyroidism & irritable bowel syn.	*in futuro*: $700 mo. Atty. Fees: $8,000	Miller v. Miller, No. M2002-02731-COA-R3-CV (Dec. 10) No. 2003, 2003 WL 22938950 (Tenn. Ct. App.)
19	H-53 W-59	$1,609	$5,276	NR	NR	NR	NR	$850 x 120 mos. rehabilitative	Woods v. Woods, No. M2006-01000-COA-R3-CV (Tenn. App. Jul. 26, 2007)
19	NR	$2,301	$6,319-$7,742	Nominal marital estate except retirement	NR	H inappropriate conduct	NR	$1,500/mo. transitional for 5 years + $5,000 atty. fees	Matthews v. Matthews, M2009-00413-COA-R3-CV (April 28, 2010)
19	H-40 W-37	$4,333	Minimum wage	Very modest	H-NR W-AA	H inappropriate	H suicidal, obsessive-compulsive	$64,500 *in solido* to W-affirmed as property division	Phelps v. Phelps, 2011 Tenn. App. LEXIS 343
19	NR	SSI benefits	NR	NR	H-General manager at car dealership W-Registered nurse until suffering injury	Two minor children and two adult children; H received child support from W	W received SSI benefits as a result of leg injury and psychological problems	$1,000/mo. rehabilitative for 12 months, $800/mo. rehabilitative for 12 months, and $600/mo. rehabilitative for 12 months.	Williams v. Williams, No. W2016-01602-COA-R3-CV (Tenn. Ct. App. Aug. 17, 2017).

19	NR	$0-Court was upheld in ignoring potential $4,000/mo. as a trainer & $4,000/mo. in rental property income	$50,000/mo.	High	W-Masters H-NR	H's inappropriate marital conduct	NR	$1.1 mil. *in solido;* $2,500/mo. *in futuro*; $60,000 atty. & witness fees	Halliday v. Halliday, M2011-01892-COA-R3-CV (December 6, 2012)
19	NR, but W is 13 yrs. younger than H	$2,666+/mo.	NR	W had made extravagant purchases	NR	TCA §36-4-129, W voluntarily left her job & left H for another man	H- NR W–depression, anxiety, bi-polar; suicide attempt	None	Ramsey v. Ramsey, E2012-01940-COA-3-CV (October 29, 2013)
19	H–NR W–45	$3,000	$30,000	Parties had a spacious house & lived comfortably	H–MD W–HS diploma	Granted to both parties	NR	$4,500/mo. alimony *in futuro* + ½ of atty. fees at trial +100% of fees on appeal	Jirjis v. Jirjis, M2013-00512-COA-R3-CV (2014 Tenn. App.)
19	H-NR W-44	$733 (Disability)	$3,575	Frugal	H-Mechanic W-Accounting and banking certificate	Divorce granted to W based on H's inappropriate marital conduct	W-physically disabled and suffered from mental illness	$500/mo. *in futuro*	Parker v. Parker, 2019 Tenn. App. LEXIS 173, 2019 WL 1531667
18	NR	$4,000	$16,000	NR	H-Optometrist W-Med. Tech.	1 child: minor Child support: $1,779/mo. Dependency exemption on taxes alternating ea. yr. for H and W	NR	Rehabilitative: $1,500 x 60 mos. Atty. Fees: $25,000	Rafieetary v. Rafieetary, No. W2003-00121-COA-R3-CV (Apr. 19, 2004), 2004 WL 948439 (Tenn. Ct. App.)

18	H-47 W-52	$3,666.66- $3,750/mo.	$90,000/year Or $7,500/mo. Profit sharing/retirement/pension greater than W	NR	H-NR W-radiology technician	H inappropriate marital conduct	Concerns regarding W's health W disadvantaged spouse	*In futuro* to W $1,100/mo. Attorney's fees as alimony *in solido* Remanded to determine child support prior to alimony – could affect need and ability to pay	Bolt v. Bolt, No. E2017-02357-COA-R3-CV (August 21, 2018)
18	H-45 W-42	$6,000	$1,666	NR	H-BS W-BS	H depression	NR	H awarded $800 for 36 mos. Rehabilitative & atty. fees at trial & appeal	Davis v. Davis, No. E2007-01251-COA-R3-CV (Tenn. App., 2008)
18	H-42 W-44	$2,900	$7,985	Moderately high	H-BS W-HS	Fault of H, illegitimate child born of H during marriage	Depression & need for counseling	$1,200 mo. *in solido*, $11,321 atty. fees	Wynns v. Wynns, No. M2007-00740-COA-R3-CV (Tenn. App., 2008)
18	NR	NR	$46,960	Primary factor	H-orthopedic surgeon W-real estate	H adultery Post-nuptial agreement-unenforceable $1,000/mo. per child for edu. trust fund Child support: $3,237/mo. 2 children: 13,16	NR	*in futuro*: $10,500/mo.	Bratton v. Bratton, No. E2002-00432-COA-R3-CV (Mar. 14, 2003), 2003 WL 1191185 (Tenn. Ct. App.)
18	W-40	$0	$7,281	$1.1 million in net assets	H-Law Degree W-Fashion Merchandising Degree	W awarded $645,618 in marital assets W awarded $2,330 child support Twin daughters are autistic	NR	$1,000/mo. *in futuro* - remanded to trial court to reconsider after 2 yrs.	LaGuardia v. LaGuardia, No. 2005 WL 1566492 (Tenn. Ct. App. July 6, 2005)

18	H-45 W-50	$1,690.26	Imputed at $2,940.00	Modest	H-Law degree from Jordan W-Law degree from Jordan	H maintained a child support obligation of $589.00/mo.	Good health	$500/mo. rehabilitative alimony for 1 year; $3,000 *in solido*	Alattiyat v. Qasqas, No. W2016-00855-COA-R3-CV (Tenn. Ct. App. Nov. 9, 2017).
18	H-51 W-44	$8/hr.	$400/wk.	Unstated	W-HS	Unstated	Unstated	$200/mo. for 36 mos. + $4,850 *in solido*	Collins v. Collins, No. M2008-00930-COA-R3-CV (May 5, 2009)
18	Unstated	Unstated	>$8,333	Unstated	H-college W-HS	Unstated	Both generally good	$3,000/mo. for 24 mos. Rehab & $2,000/mo. *in future*	Inzer v. Inzer, No. M2008-00222-COA-R3-CV (July 28, 2009)
18	H-65 W-55	$2,441 (imputed)	$17,166	NR	H-NR W-College	TCA §36-4-129	Each have some issues	Periodic of $3,000/mo.	Fox v. Fox, 2011 Tenn. App. LEXIS 145
18	NR	$3,500 (imputed)	Not working by choice	NR	Both College	TCA §36-4-129	Both good	$500/mo. for 24 mos.	McKin, v. McKin, 2011 Tenn. App. LEXIS 61
18	NR	$2,000/mo. (imputed)	$5,000/mo. (imputed)	NR	NR	TCA §36-4-129	NR	W awarded rehabilitative alimony of $350/mo. for 12 mo. & $550/mo. for 48 mos. + alimony *in solido* of H's retirement account ($13,000)	Thomas v. Thomas, M2011-00906-COA-R3-CV (March 26, 2013)
18	H-74 W-69	$1,441/mo. (mostly from SS)	$2,132/mo. (annuity)	NR	NR	H was incarcerated for the remainder of his life due to multiple felony convictions, including Rape of a Child	W was in poor health	$1,000/mo. *in futuro*	Watt v. Watt, No. M2014-02565-COA-R3-CV (Tenn. Ct. App. Apr. 27, 2016.)

18	H-52 W-60	$0.00	$29,166.00 to $45,833.00	"lavish lifestyle"	H-Physician W-Nurse; homemaker at time of divorce	Prenuptial agreement was valid and Husband, therefore, had a significant separate estate of $3.1 Million	Wife received nominal amount under the prenuptial agreement; prenuptial agreement did not set alimony	$8,000.00/mo. *in futuro* and $500,000.00 *in solido*	Seifert v. Seifert, No. ME2016-01340-COA-R3-CV (Tenn. Ct. App. Jan. 25, 2017).
18	NR	$934.00/mo. from SS	NR	Comfortable	NR	W had filed untruthful affidavits of inc. & exp, & had secretly dissipated $100,000 from marital estate	NR	W awarded $900.00/mo alimony *in futuro*	Willocks v. Willocks, E-2012-00378-COA-R3-CV (January 10, 2013)
18	H-NR W-44	Minimum wage at time of trial, had earned $3,000+/mo. in past	$8,333/mo. ($2,800 guaranteed); had been as high as $41,667 in the past	Lavish; debts are enormous	W–BS	NR	NR	Transitional alimony to W of $5,000/mo. for 4 yrs. followed by $3,000/mo. for 4 yrs. + W atty. fees	Kelly v. Kelly, E2012-02219-COA-R3-CV (August 6, 2013)
18	H–47 W–40	No material work experience outside the marriage; imputed at $1,257/mo.	$29,166	NR, but total marital estate was $378,000	W–Bachelor's degree in education	Both on stipulated grounds	Both in good physical and mental health	$6,500/mo. rehabilitative for five yrs. + $45,000 toward atty. fees	Browne v. Browne, E2013-01706-COA-R3-CV (2014 Tenn. App.)

18	H-55 W-51	Primarily worked as a homemaker, but for 2 years prior to trial she was employed with East Tennessee State University, earning $1,500/mo.	$8,333.33/mo. or more	NR; $24,145 in credit card debt, each party had 401(k), and only $46,000 in equity in marital residence	W-taking one college course per semester toward earning bachelor's degree H-employed by Wells Fargo as financial adviser; military for 20 years; bachelor's degree	CS $1,676.00/mo. H had surplus of $3,667 per month after payment of regular expenses W had been homemaker and caregiver for children, impacting employability and earning capacity	H had back injury, but did not claim he was unable to work	$2,500/mo rehabilitative for four years. Conclusion that W could be rehabilitated lacked sufficient evidenciary foundation Remanded to conduct a hearing on whether Mother is capable of being rehabilitated	Buchanan v. Buchanan, No. E2017-02364-COA-R3-CV (July 19, 2018)
18	H-42 W-54	Imputed at $628/mo. while homeschooling children, then $1,256/mo. thereafter	$9,939.17/mo. Court found that he was voluntarily underemployed and averaged his earnings over the most recent 3 years	Relatively high	W- GED and cosmetology license, but had not worked in a salon for years prior to marriage	W- homemaker and home schooled two minor children Husband at fault for failure of the marriage	W- significant health issues H- fair health; CS; Husband was obligated to pay for son's medical treatment	*In futuro* at $3,000/mo. was vacated and remanded. The Court found that *in futuro* was appropriate, but that whether H had the ability to pay the amount awarded was not clear from the record	Griffith v. Griffith, No. M2018-01245-COA-R3-CV (April 29, 2019) (Tenn. Ct. App.)
17	H-58 W-48	Imputed at $1,256 per month	$1.7 million per year	Enjoyed a standard of living that exceeded their income during the marriage	W- high school; police academy; some community college H-high school; military; country music recording artist and songwriter	W had been homemaker and caregiver for children	W- Rheumatoid arthritis H- reasonably good health; no evidence of chronic health problems H had affairs and was dishonest	*In solido* - $49,306.66 for attorney's fees and $24,151 in unpaid expert witness fees – affirmed. Rehabilitative alimony award was vacated. Awards of transitional alimony of $4,000 per month for 54 months to assist with the mortgage and *in futuro* alimony in the amount of $2,000/mo. plus health insurance not to exceed $1,000/mo. were remanded for further factual findings	Diffie v. Diffie, No. M2018-00267-COA-R3-CV (April 23, 2019) (Tenn. Ct. App.)
17	H-49 W-48	$1,500	$8,250	NR	H-IRS Agent W-Waitress	Child born 3 yrs. before marriage	Bi-polar & depression	$1,500/mo. + health insurance, atty. fees of $9,000	Slaughter v. Slaughter, No. W2007-01488-COA-R3-CV (Tenn. App., 2008)

17	NR	$695	$5,200	NR	H-College Degree W-College Degree	2 minor children	NR	$1,800 for 2 mos.; $1,000 for next 24 mos.; $500 for next 24 mos. rehabilitative alimony + $8,586.80 in atty. fees.	Hunter v. Hunter, No. 2005 WL 1469465 (Tenn. Ct. App. June 21, 2005)
17	H-47 W-42	$1,035	$4,167	NR	H-own business W-HS	H-not credible witness 2 children	NR	Rehabilitative: $600 x 48 mos. Atty. Fees: $600	Magill v. Magill, No. E2003-02209-COA-R3-CV (Aug.31, 2004), 2004 WL 1949462 (Tenn. Ct. App.)
17	H-64 W-64	$1,436	$2,275	NR	NR	$145/mo. Military pension No med. evidence of W's disability 1 child - $400/mo.	Crohns	$250/mo. x 24 mos. Transitional	Ricketts v. Ricketts, No. M2005-00022-COA-R3-CV (October 3, 2006) (Tenn. Ct. App.)
17	H-56 W-43	$2,917	$9,575	NR	H-Adm. Law Judge W-Legal Secretary BS	NR	NR	Periodic $1,000/mo.	Dowden v. Feibus, No. E2004-02751-COA-R3-CV (January 18, 2006) (Tenn. Ct. App.)
17	W-54	$2,457	$3,935	NR	NR	NR	NR	$1,200 Rehabilitative alimony for 60 mos. Remand for $	Walker v. Walker, No. M2005-01561-COA-R3-CV (May 12, 2006) (Tenn. Ct. App.)
17	NR	$866	$19,000	$1,543,000 estate	NR	3 minor children, W-60%, H-40%	NR	$2,000 for 20 mos., remanded	Long v. Long, No. M2006-02526-COA-R3-CV (Tenn. App., 2008)
17	H-41 W-51	$1,135	$5,151	Unstated	W-Associates Degree	H fault	W on disability	$800/mo. *in futuro*	Farnham v. Farnham, No. E2008-02243-COA-R3-CV (December 29, 2009)
17	Unstated	Unstated	Unstated	Marital estate of $1.4 mil.	W-college	H fault	Unstated	$6,000/mo. for four yrs. then $3,000/mo. *in futuro*	Pedine v. Pedine, No. E2008-00571-COA-R3-CV (March 9, 2009)
17	NR	Apparently nominal	$59,426	H-very lavish W-had retrenched	W-College grad	Modification	NR	$10,000/mo. *in futuro* until 2017 + atty. fees on remand	Wiser v. Wiser, No. M2009-00620-COA-R3-CV (June 25, 2010)
17	W-47	$400	$10,000	NR	W-College grad	H inappropriate conduct	W-employable as pilot	$2,200/mo. transitional for 24 mos.	Gordon v. Gordon, No. E2010-00392-COA-R3-CV (October 27, 2010)
17	H-40 W-39	$43,000/yr. unempl. at trial	$3,969/mo.	H filed bankruptcy	H-2 yr. college W-BA	H inappropriate	NR	$0	K.B.J. v. T.J.1, 2011 Tenn. App. LEXIS 474

17	NR	$13,000/mo.	Unemployed by choice capable of $3,250/mo.	Modest	H-2 yrs. of college W-College degree	H's inappropriate marital conduct	NR	$0	Mayfield v. Mayfield, M2010-01383-SC-R11-CV (December 3, 2012)
17	H-44 W-41	$0	$22,916	Spent more than was prudent - excessive	H-JD/LLM W-BA	TCA §36-4-129	W-Good	$7,000/mo. while appeal pending then $5,000/mo. for 10 yrs. in total	Jannerbo v. Jannerbo, E2011-00416-COA-R3-CV (March 9, 2012)
17	NR	$2,087.00	$6,026.00	"Reasonable"	H-College degree W-High school	Two children	NR	Transitional and rehabilitative alimony; Alimony *in solido* for 72 months with interest	Cardle v. Cardle No. M2016-00862-COA-R3-CV (Tenn. Ct. App. May 17, 2017).
17	NR	NR	$29,166	NR	H-Dentist W-JD	H's Fault	NR	$150,000 to Atty. Fees	Eberting v. Eberting, E2010-02471-COA-R3-CV (February 27, 2012)
17	H-44 W-46	$43,973/mo.	H imputed income of $4,000/mo.	Marital estate was $2,525,670 equally divided	H-Engineering Degree W-Orthopedic surgeon	Awarded to H on stipulated grounds	NR	$2,000/mo. rehabilitative alimony to H for 36 mos.	Gladwell v. Gladwell, W2014-01095-COA-R3-CV
17	NR	Potential $4,791/mo.	>$34,000/mo.	Luxurious	H-Dentist W-Registered nurse	H-Adultery W-Had let license lapse to raise their children.	NR	To W $3,600/mo. rehabilitative for 3 yrs.; $2,288/mo. *in futuro* thereafter; atty. fees of $207,295 at trial + fees on appeal.	Lunn v. Lunn, E2014-00865-COA-R3-CV (June 29, 2015)
16	H-49 W-49	$2,083	$12,500	NR	H-dentist W-acct. degree	W will raise 2 children, work part-time, & take classes toward CPA	NR	Rehabilitative: $2,000 x 60 mos.	Hochhauser v. Hochhauser, No. W2003-00119-COA-R3-CV (Nov. 19, 2003), 2003 WL 22768792 (Tenn. Ct. App.)
16	H-68 W-61	$852	NR	Addressed but no quantified	H-BS W-NR	No children, 2nd marriage for both	M.S., disabled	$2,600 for 12 mos. & then $1,000/mo. thereafter	Edwards v. Edwards, No. E2007-1680-COA-R3-CV (Tenn. App., 2008)
16	H-41 W-39	NR	NR	NR	H-MD emergency room W-BS	4 children Child support: $4,493/mo.	Brain injury	$2,280/mo. *in futuro* Atty. fees	Ort v. Ort, No. W2005-00833-COA-R3-CV (January 5, 2006) (Tenn. Ct. App.)
16	NR	NR	$12,500+ bonus	NR	H-acct. degree W-med. Anthropology degree	3 minor children	NR	*in solido*: $78,000 remanded to trial ct.	Schuett v. Schuett, No. W2003-00337-COA-R3-CV (Mar. 31, 2004), 2004 WL 689917 (Tenn. Ct. App.)

16	NR	NR	NR	NR	NR	H adultery H earned $330,729 during marriage W earned $653,204 during marriage W was awarded marital home No children	NR	Atty. fees $2,191	Current v. Current, No. M2004B02678-COA-R3-CV (Tenn. Ct. App. March 15, 2006)
16	H-55 W-53	$185.00	$4,900.00	NR	H-Retired	No children;; W worked for 12 years of marriage until car accident	H was not in good health suffering from leukemia and heart attacks; W addicted to pain medication and heroin	$980/mo. *in futuro* for 3 yrs. or until H draws pension; Once H draws pension, support is $720; alimony terminates upon W drawing SS	McBroom v. McBroom, No. W2016-01276-COA-R3-CV (Tenn. Ct. App. June 21, 2017).
16	NR	$3,215	$3,329	NR	H-Sheriff's Deputy	1 child	None	$250 x 18 mos.	Flowers v. Flowers, No. W2006-02053-COA-R3-CV (Tenn. App. November 6, 2007)
16	NR	$2,500	$6,667	NR	NR	bankruptcy H stipulated he had 25 sexual affairs Misconduct No children	NR	$500 x 12 mos. transitional alimony + $15,000 atty. fees	Echols v. Echols, No. E2006-02319-COA-R3-CV (Tenn. App. June 19, 2007)
16	NR	$0	NR	NR	H-Cert. Surgeon W-Cert. Anesthesiologist	Children: 17, 15 $951/mo. & $400/mo. private school - 1st order Child support $3,200 - 2nd order	Chronic Lupus, no evidence re: disability	$0 None	Melvin v. Melvin, No. M2004-02106-COA-R3-CV (April 27, 2006) (Tenn. Ct. App.)
16	W-46	$1,391	$2,953	NR	H-BS W-BS	$901 child support alimony deferred until child turns 18	None	$150/mo. *in futuro*	Kienlen v. Kienlen, No. E2007-00067-COA-R3-CV (Tenn. App. July 11, 2007)
16	H-65 W-64	$4,000	$41,667	$6,800,000 estate, 55.69% (H) 44.31% (W)	H-MD W-MS	Separate property of W $318,000 awarded $2.5 mil.	NR	$2,500 for 24 mos. reversed to $0	Franklin v. DeKlein-Franklin, No. E2007-00577-COA-R3-CV (Tenn. App., 2008)

16	NR	$0	$14,423	H - separate estate = $2 mil.	H-3yrs. College W-HS	H inappropriate conduct	W capable of working	$478,000 alimony *in solido*	Keyt v. Keyt, No. M2008-01609-COA-R3-CV (May 14, 2010) [Keyt II]
16	NR	$2,184	$12,083	Parties living beyond their means	NR	TCA §36-4-129	NR	$2,100/mo. for 12 mos. and $1,500/mo. for 18 mos. transitional + atty. fees TBA	Green v. Green, No. M2008-02759-COA-R3-CV (March 12, 2010)
16	NR	$5,500	$5,500 (deemed)	NR	H-MBA, JD W-Grad.	Parties stipulated	NR	$0	Armbrister v. Armbrister, Jr., 2011 Tenn. App. LEXIS 628
16	NR	$1,260/mo. ($4,166/ mo. imputed)	$13,904/ mo.	NR-estate $330,000	H-Masters W-Masters	H adultery & inapp.	NR	$2,000/mo. rehab for 3 yrs. then $2,000/mo. *in solido* for 12 yrs.	Gorman v. Gorman, 2011 Tenn. App. LEXIS 624
16	H-51 W-49	Nominal	NR	Beyond means	H-MD W-MDA	H inappropriate	NR	$1,750/mo. transitional for 36/mo. + atty. fees & expenses $15,000	Garman v. Garman, 2011 Tenn. App. LEXIS 252
16	H-60 W-66	NR	NR-3 pensions	NR	H-BS W-HS	Equal Fault	NR	Transitional $500/mo. until H's retirement	Nusbaum v. Nusbaum, M2011-00832-COA-R3-CV (January 5, 2012)
16	H–61 W–45	More than the $8/hr. she was currently earning	$5,059/mo.	NR	W–degree in early childhood education from Ukraine + training as Cert. Nursing Asst.	Awarded to W as her fault was less than H's	NR	$800/mo. transitional alimony for 7 yrs. + $9,000 atty. fees	Nita v. Nita, M2013-00201-COA-R3-CV (2014 Tenn. App.)
15	H-51 W-44	$15,500.00/ mo.	Imputed at $3,125.00/mo.	NR	W –college educated; real estate agent H- experience with tile and granite company	H- minimal contribution to the marriage; enjoyed a life of leisure, instead of working; economically disadvantaged	NR	$2,000.00/mo. transitional alimony for 6 mo. or until lot is sold (whichever occurs first); W shall make mortgage payments on lot ($808.00) until sold; W shall cover H's health insurance for 6 mo. or until employed	Flodin v. Flodin, E2018-01499-COA-R3-CV (Tenn. Ct. App. June 26, 2019)

15	H-64 W-60	$75/week $192/mo in food stamps	$1,434.96/mo Army Retirement; $1,378 in social security; $399 in retirement from Veteran's Admin.	NR	H-retired military W- CNA but expired; homemaker; worked at daycare	W at fault: domestic assault, obtained loans and credit cards without H's consent, destroyed property	W health issues but not disabled W eligible for Social Security in less than 2 years H disabled from service	Alimony *in futuro* to W $400/mo.	Rufsholm v. Rufsholm, No. M2016-02404-COA-R3-CV (December 6, 2017)
15	NR	$1,892	$4,166	NR	H-JD W-NR	2 minor children, 1 child disabled - requires 24/7 care	NR	$500/mo. *in futuro*, $15,000 atty. fees	Vaughn v. Vaughn, No. W2007-00124-COA-R3-CV 9 (Tenn. App., 2008)
15	H-54 W-47	$5,833	$1,633	NR	H-HS retired TVA, own business W-geologist, college degree	W inappropriate behavior w/15 yr. foster child. No children	NR	Atty. fees. $25,000 to H	Foxx v. Bolden, No. E2002-02831-COA-R3-CV (Feb. 12, 2004), 2004 WL 256572 (Tenn. Ct. App.)
15	W-38	NR	$9,400	NR	H-Exec. at Best Buy, Inc. W-HS, no college degree	Child support: $3,238/mo. 4 children	NR	$1,000/mo. x 120 mos. + $246 COBRA	Greene v. Greene, No. M2005-00456-COA-R3-CV (April 25, 2006) (Tenn. Ct. App.)
15	H-41 W-41	$0.00	Approximately $74,166.00 per month	High	H-Doctor W-Real estate agent but had not worked for 10 years at time of trial	Child support: $3,200.00/mo.	Marital estate of $3,185,379.00	$6,000.00/mo. *in futuro* to run concurrent with $5,000.00/mo. in rehabilitative alimony for 3 years	Mabie v. Mabie, No. W2015-01699-COA-R3-CV (Tenn. Ct. App. Jan 9, 2017).
15	NR	$2,500	$3,000	NR	H-postal clerk W-self employed	Reduced alimony from $1,500-$1,250/mo. b/c of leaving w/another man but was at time of hearing	Med. Conditions, disc problems in her neck, fusion surgery	*in futuro*: $1,250/mo.	Woodall v. Woodall, No. M2003-02046-COA-R3-CV (Oct.15, 2004), 2004 WL 2345814 (Tenn. Ct. App.)
15	H-52 W-47	$300	Approx. $22,500	NR	H-Bachelor's degree W-Two years of college; real estate license	1 child	W testified that she could earn $40,000.00 per year as a teacher	$2,444.00/mo. in rehabilitative alimony so long as W is actively pursuant teaching certificate for period not to exceed 2 years	Treadwell v. Lamb, No. M2015-01391-COA-R3-CV (Tenn. Ct. App. Jan 19, 2017).

15	H-46 W-43	$2,083	$61,120	NR	H-bus. W-1 yr. bus. School, pharmacist asst.	1 minor child Child support: $4,464/mo.	NR	*in futuro*: $2,000/mo. Atty. Fees: $142,992	Smithson v. Smithson, No. W2003-00204-COA-R3-CV (Dec. 23, 2003), 2003 WL 23100342 (Tenn. Ct. App.)
15	H-49 W-43	$2,166.66 Unemp.	$3,800	NR	H-2 yrs. college W-2yrs college	H affairs, gambling problems Children: 1minor - suffers from mild to moderate retardation. Child support: $600/mo.	Obsessive compulsive disorder	Rehabilitative: $550 x 12 mos. $350 x 12 mos. $250 x 12 mos	Mueller v. Mueller, No. W2004-00482-COA-R3-CV (Nov. 17, 2004), 2004 WL 2609197 (Tenn. Ct. App.)
15	H-39 W-38	$0	$12,000+	NR	H-MBA W-HS + some college	H's affair 2 minor children	NR	$1,500 for 72 mos. transitional, $281.68 for 18 mos. COBRA	Pearson v. Pearson, No. E2007-02154-COA-R3-CV (Tenn. App., 2008)
15	NR	$968	$1,238	NR	NR	2 minor children home schooled $587/mo. child support	None	$10/mo.	Eaves v. Eaves, No. E2006-02185-COA-R3-CV (Tenn. App. November 30, 2007)
15	H-64 W-60	$2,166	$2,418	NR	H-Disabled W-Hairstylist	3rd marriage for each (2) (4) (5) - (9) (8) (10)	NR	Transition $400 x 60 mos.	Hensley v. Hensley, No. E2005-02735-COA-R3-CV (August 29, 2006) (Tenn. Ct. App.)
15	NR	W-52	$1,959	$2,080	H-BS W-NR	Living with adult son	W has Hodgkin disease	$100/mo. *in futuro* for medical insurance + $250/mo. *in futuro* alimony	Hastie v. Hastie, No. E2006-01874-COA-R3-CV (Tenn. App. May 9, 2007)
15	H-49 W-51	$0	$70,833	Very high	H-MD W-Bachelors	H adultery	NR	$8,000/mo. for 4 yrs., then $5,000/mo. for 2 yrs. rehab; + $8,500/mo. *in futuro*; plus $186,000 atty. Fees	Andrews v. Andrews, No. W2009-00161-COA-R3-CV (August 31, 2010)

15	NR	$3,600	$1,125	NR – apparently modest	NR	TCA §36-4-129	H on SSDI	$0	Ogle v. Ogle, 2011 Tenn. App. LEXIS 622
15	NR	$900	$5,500	NR	NR	Divorce granted to W based on H's adultery; H had no credibility on any contested issue	W–fragile mental state due to H's blatant lying & adultery	W received as alimony *in solido* equity in marital residence + H to pay mortgage [total of $276,000] + rehabilitative alimony of $1,552/mo. for 24 mos. + $980/mo. for 24 mos. + W's atty. fees	Trego v. McCoy, E2012-02698-COA-R3-CV (November 4, 2013)
15	H-around 40 W–39	W had not worked outside home for 6 yrs.	$1,616/mo. at time of trial; had been $3,600 before his termination by Police Dept.	NR	H–NR W–HS diploma	Declared the parties divorced	NR	$0–no proof re H's expenses or W's ability to work	Litton v. Litton, M2013-01363-COA-R3-CV (2014 Tenn. App.)
14	H – 53 W – 47	Wife imputed at $4,166.67 per month	Husband imputed at $10,000.00 per month	Owned real property in TN and TX; traveled rather extensively; purchased as they desired. Can no longer be maintained.	H – Master's Degree, chemist W- J.D. and LLM. degrees	Each party at fault. Neither party willing to compromise.	10 year old minor child. W traditionally did not work outside home. H accepted W's role as homemaker.	Three years of transitional alimony appropriate. Remanded for recalculation based on imputed incomes and classification of certain marital property. Award of rehabilitative alimony was error. $25,000 alimony *in solido* was affirmed.	Belinda Bentley Wright v. John Andrew Wright, W2018-02163-COA-R3-CV (March 6, 2020).
14	H-NR W-39	$1,100 + $1,001 (c/s)	$5,351.78 (net)		W-managerial experience and ability to increase her work hrs; can improve her earning capacity w/o additional training	-legally separated for 2 years	W working would not interfere w/ ability to care for children -3 school-aged children	$600/mo. transitional alimony for 60 mos. +car loan & car insurance $516.32/mo. Modified from alimony *in futuro*	Finstad v. Finstad, No. E2017-01554-COA-R3-CV, 2018 Tenn. App. LEXIS 612 (Ct. App. Oct. 19, 2018)

14	NR	NR	$12,000	NR	W-nurse	1 minor child Child Support $1,856	NR	$1,000/mo. 36 mos. rehab alimony Atty. fees $10,998 $1,250 psych eval.	Ouyang v. Chen, No. 2005 WL 2089829 (Tenn. Ct. App. Aug. 26, 2005)
14	H-54 W-49	$2,924	$5,835	$105,000/yr.	NR	1 adult child	NR	$450 for 36 mos. transitional	Moore v. Moore, No. M2006-02624-COA-R3-CV (Tenn. App., 2008)
14	NR	$2,441	$13,775	W living well beyond her means	W-College Grad	Modification	W-Good H-NR	$750/mo. rehab until youngest child turns 18	von Tagen v. von Tagen, M2009-00850-COA-R3-CV (March 12, 2010)
14	H-50 W-48	$2,000	$8,000+	NR	W-HS	H inappropriate conduct	NR	$1,5000/mo. rehab for 5 yrs.	Truman v. Truman, E2009-00237-COA-R3-CV (January 28, 2010)
14	H-41 W-33	$3,900	$11,050	NR	H-college educ. W-gained some training and education during the marriage, which will eventually improve her earning capacity	NR	W- 54% of marital estate H- 64% of marital estate	None (W waived claim to alimony) No atty. fees bc both parties had assets	Dewald v. Dewald, No. M2017-02158-COA-R3-CV, 2018 Tenn. App. LEXIS 541 (Ct. App. Sep. 17, 2018)
14	NR	$11.83/hr. working 35 hrs./wk.	$9,166.67/mo.	H owned several business interests	H-HS W-Teacher's assistant	H obligated to pay child support W's adultery 4 minor children	W enrolled at a community college & anticipated graduating within 8 yrs.	COA reversed & remanded TC award of $2,500/mo. in rehabilitative alimony for 15 yrs.	Hopwood v. Hopwood, No. M2015-01010-COA-R3-CV (Tenn. Ct. App. June 23, 2016.)
14	H–41 W–60	$0, but W should be eligible for $1,000-1,100/mo. SSD; income of W's live-in daughter is a factor	Capacity of $5,166	NR, but total marital estate was modest	H–HS diploma + vocational school W–HS diploma	H's adultery	H–able-bodied W–numerous health problems & is totally & permanently disabled	$75,000 equity in house as alimony *in solido*; $2,000 toward atty. fees at trial; $150/wk. *in futuro* + atty. fee & expenses on appeal	Berkshire v. Berkshire, E2014-00022-COA-R3-CV (Tenn. App. 2014)

14	H-51 W-48	$100-$200	$12,750	Spending exceeded income	H-BS + some post-graduate courses W-NR	H's fault; parties have severely disabled child who needed constant supervision.	H-Adjustment disorder with mixed anxious & depressed mood, high blood pressure, injured knee W-NR	$2,500/mo. *in futuro*; each attorney had lien against marital residence.	Kibbe v. Kibbe, E2014-00970-COA-R3-CV (April 28, 2015)
13	H – 48 W – 44	W imputed at $4,500 per month	$7,916 per month	"Good" Parties living above their means, however.	W – Master's Degree in nursing, NP H – loan officer for a number of years	Irreconcilable divorce. Parties desired for W to stay home with child; Homeschooling child.	W was in an automobile accident that has left her injured. Injuries impact her ability to work.	$1,100 per month in alimony *in solido* for a period of 8 years. $3,875.00 in attorney's fees at trial; awarded attorney's fees on appeal.	Jim Daniel Story, Jr. v. Heidi Rebekah Nussbaumer-Story, No. M2019-01705-COA-R3-CV (August 19, 2020)
13	H-41 W-39	$2,441.67 (personal trainer 3 days/wk; after degree earning potential= $50k)	$7,291.67	Not extravagant - consistent w/ level of H's income w/o educ. & vocational rehab, W can't obtain SoL	H- adv. assoc. degree W- studying to get a degree in psychology; working as a personal trainer	H at fault (IMC) H uncooperative w/ discovery & deliberately prolonged case	H-anxiety & depression W- good health	$1,250/mo. of rehabilitative alimony for 48 mos. + $56,611.50 atty. fees	Kanski v. Kanski, No. M2017-01913-COA-R3-CV, 2018 Tenn. App. LEXIS 630 (Ct. App. Oct. 29, 2018)
13	H-36 W-37	$0/mo. Full-time student	$70,833.33/m. $35,435.80 (net)	High stnd of living	H-med. degree, master's degre W- only hs degree + @ trial, full-time student to obtain Bachelor's in Accounting ($90k max)	-Both @ fault -H's earning cap. -W's inability to achieve H's earning cap. -W worked while H in med. school -Moved freq. for H's job	-H & W-good phy. & mental health -no children	$7,500/mo. *in futuro* to W	Patel v. Patel, No. W2018-00820-COA-R3-CV, 2019 Tenn. App. LEXIS 560 (Ct. App. Sep. 17, 2019).
13	NR	At school	$6,200	NR	H-Associates Degree W-1.5 yrs. College	H adultery	NR	$800/mo. rehab for 6 yrs.	Nieman v. Nieman, No. M2008-02654-COA-R3-CV (August 27, 2009)
13	H-58 W-48	NR	$10,416	NR	W-10th Grade	TCA §26-4-129	Good	$1,800/mo. 2 yrs.; $1,500/mo. 3 yrs; $1,250/mo. 5 yrs.; $500/mo. 5 yrs.	Schiffner v. Schiffner, 2011 Tenn. App. LEXIS 148

13	NR	$0	$6,200	Beyond their means	H-HS W-HS	TCA §36-4-129	W-Some health problems & limitations	48/mo. rehab, $1,800/mo. for 12 mos.; $1,600/mo. for 12 mos.; $1,400/mo. for 24 mos.; $4,263 towards atty. fees	Mobley v. Mobley, M2011-02269-COA-R3-CV (November 30, 2012)
13	NR	Unemployed	>$14,000	NR	H–two bachelor's degrees W–associate's degree	NR	W–unspecified health problems & depression	W awarded alimony *in futuro* of $1,000/mo. & alimony *in solido* of $5,000	Sartain v. Sartain, M2012-01603-COA-R3-CV (June 27, 2013)
13	NR	$8/hr. $1,642/mo. (imputed)	$4,565/mo. including disability	NR	Both high school	NR-determined on remand; Father became unemployed during remand	H-PTSD W-NR	$800/mo. for 39 mos. rehabilitative + $25,000 *in solido* + $2,600 in atty. fees for first appeal.	Velez v. Velez, M2014-01115-COA-R3-CV (June 30, 2015) (Second appeal)
12	NR	$984 SS	$3,200	NR	NR	H live-in	M.S., Disabled	$780/mo. *in futuro*, $1,500 atty. fees + appeals atty. fees	Williams v. Williams, No. E2007-01747-COA-R3-CV (Tenn. App. 2008)
12	H-48	NR	$14,423	NR	H-3 yrs. College W-HS	Estate valued $2,221,820 Wife 37% 1 child $1,800/mo.	Hashimoto Disease	$2,500 x 96 mos. Rehabilitative alimony Atty. fees $0	Keyt v. Keyt, No. M2005-00447-COA-R3-CV (June 22, 2006) (Tenn. Ct. App.)
12	NR	NR	NR	NR	NR	H fault H closed business that was the family primary source of income & opened a sham business. Child support: $1,366/mo. 2 children: minors	NR	Rehabilitative: $500 x 36/mos. Atty. Fees	Hewson v. Hewson, No. M2002-02785-COA-R3-CV (Mar. 31, 2004), 2004 WL 725334 (Tenn. Ct. App.)

12	NR	NR	NR	$200,000 in net assets	H-Associates Degree W-Two Bachelors Degrees	H-awarded $67,165 in marital assets W-awarded $131,325 in marital assets 3 minor children	NR	$500 rehab. for 3 yrs. & $3,206 in atty. fees	Woods v. Woods, No. 2005 WL 1651787 (Tenn. Ct. App.) (July 12, 2005)
12	H-34 W-32	$1,152 to $1,440	$3,700	NR	H-Engineering Degree W-Associates Degree	One minor child	NR	$415/mo. for 5 yrs. rehabilitative alimony	Owens v. Owens, No. 2005 WL 123438 (Tenn. Ct. App.) (January 21, 2005)
12	H-36 W-36	$0.00/mo.	$5,358/mo.	NR	H-G.E.D. W-Dropped out of high school	Wife testified that she intended to obtain a surgical technician's degree Two minor children	W suffered from a thyroid condition	$350 for 30 mos. in rehabilitative alimony	Tidwell v. Tidwell, No. M2015-00376-COA-R3-CV (Tenn. Ct. App. Feb. 2, 2016.)
12	NR	$1,167	$5,000	NR	H-HS Diploma W-HS Diploma	2 minor children	NR	Rehabilitative alimony remanded to trial court	Spurgeon v. Spurgeon, No. 2005 WL 13900067 (Tenn. Ct. App. June 13, 2005)
12	NR	$2,400 presumed	$5,633	Bankrupt	W-Dog groomer	1 minor child	Degenerative disk disease, Fibromyalgia	$1,800 for 30 mos. rehabilitative, $10,851 atty. fees	Hughes v. Hughes, No. M2007-02216-COA-R3-CV (Tenn. App. 2008)
12	NR	$0	$6,416	NR	H-advanced degree W-MBA	H fault	Lyme disease	$1,200/mo. *in futuro* + 36 mo. COBRA + $5,000 *in solido*	Neamtu v. Neamtu, No. M2008-00160-COA-R3-CV (January 21, 2009)
12	H-62 W-52	$1,333	$5,127	Substantial separate & marital	NR	TCA §36-4-129	NR	$1,500/mo. *in futuro* + $100,000 atty. fees	Hankins v. Hankins, No. W2009-00240-COA-R3-CV (March 26, 2010)
12	NR	NR	NR	NR	NR	H's cruel & inhuman treatment; adultery; dismissed H counter-complaint for divorce	W had suffered traumatic brain injury in an accident; not capable of employment or rehabilitation	W awarded $1,250/mo. alimony *in futuro*	Longanacre v. Longanacre, No. M2012-00161-COA-R3-CV (January 16, 2013) **(Legal separation)**

12	H- W-57	$0/mo.	$38,123/mo. *Primary breadwinner during the marriage*	W's mo. exp. $8,014/mo.	H-emerg room physician	-H only at fault (adultery & IMC) -TC granted Default Judgment (affirmed after H appealed)	W- medical disability → unable to maintain employment	$6,500/mo. *in futuro* + $100,000 *in solido* to W	Wise v. Bercu, No. M2017-01277-COA-R3-CV, 2019 Tenn. App. LEXIS 479, at *1 (Ct. App. Sep. 30, 2019).
12	NR	$1,019	Ranged from $3,222-$11,072; Currently $6,250/mo. or restate this figure as per annum	NR	H–Bachelor's Degree W-GED	H's inappropriate marital conduct	NR	$1,200 rehabilitative for 5 yrs. + $10,000 *in solido* toward atty. fees.	Howell v. Howell, No. M2013-02260-COA-R3-CV (Tenn. App. 2014)
12	H-41 W-37	NR	$9,332.12/mo.	NR	W- Bachelor's degree in marketing	W-awarded more assets than H, including the unencumbered marital home; moderate expenses of $1,477.00/mo.	W- able bodied	$1,000/mo. for 6 mo. then $500/mo. for 6 more mo. Transitional	April H. v. Scott H., No. M2018-00759-COA-R3-CV (Tenn. Ct. App. May 6, 2019.)
11	H-39 W-57	$454	$6,172	NR	H-Helicopter pilot W-RN	(2) (3) (4) (5) (6) (7) (11)	$432 mo. Drugs	$9,318 *in solido* $2,000 x 36 mos. Rehabilitative	Jones v. Jones, No. M2004-02687-COA-R3-CV (March 8, 2006) (Tenn. Ct. App.)
11	H-37 W-52	NR	NR	NR	H-optometrist W-nurse school, for master degree	H owned his business, embezzled money for own personal use. H adultery No children	NR	Arrearage: $1,000/mo. X 12.5/mos. *in solido*: $416.67/mo. X 120/mos. *in solido*: $416.25/mo. X 12/mos. Transitional: $1,388.89/mo. X 36/mos Atty. Fees *in solido*: $644.33 x 60/mos. Or until paid in full garnishment wages possibility.	Halkiades v. Halkiades, No. W2004-00226-COA-R3-CV (Dec. 29, 2004), 2004 WL 3021092 (Tenn. Ct. App.)
11	NR	$600	$13,416	NR	H-Pilot W-HS	Children-3 (no ages) Child support $2,4000 mo.	STD	$4,000 - 24 mos. $2,700 - 24 mos. $1,000 - 60 mos. Transitional alimony	Barrentine v. Barrentine, No. E2005-02082-COA-R3-CV (September 13, 2006) (Tenn. Ct. App.)

11	NR	NR	NR	Lavish lifestyle	H-BS W-MS	home only asset H lived off trust fund 2 children	NR	$360,000 *in solido*, $1,500 for 36 mos. transitional	Atkins v. Motycka, No. M2007-02260-COA-R3-CV (Tenn. App. 2008)
11	NR	NR	$5,000	Above Avg.	NR	1 Child: minor Child support: $750/mo. Except in Jun. $550/mo. and Jul. $375/mo.	NR	*in futuro*: $500 x 120 mos.	Hoback v. Hoback, No. M2001-01913-COA-R3-CV (Apr. 5, 2004), 2004 WL 746440 (Tenn. Ct. App.)
11	NR	$0	$5,576	NR	NR	H-adultery W-incapable of work - not worked since 1996 One minor child - child support of $854 W receives sporadic payments of $397 alimony/mo. from previous marriage	Fibromyalgia, pain, depression	$500/mo. transitional alimony for 6 yrs. + atty. fees of $2,500 + health insurance	Ohme v. Ohme, IV, No. 2005 WL 195082 (Tenn. Ct. App. January 28, 2005)
11	NR	$1,612	$5,600 (net)	NR	NR	NR	NR	$330/mo. for 60 mos. + $8,500 atty. fees + costs	Brock v. Brock, 2011 Tenn. App. LEXIS 436
11	H-41 W-39	$0	$11,666	Reasonable standard of living based upon H's income Marital Estate $278,749	H-Masters W-Masters in Computer Science	11 year arranged marriage. H was abusive. Both parties from India. H at fault for dissipating marital assets and engaging in inappropriate conduct by controlling and oppressing W.	H dissipated $73,010.00 in marital assets. H's conduct during proceedings was oppressive to wife and unnecessarily increased the expense of litigation. H's degrading treatment of wife has hindered her ability to reenter the workforce	$1,000/mo. *in futuro* in addition to 84 months of rehabilitative alimony at $1,500/mo. and $4,200 in alimony *in solido*	Singla v. Singla, 2018 Tenn. App. LEXIS 681, 2018 WL 6192232
11	H-68 W-66	$1,327 in retirement/ SS	$4,666/mo.	Marital estate $870,000	H-HS W-HS + 2 yrs. college	Both parties' fault	H-Heart condition W-Nothing to prevent her from working.	$2,000/mo. transitional for 14 mos.	Ogles v. Ogles, M2013-02215-COA-R3-CV (January 7, 2015)

10	H-51 W-57	NR	NR	NR	H- HS diploma or GED (H worked up until his inherit) W-HS diploma or GED (W too sick to maintain empl)	-H only @ fault (IMC & abandonment)	H & W- sim. Mental cond. H & W-phy. condit., but W-poor health -no minor children -H rec. inherit: $702,653 -When fully-employed both parties had a subst. earning power	*in solido*: $30k + atty's fees: $30k to W	Howell v. Howell, No. W2019-00061-COA-R3-CV, 2019 Tenn. App. LEXIS 554 (Ct. App. Nov. 13, 2019).
10	H-72 W-67	$922 ($645 after divorce)	$3,900		H-unemployed throughout the marriage; prior employment = railroad W-attended graduate school studying English, creative writing & French literature	H-$952,028 in assets W-$42,000 in assets H- $800 surplus of expenses W-$1,221 deficit in expenses	H-disabled as of DOM (psoriatic arthritis, a bad back, hard of hearing & neuropathy in his extremities after back surgery) W- good health	$100,000 of alimony *in solido* from H's separate property Attorney's fees	Bounds v. Bounds, No. E2017-02366-COA-R3-CV, 2018 Tenn. App. LEXIS 524 (Ct. App. Sep. 6, 2018).
10	NR	NR	$900 pension	$600,000+ marital property	H-HS W-GED	H claimed partial disability	NR	$0	Bilyeu vs. Bilyeu, No. 2005 WL 3190338 (Tenn. Ct. App. November 28, 2005)
10	NR	$1,600	$3,131: $662 SS $2,172 VA $297 Marine child care	NR	W-9th grade educ.	H-disabled W-awarded child support of $755/mo.	NR	$400/mo. for 60 mos. rehab. alimony	Troglen v. Troglen, No. 2005 WL 990567 (Tenn. Ct. App. April 28, 2005)
10	NR	$0	$9,500	$1.7 mil. gross income from sales +$5 mil. from stock trading	H-College degree W-College degree	H -dissipated assets of $59,038 W-never worked outside home except some modeling before children were born 4 minor children	NR	$456,351 alimony *in solido* + atty. fees	Robinson v. Robinson, No. 2005 WL 1105188 (Tenn. Ct. App. May 9, 2005)
10	H-44 W-36	NR	$3,500	NR	H-Truck driver	$400,000 marital estate Children- 3 yr. old twin boys Child support: $822/mo.	M.S. & Fibromyalgia Disabled	$3,500/mo. *in futuro* Medical premiums for 30 mos. $10,000 *in solido* (alimony arrearage) Atty. fees	Fox v. Fox, No. M2004-02616-COA-R3-CV (September 1, 2006) (Tenn. Ct. App.)

10	H-46 W-44	$0	$4,683	NR	W-3 yr. College	H-4th marriage W-2nd marriage	Terminal brain cancer	$1,821/mo. *in futuro*	Price v. Price, No. M2005-02704-COA-R3-CV. (Tenn. App. May 29, 2007)
10	NR	NR	NR	NR	NR	1 child 7 yrs. old Child support: $979/mo. Dysfunctional Family of 2006 Award	NR	Remanded to determine H gross income	Radebaugh v. Radebaugh, No. M2005-02727-COA-R3-CV (October 26, 2006) (Tenn. Ct. App.)
10	H-50 W-50	$1,100	$2,333	Bankrupt	H-NR W-BS	2 children	NR	$200/mo. *in futuro*	Clayton v. Clayton, No. W2007-01079-COA-R3-CV (Tenn. App., 2008)
10	NR	NR	$25,000	NR	NR	W 2nd marriage w/2 children 2 children this marriage	None	$3500 x 12 mos. + $3000 x 12 mos. + $2000 x 48 mos. + $24,500 atty. fees	Audiffred v. Wertz, No. M2006-01877-COA-R3-CV (Tenn. App. July 19, 2007)
10	H-37 W-33	NR	$9,065/mo.	NR	H-BS W-BA	TCA §36-4-129	NR	$0; W's atty. fees $26,612 to be paid from marital funds	Irvin v. Irvin, M2011-02424-COA-R3-CV (November 30, 2012)
10	W-56	$447/mo. after tax & health insurance	H not credible; H was self-employed with apparent substantial income	Parties had lived in 6,000 sq. ft. home H had bought W a new vehicle for her birthday	W–HS	H's adultery	NR	W awarded $3,156 alimony *in futuro*	Dodd v. Dodd, M2012-00153-COA-R3-CV (January 9, 2013)
9.5	H-39 W-32	$4,042	$3,412	NR	H-director of golf club W-BS	W adultery Child support Children: 1,4	NR	NR	Craig v. Craig, No. E2003-02479-COA-R3-CV (Aug. 26, 2004), 2004 WL 1906448 (Tenn. Ct. App.)
9	NR	NR	NR	NR	NR	NR	NR	$10,000 in attorney fees payable at $400/mo.	Rummage v. Rummage, No. M2016-02356-COA-R3-CV (April 10, 2018)

9	W-29 H-NR	$0	$3,060	NR	H-self employed contractor for Comcast W-"obtained an education and worked in a dental office" prior to birth of the parties' son	NR	W was able bodied and had only been out of the work for a couple of years. W's financial problems resulted primarily from W's refusal to get a job.	$0	Vermilyea v. Vermilyea, 2018 Tenn. App. LEXIS 236, 2018 WL 2041559
9	NR	NR	NR	NR	Both previously held steady jobs and were trained in the field of information technology H- left IT job in May 2015 to move to Washington State to work for his brother-in-law's marijuana business	W's Counter-Complaint Granted, H's Complaint for Divorce Dismissed	W- disabled with EDS (disorder of connective tissue causing bewildering array of symptoms) H- Ct. found that H had dissipated marital assets by moving to Washington State to work for his brother-in-law's marijuana business	$68,250 *in solido*; $2,000/mo. for two years in transitional alilomy (subject to change if or when W's appeal for disability benefits is decided by the Social Security administration)	Carter v. Browne, 2019 Tenn. App. LEXIS 63, 2019 WL 424201
9	NR	NR	$52,000	NR	H-cardiologist, own practice	1 minor child child support: $6,200/mo. $14,486/mo. College edu. fund	NR	Rehabilitative: $5,500/mo. X 84/mos. *in solido*: $400,000	Cunningham v. Cunningham, No. W2002-02296-COA-R3-CV (Jan. 9, 2004), 2004 WL 57088 (Tenn. Ct. App.)
9	H-60 W-42	$70/mo.	$4,390/mo.	"essentially no marital estate"	H-did not graduate from HS W-HS	H committed domestic violence against W & violated the Court's Order of Protection	W spoke very little English W suffered from chronic headaches & back pain as a result of H's abuse	$1,500/mo. *in futuro*	Acosta v. Acosta, No. E2015-00215-COA-R3-CV (Tenn. Ct. App. Apr. 26, 2016.)

9	NR	NR	NR	NR	NR	H-fault	Disabled	$850/mo. *in futuro* Atty. Fees: remanded for amt. To Trial Ct.	Davis v. Davis, No. 138 S.W. 3d 886, (October 28, 2003)
9	H-NR W-42	$1,438	$2,324	NR	NR	NR	Thoracic Outlet Syndrome & other major	$300/mo. *in futuro* + atty. fees	Dichristina v. Dichristina, No. M2006-00025-COA-R3-CV (Tenn. App. May 11, 2007)
9	NR	$2,080	$2,600	NR	H-Masters in Computer Science W-Bachelors Degree in Medical Technologist	One minor child Child support to W	NR	$0	Suzan Darvarmanesh v. Mahyar Gharacholou, No. 2005 WL 1684050 (Tenn. Ct. App. July 19, 2005)
9	NR	$0.00	$16,409.17	Traveled often	H-College degree; helicopter pilot W-High school	W quit job to move to Europe with Husband upon engagement	No children; H guilty of adultery	$2,500/mo. rehabilitative alimony for 3 years; $20,000.00 in attorneys' fees	Henson v. Henson, No. M2016-01661-COA-R3-CV (Tenn. Ct. App. Mar. 21, 2017).
9	H-63 W-64	$700	NR	NR	NR	Both	both significant problems	$1,000/mo. *in futuro* + $10,000 *in solido*	Hayes v. Hayes, No. M2008-02007-COA-R3-CV (June 29, 2009)
9	W-54	NR	NR	NR	NR	TCA §36-4-129	W physical & major mental issues	$2,900/mo. for 30 mos.; $3,100/mo. thereafter	Jackman v. Jackman, 2011 Tenn. App. LEXIS 571
9	NR	$1,916	$11,083	NR	Both-HS	W adultery	NR	$500/mo. for 12 mos. + $5,000 *in solido* atty. fees for an appeal	Morris v. Morris, II, 2011 Tenn. App. LEXIS 50
9	NR	$16,990 + investment inc. to be calculated on remand	$6,250/mo. (earning capacity); $1,487/mo. actual	High – exceeded their means	Both have MBAs	NR	No debilitating conditions	W paid $27,000 to reimburse children's 529 accounts for money taken by H	Rogin v. Rogin, W2012-01983-COA-R3-CV (July 10, 2013)
9	NR	$3,667	H unemployed for 3 yrs.; previously earned $6,500	NR	H–HS W–Masters in environmental engineering	TCA §36-4-129	NR	None	Jacobsen v Jacobsen, M2012-01845-COA-R3-CV (April 5, 2013)
8	H-49 W-36	NR	$12,500	High	H-MD W-MS	NR	ADHD, Tourettes Syndrome, Chronic Fatigue	$1,200 x 12 mos. rehabilitative	Walker v. Walker, No. M2006-00071-COA-R3-CV (Tenn. App. March 22, 2007)

8	NR	$1,666	$10,166	Negligible	W-HS	Stipulated both	Unstated	$1,540/mo. transitional + $6,755 *in solido*	Douglas v. Douglas, No. M2008-00219-COA-R3-CV (January 2, 2009)
8	NR	$4,500	> $12,500	Marital estate range of $500,000	Both-College	Unstated	Unstated	$2,500/mo. for 30 mos. transitional + atty. fees of $24,000	Montgomery v. Silberman, No. M2009-00853-COA-R3-CV (November 24, 2009)
8	H-53	$6,000-6,666.	$51,583	Very high	H-Masters W-Bachelors	H inappropriate conduct	W good	$6,600/mo. transitional for 72 mos. + $10,000 atty. fees	Ghorashi-Bajestani v. Bajestani, No. E2009-01585-COA-R3-CV (August 24, 2010)
8	NR	$3,083	$6,650	Both had lived beyond their means but had taken steps to live economically	NR	Divorce granted to W based on H fault (adultery)	NR	Transitional alimony to W of $1,000/mo. for 36 mos.	Russell v. Russell, M2012-02156-COA-R3-CV (November 27, 2013)
7	NR	$5,833	$9,688	NR	W-MBA H-HS	Atty. fees only	NR	Atty. fees remanded	Edenfield vs. Edenfield, No. 2005 WL 2860289 (Tenn. Ct. App. October 31, 2005)
7	H-42 W-41	$584	$5,417	NR	H-Lowe's contractor	W marital assets $248,368	3 spinal injuries, inability to perform many every day task.	*in solido*: $350/mo. X 24/mos. 400/mo. X 24/mos. $500/mo. X 24/mos.	Cunningham v. Cunningham, No. M2002-01659-COA-R3-CV (Dec. 22, 2003), 2003 WL 22994291, (Tenn. Ct. App.)
7	NR	$1,200	$15,000	Bankrupt	H-MD W-Nurse	H-sex addict W-2nd marriage 1 child	NR	$2,000 for 48 mos. transitional, $28,000 atty. fees	Fulford v. Fulford, No. M2006-02625-COA-R3-CV (Tenn. App., 2008)
7	NR	$0	$10,033	$111,000 + marital property	NR	Child Support - $2,744	NR	$2,377 for 36 mos. rehabilitative alimony $30,000 in atty. fees	Norman vs. Norman, No. 2005 WL 2860274 (Tenn. Ct. App. October 31, 2005)
7	NR	$0	$6,667	NR	H-Flight attendant W-Flight attendant	Children: 6, 5, 2 Child support $1,900/mo.	NR	Transitional $2,500 - 12 mos. $1,500 - 12 mos. $1,000 - 24 mos. COBRA - 36 mos.	Simmons v. Simmons, No. M2005-00348-COA-R3-CV (January 31, 2006) (Tenn. Ct. App.)
7	NR	$1,200 (net)	$2,600 (net)	NR	H-technical W-meager	H adultery	NR	$200/mo. for 3 yrs. rehab + $2,000 atty. fees	Gentry v. Gentry, No. E2010-00943-COA-R3-CV (December 28, 2010)
7	NR	$0	$5,214	NR	NR	Modification	H-NR W-still unable to work	$1,331/mo. *in futuro*	Price v. Price, No. M2009—01787-COA-R3-CV (December 2, 2010)

7	H-NR W-33	$400	$4,462.50	NR	H-College Degree W-HS + some college	H's inappropriate martial conduct	NR	$500/mo. transitional alimony for 36 mos. + $2,500 *in solido* toward atty. fees.	Hayes v. Hayes, M2014-00237-COA-R3-CV (Mar. 26, 2015)
6-7	H – NR W – 25	$0	$9,800.00	NR	H-Software engineer W-nanny for 2 months; taking classes in computer design and front-end programming	H's inappropriate marital conduct; Wife PRP for two children, ages 2 and 3 Child support: $1,782.00 W received 58% of marital estate H greater earning potential	NR	Rehabilitative awarded to Wife $4,000.00/mo. for four years *In solido*: $7,000.00 in attorney fees	Brown v. Brown, No. E2017-01629-COA-R3-CB (August 23, 2018)
6.67	H-61 W-59	$15/hr. @ time of trial W prev. making sig. more from bus, but sold relying on H's rep. of their future	-Recently retired voluntarily -Living off of investments & retirement -knew of H's intent to retire prior to DOM	Spent extravagantly during the marriage	H-college degree W-HS diploma	-H more @ fault than W (3 mo. plan to secretly leave W) -H had $140k more in sep. assets	-alimony award approp. counter the impact of the sale of the wife's bus.	*in solido* +atty's fees to W	Stearns-Smith v. Smith, No. M2017-01902-COA-R3-CV, 2019 Tenn. App. LEXIS 372 (Ct. App. July 31, 2019).
6	NR	NR	NR	NR	NR	Incomplete transcript & record 2 minor children	NR	$1,500 x 36 mos. rehabilitative	Schuerman v. Schuerman, No. M2007-00173-COA-R3-CV (Tenn. App. October 22, 2007)
6	NR	$2,667	$20,833	NR	H-Optometrist W-Dir. of Continuing Edu.	H adultery Counseling Both parties married before. 1 child Child support: $1,000/mo.	NR	*in futuro*: $1,000/mo.	Bacigalupo v. Bacigalupo, No. W2003-01578-COA-R3-CV (Oct. 4, 2004), 2004 WL 2280409 (Tenn. Ct. App.)
6	H-35 W-34	$1,906	$3,167	NR	H-Food City W-Receptionist	H disabled No children	NR	Transitional (amount NR)	Bunch v. Bunch, No. E2007-01475-COA-R3-CV (Tenn. App., 2008)
5	H-55 W-52	$548	$16,000	NR	NR	H 5th marriage	Rheumatoid Arthritis & Osteoarthritis Disabled	$3,000/mo. *in futuro*	Crocker v. Crocker, No. W2006-00353-COA-R3-CV (December 11, 2006) (Tenn. Ct. App.)

5	W-30	$2,734	$3,293	Modest	NR	$288,000 tort judgment 1 child	Herpes by H	$0	Cardella v. Cardella, No. M2007-01522-COA-R3-CV (Tenn. App., 2008)
5	H-44 W-49	$3,000	$7,910	NR	H-Bachelors Degree W-Some college	W awarded $130,000 in marital assets	NR	$1,000 rehab. for 3 yrs.	Kwasnik v. Kwasnik, No. 2005 WL 1596713 (Tenn. Ct. App. July 8, 2005)
5	H-45 W-36	$0	$10,649+ bonuses	W unable to achieve the standard during the marriage W had no command of the language	H-NR W-HS	prenuptial agreement, economic disadvantage 3 minor children child support	NR	Atty. fees $22,180	Burnett v. Burnett, No. W2007-00038-COA-R3-CV (Tenn. App., 2008)
5	NR	NR	NR	NR	H-BS W-BS	Prenuptial 1 minor child	NR	$1,000 for 36 mos. transitional, $20,000 *in solido*, $75,000 atty. fees	Solima v. Solima, No. M2006-01987-COA-R3-CV (Tenn. App., 2008)
5	NR	NR	NR	NR	NR	W-used child support from previous relationship to help w/family 2 children: both from previous relationships	NR	Atty. Fees: $3,410	Bates v. Bates, No. M2002-02037-COA-R3-CV (Sept. 16, 2003), 2003 WL 22171555 (Tenn. Ct. App.)
5	H-52 W-48	$2,016-$3,416	$8,036	Unstated	Unstated	Unstated	Unstated	$750/mo. for 12 mos. Transitional + atty. fees	Whitley v. Whitley, No. E2008-00977-COA-R3-CV (July 28, 2009)
5	H-46 W-41	$4,166 (capacity)	$7,250	Marital estate of $205,667	H-assoc. Degree W-masters	Stipulated both	Both had some issues	None	Rogers v. Rogers, No. E2008-00258-COA-R3-CV (July 30, 2009)
5	H-43 W-25	$2,280 SSD	$7,500	NR	W–graduated from nursing school	TCA §36-4-129	W–depression, bi-polar, PTSD, borderline personality disorder 10 hospitalizations, 2 suicide attempts SSD	W received $12,000 toward atty. fees as alimony *in solido* + COBRA coverage for one yr.	Belardo v. Belardo, M2012-02598-COA-R3-CV (November 1, 2013)

5	H-33 W-36	$416.67	$10,833	NR	NR	Divorce on stipulated grounds pursuant to TCA §26-4-129 child with special needs requiring in-home care.	NR	$1,000 *in futuro* + $10,500 *in solido* toward atty. fees.	Yocum v. Yocum, E2015-00086-COA-R3-CV (December 15, 2015)
4	NR	NR	$8,340.74 (gross)	Comfortable standard of living	W inferior ability to acquire assets and income W rec. cs from prior marriage W unable to work due to PTSD, stutter	W granted divorce against H on gnds of IMC H physically abused W resulting in emot. & phys. Inj. More likely than not caused PTSD	Premarital home transmuted to marital prop W contributed to the marriage by putting her monies into the jt bnk accnt – transf. her premarital alarm system, majority of the lawn upkeep, house cleaning, upkeep, and cooking.	H pay mortgage and utility payments in the marital home while W resided there until sold as transitional alimony CoA remanded for trial court to determine amt of atty fees to be awarded to W	Hunt-Carden v. Carden, No. E2018-00175-COA-R3-CV, 2020 Tenn. App. LEXIS 91 (Ct. App. Mar. 3, 2020).
4	H-53 W-32	NR	NR	NR	W-Physician	No children W c/n obtain medical license in U.S.	NR	$0	Kesterson v. Kesterson, No. W2004-02815-COA-R3-CV (January 4, 2006) (Tenn. Ct. App.)
4	H–70 W–58	$1,700 in pension	NR–but has pension or retirement income	NR–but each has substantial separate assets	Discounted as both retired	NR	Both appear healthy	None	Morris v. Morris, E2013-02581-COA-R3-CV (Tenn. App. 2014)
3.5	NR	NR	$7,916.66 + bonus	NR	NR	H adultery Children: 1 minor	NR	Remanded for alimony & atty. fees.	Miller v. Miller, No. W2003-00851-COA-R3-CV (Jun. 14, 2004), 2004 WL 1334516 (Tenn. Ct. App.)
3	NR	$1,250-$1,750/mo. $1,780 /mo. in support from previous marriage	$17,500	NR	H-Mechanical engineer W-HS	W had a small estate at the time of the marriage	H was awarded his separate property	$1,000/mo. transitional alimony for 24 mos.	Moon v. Moon, No. E2015-01470-COA-R3-CV (Tenn. Ct. App. Apr. 21, 2016.)

3	NR	$2,700	$6,000	NR	H-Stock Broker	H dissipated estate H & W invested together prior to marriage $0 estate	NR	$51,500 Alimony *in solido*	Broadbent v. Broadbent, No. M2003-00583-COA-R11-CV (October 19, 2006) (Tenn. Ct. App.)
3	H-37 W-38	$2,000	$7,000	NR	Both college grads	TCA §36-4-129	NR	$1,000/mo. transitional for 12 mos.	James v James, M2009-02332-COA-R3-CV (October 25, 2010)
3	H-30 W-25	$3,000	$5,700	Substantial purchases	H-BS W-BA (Law Student)	H's inappropriate marital conduct	NR	Transitional of $500/mo. + $15,000 atty. fees + fees on appeal	Tippens-Florea v. Florea, M2011-00408-COA-R3-01 (May 31, 2012)
2	H-43 W-26	$1,430	$7,200	Net assets over $750,000	NR	One minor child	NR	Atty. fees	Chaffin v. Ellis, No. 2005 WL 2043607 (Tenn. Ct. App.) (August 24, 2005)
2	H-63 W-49	$984	$5,500-$6,666	Negligible marital estate	H-masters W-HS	Unstated	Unstated	$54,527 *in solido* + atty. fees	Bird v. Bird, No. E2008-00269-COA-R3-CV (August 27, 2009)
2	H-31 W-23	$0	$2,080 imputed	W on food stamps and help from family	NR	H's inappropriate marital conduct	W awaiting hip surgery	Transitional alimony of $1,350 to be paid over 6 mos.	Barnes v. Barnes, M2011-01824-COA-R3-CV (October 24, 2012)
1.3	NR	NR	NR	NR	H-trash business	W-adultery H-didn't take care perjury of W Child support: $500/mo.	NR	NR	Cummings v. Cummings, No. M2003-00086-COA-R3-CV (Oct. 15, 2004), 2004 WL 2254014 (Tenn. Ct. App.)
1	H-33 W-30	NR	NR	NR	H-worked for BellSouth W-Teacher	NR	NR	$7,918.57 in atty. fees	Broadbent v. Broadbent, No. 2005 WL 2043639 (Tenn. Ct. App. August 24, 2005)
1	NR	Unemp.	$2,200/mo.	NR	H-NR W-2 Masters	TCA §36-4-129	W serious mental issues; delusional	Transitional 4/mo. $2,500	Malmquist v. Malmquist, 2011 Tenn. App. LEXIS 144

220 days	NR	Prior earnings $2,667/mo. ; currently $0	NR	NR	NR	TCA §36-4-129	NR	Transitional $1,700/mo. for 12 mos.; $750/mo for 12 mos.; atty. fees of $8,000 + $2,500 in moving expenses	Gorbet v. Gorbet, W2011-01879-COA-R3-CV (October 11, 2012)
0.6	H-55 W-49	$1,050	$2,017	NR	H-farmer	H fault No children	NR	*in solido*: $2,000	Hicks v. Hicks, No. W2001-02931-COA-R3 CV (Sept. 29, 2003), 2003 WL 22272457 (Tenn. Ct. App.)
NR	NR	$1,500	$26,500	High	H-NR W-BS	Minor children, life style	NR	$5,000/mo. for 96 mos.	Altman v. Altman, No. E2008-00081-COA-R3-CV (Tenn. App. 2008)
NR	H-46 W-47	$1,458	$4,000	NR	H-Advanced Accounting W-HS + some college	Medical problems of W, but no evidence of reduction in earning capacity	No evidence	$833 for 60 mos. rehabilitative	Avaritt v. Avaritt, No. M2007-01804-COA-R3-CV (Tenn. App., 2008)
NR	H-67 W-61	$6,076	$12,083	High	H-JD W-NR	$450,000 estate, W-51%, H-49%, H-$699,000 in separate property	NR	$75,000 *in solido*, $1,500 for 60 mos. $26,500 in atty. fees	Fickle v. Fickle, No. W2007-01509-COA-R3-CV (Tenn. App., 2008)
NR	H-64 W-64	$16,667	$6,834	NR	NR	Pre-nuptial agreement H-3rd marriage W-4th marriage	NR	Atty. fees denied & reversed	Erickson v. Erickson-Mitchell, No. M2006-00895-COA-R3-CV (Tenn. App. May 29, 2007)
NR	NR	$1,517	$1,633	NR	NR	$627/mo. child support	NR	$80/mo. *in futuro*	Kambu v. Katera, No. M2006-01482-COA-R3-CV (Tenn. App. July 25, 2007)
NR	NR	NR	NR	NR	NR	H careless in handling funds	NR	Remanded to Trial Court	Flannary v. Flannary, No. 121 S.W. 3d 647 (December 16, 2003)
NR	NR	NR	NR	NR	NR	H is disabled	NR	$11,225 transitional	Sonya Renee Vaden Ausley v. Dempsey Renea Ausley, Jr., No. 2005 WL 2205922 (Tenn. Ct. App. September 8, 2005)

NR	NR	NR	NR	NR	H-JD, Owns law practice W-HS + 3 yrs. college	H-earning capacity superior to hers. W-property decreased in value	NR	Atty. Fees: $5,250	Bell v. Bell, No. E2002-02762-COA-R3-CV (Nov. 29, 2004), 2004 WL 2709199 (Tenn. Ct. App.)
NR	W-44	NR	NR	NR	H-BS, teacher W-HS	H 2nd divorce	Severe mental problems, psychiatrist treatment, physical therapy problems: shoulders & knees	Rehabilitative: $750/mo. X 48 mos. Atty. Fees: $13,000	Sweezy v. Sweezy, No. E2003-00970-R3-CV (Jun. 11, 2004), 2004 WL 1299905 (Tenn. Ct. App.)
NR	NR	NR	$29,167	NR	NR	2 children: minors Child support: $4,000/mo.	NR	NR	Kaplan v. Bugalla, No. M2003-01012-COA-R3-CV (Oct. 6, 2004), 2004 WL 2280409 (Tenn. Ct. App.)
NR	H-52 W-53	$4,167	$25,000	NR	H-HS, fireworks bus. W-Bus. School, St employed	H adultery No children	NR	*in solido*: $1,033,000	Langley v. Langley, No. M2002-02278-COA-R3-CV (Dec. 19, 2003), 2003 WL 22989026 (Tenn. Ct. App.)
NR	NR	$4,167	NR	NR	NR	H-$967,577 (58%) W-$687,908 (42%) $33,377 additional property division	Declining health	$0	Anderson v. Anderson, No. E2005-02110-COA-R3-CV (September 5, 2006) (Tenn. Ct. App.)
NR	NR	$2,500	$13,226	NR	NR	NR	NR	$78,000 *in solido* $11,708 Atty. fees	Schuett v. Schuett, No. W2005-02482-COA-R3-CV (December 4, 2006) (Tenn. Ct. App.)
NR	H-63 W-56	$0	$25,000	Marital estate of $421,000	H-JD W-HS	Unstated	Unstated	3 yr. at $6,000/mo. + 4 yr. at $4,000/mo. + $1,500/mo. *in futuro*	Watson v. Watson, No. W2007-02735-COA-R3-CV (May 27, 2009)
NR	NR	$2,728	NR	NR	NR	NR	W severely disabled	$400/mo. *in futuro* + $1,500 in fees	Miller v. Miller, 2011 Tenn. App. LEXIS 212

NR	NR	NR	NR – H reported losing $10,000 per month from online consulting company that went under after entry of final decree; bank statements showed assets	NR	H-internal medicine physician W-NR	Modification H filed to reduce alimony; W counter-claimed to increase alimony Neither party met burden to show substantial and material change	H – Type 1 diabetes diagnosed years after entry of final decree Working more, but less efficient at work due to diabetes	$1,000.00/mo. Alimony i*n futuro* Court determined H was still capable of generating income sufficient to continue to pay this amount	Friesen v. Friesen, No. E2017-00775-COA-R3-CV (February 20, 2018)
NR	NR	NR	NR	NR	NR	H at fault: (adultery & substance, psychological, and physical abuse)	NR	$53,124.86 atty. fees as alimony *in solido* ($22,622.70 from H's equity in the marital residence; balance paid over time, $370/mo.)	Olinger v. Olinger, 585 S.W.3d 919, 2019 Tenn. App. LEXIS 97, 2019 WL 927766.

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