

## **TENNESSEE JUDICIAL CONFERENCE OCTOBER 16, 2014: FAMILY LAW UPDATE**

Attached to this cover page are three documents:

(Volume 1) is a New Law Update for family law covering cases from the summer of 2013 through September 24, 2014. These materials will be discussed at the Judicial Conference on October 16, 2014.

(Volume 2) is a New Law Update for family law covering cases decided in 2013; and

(Volume 3) is a New Law Update for family law covering cases decided in 2009-2012.

In these documents, you will find six years of case summaries, with some overlap between the first and second volumes. Our apologies for the overlap: because this seminar is an annual update, and does not occur on January 1 each year, the only way to give you a full year of cases is to reach back into a part of the prior year. Additionally, you may find cases decided in earlier years by the Court of Appeals that were later addressed by the Tennessee Supreme Court, but those Supreme Court cases are also included in later years.

If you think there is too much material here, you can thank Judge James G. Martin, III of the 21<sup>st</sup> Judicial District. Judge Martin thought it would be helpful for everyone to read as much as he reads. Hopefully 400 pages covering six years are more entertaining than 100 pages covering a single year.

One last thing: some of you will find these materials more helpful if they are delivered electronically, so that searching them will be easier than plodding through the written materials. Electronic versions will be available through the Judicial Conference for download on your own computers.

Thank you. We hope you enjoy the materials and the presentation, where we strive to discuss most of the worthwhile cases and all of the fun ones, and certainly every case where the trial lasts longer than the marriage.



**TENNESSEE JUDICIAL CONFERENCE  
OCTOBER 16, 2014**

**NEW LAW UPDATE: FAMILY LAW CASES  
(Summer 2013 through September 24, 2014)**

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**Family Law Update for the  
Tennessee Judicial Conference  
October 16, 2014**

**Covering Cases from the Summer of 2013 through September 24, 2014**

The cases below are divided into various categories, but it is worthwhile to note that several cases were instructive about a variety of issues. Some contain relatively unique fact patterns and decisions; some are useful in reminding us of common principles. Where appropriate, the cases use extensive language from the decisions themselves. This is not because it is entirely necessary for you, the reader, but because it helps make these materials more useful to the author, and because it is often in the details that the cases display their value.

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## I. Alimony

### 1. Words Matter

*Myrick v. Myrick* (Court of Appeals at Nashville, June 19, 2014). The Court of Appeals summary makes this case sound simple:

The issue presented in this case is whether alimony *in futuro* was properly terminated by the trial court. The parties entered into a marital dissolution agreement, which provided that Husband/Appellee would pay Wife/Appellant alimony *in futuro* until death, remarriage, or “until a third person not the Wife’s child, moves into the Wife’s residence.” The marital dissolution agreement was incorporated, by reference, into the final decree of divorce. Thereafter, Wife’s mother moved into Wife’s home, and Husband filed a motion to terminate his support obligation based upon the occurrence of the suspending condition. The trial court granted Husband’s petition, finding that the parties’ agreement for alimony *in futuro* was contractual in nature and that the unambiguous language mandated cessation of Husband’s support obligation when Wife’s mother moved into Wife’s home. Based upon the provision for attorney’s fees in the parties’ marital dissolution agreement, the trial court also awarded Husband his attorney’s fees and costs. Wife appeals. Discerning no error, we affirm and remand.

*Id.* Of course, like many cases, this was not so simple. Wife contended that the trial court should have applied a rebuttable presumption to the termination of her alimony, consistent with the statute. Husband argued that the alimony language of the Marital Dissolution Agreement was contractual in nature and should be interpreted and enforced like a contract. The Court of Appeals relied on *Honeycutt v. Honeycutt*, 152 S.W.3d 556 (Tenn. Ct. App. 2002), which held that the alimony statutes were not applicable where the parties had agreed in an MDA to terms different from those set out in the statutes:

In this particular case, we find T.C.A. § 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.* citing *Honeycutt*, 152 S.W.3d at 564. As the Court of Appeals concluded:

As in the *Honeycutt* case, here, the parties chose to include, in their MDA, a suspensory condition, i.e., a "condition[ ] precedent that suspend[s] the operation of a contractual promise [in this case, Husband's promise to pay alimony]. . . ." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 862 (2nd ed. 1995). The language used, i.e., "until a third person not the Wife's child, moves into the Wife's residence," is not ambiguous, and the parties' choice to use this language in their agreement binds them to it.

*Id.*

## 2. When Silence Means "Transitional" Not "In Solido"

*Miller v. McFarland* (Court of Appeals at Nashville, May 23, 2014). *Miller* is not a case, it is an alimony treatise. It is highly recommended as a brief but thorough introduction to the various forms of alimony available in Tennessee. At issue was whether the following provision in the parties' Marital Dissolution Agreement resulted in an award of transitional alimony (as the ex-husband claimed) or alimony *in solido* (as the ex-wife claimed and the trial court found):

"Wife is economically disadvantaged as compared to Husband. Husband shall pay Wife alimony at the rate of \$929.00 per month, beginning August 15, 2011. Said alimony shall continue for a period of eight years."

The Court of Appeals quickly discarded the possibility that this was alimony *in futuro* (because it had a definite end date) or rehabilitative alimony (because neither party asserted that it was rehabilitative in nature). The ex-husband desired that the alimony be treated as transitional alimony because the ex-wife had remarried and transitional alimony, by statute, may be modified when the recipient is residing with a third party. The ex-wife desired that the alimony be treated as alimony *in solido* because it would not be subject to modification of any kind based on her remarriage.

Ultimately, after going through a number of other cases in which the trial courts and Courts of Appeals had to determine the kind of alimony agreed upon by the parties because they failed to identify it themselves, the Court of Appeals found that the alimony in this case was transitional, for these reasons: (1) the time period, while long, was within the time period in which other transitional alimony awards had been approved, and was for a definite time and amount; (2) “economic disadvantage” is a consideration by statute in the award of transitional alimony, but not alimony *in solido*; and (3) the legislature has expressed a preference for transitional alimony over alimony *in solido*. Accordingly, the case was remanded to the trial court for a hearing on the appropriate modification of the ex-husband’s alimony obligation.

### 3. ***Gonsewski, We Hardly Knew Ye***

*Fogle v. Fogle* (Court of Appeals at Knoxville, May 22, 2014). *Gonsewski*, for those with long memories, was a Tennessee Supreme Court case decided a long, long time ago, in September 2011. And just as we learn how to pronounce the name of the case, it fades into the distant past. One of the principal lessons of *Gonsewski* was this:

Appellate courts decline to second-guess a trial court's decision absent an abuse of discretion. Robertson, 76 S.W.3d at 343. An abuse of discretion occurs when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice.

*Id.* In *Fogle*, the trial court awarded the wife 48 months of alimony at \$750.00 per month.

The Court of Appeals, faced with a challenge by the wife both as to the amount and duration, found that the trial court had abused its discretion in both areas, and modified the award to give the wife alimony *in futuro* at \$1,000 per month. The Court of Appeals reasoned as follows:

When considering the support factors, a number of the factors weigh in favor of granting a substantial award to Wife. Wife was clearly capable of maintaining minimum wage employment, but she lacked an earning capacity that was comparable to Husband's long-term employment in a stable field. Tenn. Code Ann. § 36-5-121(i)(1). The marriage was of a long duration, namely 32 years. Tenn. Code Ann. § 36-5-121(i)(3). Wife also made substantial contributions to the marriage as a homemaker for the duration of the marriage. Tenn. Code Ann. § 36-5-121(i)(10).

The remaining factors appear equally weighted or inapplicable. Indeed, the Parties did not enjoy an extravagant lifestyle or possess significant assets. However, the record reflects that Wife was economically disadvantaged and in need of support. Wife testified that she was on the verge of losing her apartment, could not adequately feed herself, and that she could not afford to pay for necessary car repairs.

While Husband's education was comparable to Wife's, he had thrived in long-term employment, thereby providing him with the ability to support Wife. Likewise, the record reflects that Wife was incapable of economic rehabilitation and that an award of transitional alimony would have been inappropriate when the record lacked evidence that Wife had the capacity for self-sufficiency. Wife simply lacked the experience and skills necessary to maintain a household without the benefit of long-term support.

With these considerations in mind, we conclude that the trial court abused its discretion in awarding Wife \$700 for a period of 48 months. We hold that Wife was entitled to an award of periodic alimony in the amount of \$1000 per month until her death or remarriage.

Accordingly, we modify the trial court's award of alimony and award Wife periodic alimony in the amount of \$1000 per month. In so concluding, we remind the Parties that awards of alimony in futuro "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)(A); *see also Bowman v. Bowman*, 836 S.W.2d 563, 568 (Tenn. Ct. App. 1991).

*Id.*

*Jirjis v. Jirjis* (Court of Appeals at Nashville, May 1, 2014). From the Court of

Appeals' summary:

The trial court granted a divorce to a husband and wife after a marriage of nineteen years. The court named the husband as the primary residential parent of the parties' children, divided the marital property between the parties, and awarded the wife transitional alimony of \$3,000 per month for five years. The husband argues on appeal that the trial court erred in including his separate property in the marital estate subject to division. The wife argues that the alimony award was insufficient in light of the length of the parties' marriage and the disparity in income between them, and that the court erred in failing to award her attorney's fees.

We agree that husband's separate property should not be included in the marital estate, but that the division of property is still equitable. We hold that the wife is entitled to alimony *in futuro*. We also find that she should be awarded one-half of the attorney's fees she incurred at trial.

*Id.* *Jirjis* is another case, like *Fogle*, that gave a nod to *Gonsewski*, but then proceeded to reverse the reasoning of the trial court. As the Court of Appeals noted, Husband and Wife were both 45 years old, in good health, employed, and the parties had been married for nineteen years. Husband's estimated annual income was \$360,000, while Wife's estimated annual income was \$36,000. The trial court found a significant disparity in their abilities to earn that left Wife at an economic disadvantage. As the Court of Appeals noted,

A trial court abuses its discretion if it applies an incorrect legal standard, reaches an illogical result, resolves an issue based on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice. *Gonsewski*, 350 S.W.3d at 105 (citing *Wright ex rel. Wright*, 337 S.W.3d 166, 176 (Tenn.2011) and *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010)). An appellate court is not to substitute its judgment for that of the trial court where reasonable minds can disagree about the propriety of the trial court's decision. *Jackman v. Jackman*, 373 S.W.3d 535, 541-42 (Tenn. Ct. App. 2011) (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn.1998) and *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)).

*Id.* The Court of Appeals found that the Wife could not be rehabilitated and thus "the trial court failed to apply the correct legal standard to the facts." The Court of Appeals went on to change the amount of the award from \$3,000 per month to \$4,500 per month, and the nature of the award from transitional alimony to alimony *in futuro*. The Court of Appeals also found that the trial court had mischaracterized a separate asset of the Husband as a marital asset, but made no change to the division of assets, and ordered Husband to pay a substantial share of Wife's attorneys' fees.

*Barnes v. Barnes* (Court of Appeals at Nashville, April 10, 2014). This, like *Jirjis*, is a decision by the Court of Appeals which might lead the reader to believe that alimony *in futuro* is now the default alimony award in a divorce where one party makes considerably more than the other party. In *Barnes*, the trial court originally ordered the dentist-Husband to pay alimony *in futuro* of \$6,000 per month to Wife. After considering post-trial motions filed after the Supreme Court decision in *Gonsewski*, the trial court modified its award from *in futuro* to \$4,500 per month rehabilitative alimony for a period of four years. The Court of Appeals reversed, focusing on the inability of the Wife to be rehabilitated (“The basic question, then, is whether Wife can generate enough income to provide a pre-divorce standard of living, or one comparable to Husband's post-divorce standard of living.”) The Court summarized its decision as follows:

We recognize that our role in reviewing an alimony award is to determine whether the trial court applied the correct legal standards and reached a decision that is not clearly unreasonable. *Gonsewski*, 350 S.W.3d at 105-106. We will not second-guess a trial court’s decision absent an abuse of discretion, which occurs “when the trial court causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice.”*Id.*

In this case, however, considering the trial court’s express recognition of the great economic disparity between Husband and Wife, its acknowledgment of Wife’s inability to reach economic equality with Husband or maintain the lifestyle to which the parties were accustomed, the trial court’s fundamental alteration of its award in light of its reading of *Gonsewski*, and considering, to some extent, the trial court’s skewed findings regarding each party’s earning capacity, we find that the trial court abused its discretion in altering its original alimony award and modifying the award to \$4,300 in rehabilitative alimony for four years.

We hereby vacate the trial court's amended order to the extent that it modified the original award, and we reinstate the award of \$6,000 per month in alimony in futuro as per the original divorce decree.

*Id.*

*Russell v. Russell* (Court of Appeals at Nashville, November 27, 2013). Quick summary: trial court decided husband could and should pay three years of alimony at \$1,500 per month. Husband appeals. Court of Appeals reverses, finding that the trial court incorrectly ordered Husband to pay more alimony than he could afford, and reduced the alimony to \$1,000 per month for three years. The Court of Appeals cited *Gonsewski* on several issues, but NOT (not surprisingly) on one of its principal holdings, i.e., that the appellate court should not upset an alimony ruling by a trial court absent an abuse of discretion. Also, there was an interesting discussion about the application of the unclean hands doctrine, brought on by the Husband's refusal to testify about his gambling winnings or losses (he invoked the 5<sup>th</sup> Amendment) and the Court of Appeals' decision that this applied to the grounds for divorce, but was not material to questions about Husband's income.

**3A. Well, Maybe *Gonsewski* is Still Around...**

*Litton v. Litton* (Court of Appeals at Nashville, May 5, 2014). In this 14 year marriage, the trial court awarded Wife no alimony and no reimbursement for medical expenses which she had incurred on behalf of herself and the parties' minor child. The reimbursement issue was made easy by Wife's failure to actually produce bills at trial. The alimony was more of a head-scratcher, in that Wife had only a high school education and had stayed home to care for and educate the parties' minor child for most of the marriage, while the Husband had earned over \$30,000 per year as a police officer, but was earning

substantially less at the time of trial working in a private security position. The Court of Appeals affirmed the trial court, stating as follows with regard to the judicial mandate in the *Gonsewski* case:

“For well over a century, Tennessee law has recognized that trial courts should be accorded wide discretion in determining matters of spousal support.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011) (citing *Robinson v. Robinson*, 26 Tenn. (7 Hum.) 440, 443 (1846)). This broad discretion extends to the determinations of “whether spousal support is needed and, if so, the nature, amount, and duration of the award.” *Id.* (citing *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000)). “[A]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision.” *Id.* (quoting *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998)).

We review an award or denial of spousal support for an abuse of discretion “to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable.” *Id.* (quoting *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006)). The abuse of discretion 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.” *Id.* (quoting *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)).

We must presume the correctness of the trial court’s decision and review the evidence in the light most favorable to the decision. *Id.* (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010)).

*Id.* In this case, the Court of Appeals noted that, while it would have preferred a more thorough analysis of the alimony factors by the trial court, “we are not required to interpret the trial court’s silence with respect to factors that were not particularly weighty as a refusal

or failure to consider those factors.” *K.B.J. v. T.J.*, 359 S.W.3d 608, 613 (Tenn. Ct. App. 2011). In the end, the Court of Appeals, while recognizing the Wife’s need for alimony, accepted the trial court’s determination that the Husband had no ability to pay alimony, and affirmed.

**3B. Maybe, Maybe Not...**

*Willenberg v. Willenberg* (Court of Appeals at Nashville, September 23, 2014). In *Willenberg*, the Court of Appeals cited *Gonsewski* at length in overturning the trial court’s award of alimony *in futuro* to the Wife, holding that the trial court erred in finding that the wife was incapable of rehabilitation. Here, there was no discussion of rehabilitation to a standard of living equivalent to the pre-divorce standard or the standard of living enjoyed by the ex-husband, but rather whether the wife could be rehabilitated to a standard of “self-sufficiency.” As the Court of Appeals stated, quoting *Gonsewski*,

The statutory framework for spousal support reflects a legislative preference favoring short-term spousal support over long-term spousal support, with the aim being to rehabilitate a spouse who is economically disadvantaged relative to the other spouse and achieve self-sufficiency where possible. *See* Tenn. Code Ann § 36-5-121(d)(2)–(3); *Bratton*, 136 S.W.3d at 605; *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003). Thus, there is a statutory bias toward awarding transitional or rehabilitative alimony over alimony in solido or in futuro. While this statutory preference does not entirely displace long-term spousal support, alimony in futuro should be awarded only when the court finds that economic rehabilitation is not feasible and long-term support is necessary. *See Bratton*, 136 S.W.3d at 605; *Robertson*, 76 S.W.3d at 341–42.

And, similarly, quoting *Mayfield*:

Alimony *in futuro*, a form of long-term support, is awarded where an economically disadvantaged spouse cannot achieve self-sufficiency and economic rehabilitation is not feasible. Alimony *in solido*, another form of long-term support, is typically awarded to adjust the distribution of the marital estate; it is generally not modifiable and does not terminate upon death or remarriage. Rehabilitative alimony is short-term support that enables an economically disadvantaged spouse to obtain education or training and become self-reliant following a divorce. Where economic rehabilitation is unnecessary, transitional alimony, which is intended to assist the disadvantaged spouse in transitioning to the status of a single person, may be awarded.

*Id.* The Court of Appeals determined that the Wife had a degree in public management, no physical limitations, loved numbers and had investigated obtaining an accounting certificate from Lipscomb University. “This testimony supports a determination that Wife can be rehabilitated and achieve a higher income in the future, and that the long-term support as ordered by the court may not be necessary.” The Court of Appeals reversed the award of *in futuro* alimony and remanded the case back to the trial court to determine an appropriate amount of rehabilitative support, adding that it needed to consider the cost of further education for the Wife in its new award.

### 3C. Well, Maybe Not..

*Nita v. Nita* (Court of Appeals at Nashville, January 31, 2014). Very quick, since this case caught my eye only because the Court of Appeals found that the trial court should not have characterized the alimony awarded to Wife as “rehabilitative,” but rather “transitional:”

Because the trial court did not award alimony to enable Wife to pursue rehabilitation in the form of education or training, the trial court erred in labeling the award “rehabilitative.” See *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at \*5 (Tenn. Ct. App. Oct. 24, 2012). The alimony award should be considered transitional alimony. The court specified that the award would remain modifiable. See Tenn. Code Ann. § 36-5-121(g)(2)(B).

*Id.* Say what? If *Gonsewski* means anything, one would think it would mean that the trial court has the discretion to determine whether its alimony award should be rehabilitative (which by statute remains subject to modification) or transitional (which by statute *is not* subject to modification except because of death or remarriage or other agreement of the parties). But, here, we have the Court of Appeals changing the alimony to transitional alimony that “would remain modifiable.” Why?

#### 4. Other Modification Cases

*Harkleroad v. Harkleroad* (Court of Appeals at Knoxville, May 10, 2013). In this case, 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.

*Owens v. Owens* (Court of Appeals at Nashville, July 30, 2013). The parties in this case divorced in 2004. 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.* Thus, the Husband, who expected his alimony obligation to end after seven years, found himself on the losing end of a modification proceeding, through no fault of his own.

##### **5. "Cohabitation" Defined**

*Mabee v. Mabee* (Court of Appeals at Nashville, June 27, 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.* 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.

#### **5A. But Tread Carefully...**

*Hickman v. Hickman* (Court of Appeals at Knoxville, February 26, 2014). Okay. We understand the definition of cohabitation. But what if it is not "cohabitation" as defined by *Mabee*? What if it is just a third person living with you and that third person happens to be your adult son who just graduated, or your adult daughter who lives with you in the summer between school sessions? Is *that* third person what the legislature intended when it provided

for a modification of *in futuro* alimony or transitional alimony where a third person lives with the recipient?

Yes, according to *Hickman* (and a good number of older cases it cites):

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.* So, the statute applies. In Ms. Hickman's case, she was ultimately able to show that she needed the alimony and that her financial situation had deteriorated since the entry of the original decree. The Court of Appeals found as follows:

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.

#### **6. Modification of Alimony, or Be Careful What You Ask For...**

*Fields v. Fields* (Court of Appeals at Knoxville, December 27, 2013). In this case, 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 kneecap 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.

#### **6A. "Remember When..."**

*Stewart v. Stewart* (Court of Appeals at Knoxville, September 9, 2014). Although this opinion was not written until September 2014, it was decided in an earlier opinion concerning the same parties. The one paragraph note from the 1999 opinion explains the situation:

"Before concluding, we observe that awards of child support to the four minor children of the parties—which will be converted to alimony as each reaches his or her majority—and of alimony are never final but may be modified from time to time as warranted by changing circumstances."

More than a decade after that opinion, the husband sought to modify his alimony based on changed circumstances. The wife objected, arguing that alimony could not be modified absent her death or remarriage, and the trial court agreed. The Court of Appeals reversed, finding that the alimony was *in futuro* and subject to modification by the Court.

#### **7. The Kitchen Sink and More...**

*Wheeler v. Wheeler* (Court of Appeals at Nashville, April 15, 2014). *Wheeler* is a case that could have fit almost anywhere in these materials, but it is included in this section because the alimony and support issues received substantial attention at trial and on appeal. The Court of Appeals' summary is a good place to start:

Following a 26-year marriage, Wife was granted a divorce, designated the primary residential parent of their children and given sole decision making authority for the minor children's education, health and medical care, and extracurricular activities; Husband was ordered to pay child support, pendente lite support of \$7,000 per month, post-divorce support at the same rate as pendente lite support until the marital residence was sold, transitional alimony of \$3,600 for 48 months commencing upon the sale of the marital residence, and \$25,000 of Wife's attorneys' fees.

The parties' separate and marital assets were classified, and the marital assets and debts were divided. Husband appeals, challenging Wife's designation as the sole decision making authority for the children's educational and extracurricular activities, the amount of Wife's income for purposes of child support, the awards for pendente lite support, the indefinite award of post-divorce support and the additional award of transitional alimony for 48 months. Husband also challenges the classification and division of the marital estate, including holding him liable for one-half of the \$335,000 home equity line of credit debt, most of which was incurred during the pendency of the divorce, and the award of attorneys' fees to Wife.

We have determined that Wife is not entitled to receive post-divorce support of \$7,000 per month in addition to the award of transitional alimony of \$3,600 for a term of 48 months; therefore, we reverse the indefinite post-divorce support award of \$7,000 per month. We also modify the award of transitional alimony of \$3,600 per month, reducing the term from 48 months to 24 months with the term commencing upon the entry of the Final Decree of Divorce. We affirm the trial court in all other respects. As for Wife's request to recover the attorneys' fees she incurred on appeal, we respectfully deny that request.

*Id.*

In deciding the case, the Court of Appeals upheld the trial court's finding that the Wife, who had last held employment outside the home in 2001, was not voluntarily unemployed or underemployed, despite having an MBA and a record of "exceptional success" in the workplace. The Court of Appeals noted that, while "reasonable minds could differ as to whether her failure to pursue employment during the pendency of these proceedings constitutes voluntary underemployment or unemployment; nevertheless, based on the facts in this record, the years Wife has been unemployed, and the ages of the two younger children, who were 13 and 10 years old, respectively, at the time of trial, we are unable to conclude that the evidence preponderates against a finding that Wife is not voluntarily underemployed or unemployed."

On the issue of alimony and support, the Court of Appeals found, citing *Tait v. Tait*, 207 S.W.3d 270 (Tenn. Ct. App. 2006), that the trial court erred in ordering the temporary support of \$7,000 per month to continue until the sale of the house, based on the relative financial positions of the parties, and the court terminated that obligation as of the date of the divorce. The Court of Appeals also modified the term of the transitional alimony award from 48 months to 24 months.

## II. Child Support

### 1. Willful Underemployment- Not!

*Benedict v. Benedict* (Court of Appeals at Knoxville, May 27, 2014). This is an interesting case with a lot of issues, but the Court of Appeals reversal of the trial court's finding that the father was willfully underemployed for the purposes of setting child support deserves attention:

From our review of the law and facts of this case, several things seem evident. A finding of underemployment is fact-intensive. Also, the burden is on the support recipient, here Wife, to prove underemployment. It is not sufficient to point out that Husband once earned a great deal more money than he does currently. There must be some evidence in the record to show that Husband is capable of earning more and is refraining from acquiring this better-paying work to reduce or terminate his income.

The record reveals that Husband's earnings took a major hit over the course of the decade after his divorce. Husband went from earning \$350,000 per year to \$75,000 per year at Adams. In the interim, his different enterprises eventually floundered. The evidence in the record on appeal does not support a finding that Husband intentionally torpedoed his career prospects. Rather, it appears Husband has tried and failed to reestablish some measure of his previous lifestyle.

Husband filed for bankruptcy a few years after the divorce, as well. In its order, the Trial Court questioned the credibility of Husband's accounting of his income for the relevant years. However, the Trial Court did not identify any discrete facts which would tend to support a finding of underemployment resulting in Husband's income being set at anything greater than the \$75,000 he earned at Adams.

For example, the Trial Court states that “simply because his business ventures had one or two bad years after many years of good years, does not convince the court that [Husband] will be unable to earn larger amounts in the future.” The proof is overwhelming that Husband’s businesses did not just have one or two bad years, but instead eventually did so poorly that Husband closed them.

The Trial Court also expressed incredulity at Husband’s assertions. For example, the Trial Court stated that “[i]t is difficult to believe that a business that grossed \$454,258.00 made only a profit of \$78.00.” We found nothing in the record to support this belief of the Trial Court that a business grossing over \$450,000 a year must make a profit or that the more the business grosses, the greater its profit will be. This is an assumption unsupported by any facts in the record, particularly as applies to Husband’s now failed businesses.

In our view, the record does not suffice to show willful underemployment by Husband. It should be noted that the Trial Court did not hear Husband testify. The Trial Court relied on the record of the testimony given before the Master, and we, therefore, are not required to defer to the Trial Court’s credibility determinations as to Husband.

*Id. Benedict* is just one of many cases from the Court of Appeals in recent years to overturn trial court findings that one party or the other was willfully underemployed based on evidence of what a party had earned and was now earning. It is no longer enough (and hasn’t been for several years) to prove willful underemployment by proving a substantial drop in income.

## **2. Private School, Attorneys’ Fees, and More...**

*Kraus v. Thomas* (Court of Appeals at Nashville, June 7, 2013). While this case involved several issues, including affirming a property division giving Wife 60% of the marital estate, affirming a parenting plan over the objection of the father, and reversing an award of \$50,000 attorneys’ fees to mother, one of the more interesting decisions was to reverse the trial court’s order that father, who earned approximately \$60,000 gross income per

year, be responsible for approximately \$17,000 per year in private school expenses, plus child support and other expenses. As the Court of Appeals held,

As noted earlier in our discussion of the guidelines for extraordinary educational expenses, such expenses may be added to the presumptive child support as a deviation provided such expenses are appropriate to the parents' financial abilities and to the lifestyle of the children if the parents and child were living together. Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d). In this case, the record clearly indicates that, if the parents were still living together, the proposed extraordinary educational expenses for the three children who are presently in private school, not to mention a fourth who may go to private school, are not appropriate when we consider the parents' financial abilities.

*Id.*

### 3. Counting Days

*Hooper v. Hooper* (Court of Appeals at Nashville, April 24, 2014). How many days does a parent get credit for when that parent spends the following time with a child: every other week Thursday afternoon to Monday morning; an overnight in the off week; and half of all holidays, vacations, and summer? Answer: 146 days, according to the Court of Appeals.

As the court noted,

In *Stogner v. Stogner*, 2012 WL 1965598 (Tenn. Ct. App. 2012), we applied the definition of days set forth at Tenn. Comp. R. & Regs. 1240-2-4-.02 (10) and held that a father whose parenting time began on Friday at 6:00 p.m. and ended at 8:00 a.m. the following Monday should be credited with three days rather than two, because the child spent more than twelve consecutive hours in a twenty-four hour period under the father's care.

*Id.* Applying *Stogner* to the present case made it easy to determine that the trial court had erred in finding that father's time equaled 110 days.

#### 4. Temporary Support vs. Retroactive Support

*Layman v. Layman* (Court of Appeals at Knoxville, March 28, 2014). In this case, the trial court awarded Mother \$63,000 in retroactive support, dating back to the date that the court found the parties had separated in the midst of their five-year divorce. The Father appealed, arguing that he had continued to pay the family bills during the entire pendency of the divorce, and had paid temporary support pursuant to an agreed order in the amount of approximately \$4,300. The Court of Appeals agreed with the Father, and reversed the award of retroactive support:

We agree with Husband's position that these court-ordered support payments which began in January 2010 were intended and received as sufficient temporary support from that point on for Wife *and the children*. Throughout the pendency of the case, Husband also continued his practice of financing their educations and other major expenses with regular contributions of \$20,000 a year to each child's individual Schwab account. Again, Wife saw no apparent need to pursue additional support for herself or the children until some two years after the case began. At that point, it was agreed that Husband would pay \$4,336 per month. Notably, these "temporary support" payments continued, in the same amount, to the time of trial even though all three children had long since reached the age of majority. In view of the evidence, we conclude that Wife's assertion that "Husband failed to pay any child support during the pendency of this long divorce action" is simply not correct.

*Id.*

#### 5. Just When You Need a Child Support Treatise...

*Blankenship v. Cox* (Court of Appeals at Nashville, April 17, 2014). If there is an issue involving child support which was not addressed in *Blankenship*, I missed it. This case

involved a two day trial which resulted in a comprehensive order by the trial court and a near complete affirmance by the Court of Appeals in a 21-page opinion. The Court of Appeals upheld the trial court in (1) finding the mother would be voluntarily unemployed *prospectively* and imputing income to her of \$2,475 per month beginning when the youngest child started high school; (2) making the child support modification retroactive to the date of the filing of the petition rather than the date of the graduation from high school of the oldest minor child (because the father continued to voluntarily pay support for the emancipated child during that period); (3) setting an upward deviation for private school, based on the parties' prior agreement that the children would attend private high school and the fact that the parties had the means to pay for it; and (4) allocating 60 days of parenting time to father, even though the proof was that he spent less than 60 days with the children, when the mother's own proposed plan set his time at 60 days.

The Court of Appeals also affirmed a judgment against mother at 5.25% interest for father's overpayment of child support, although it reversed on the court's setting of the private school obligation prospectively rather than retroactively to the date the youngest child started high school. This was a very thorough opinion from a case apparently well-tryed and well-decided by Judge Mike Binkley in Williamson County.

#### **6. Income Averaging for Child Support Purposes**

*Moss v. Moss* (Court of Appeals at Nashville, April 24, 2014). In this case, the Court of Appeals affirmed the trial court's use of a four-year average in setting the father's income for child support purposes, where the father earned his income through farming and had good income in 2009 and 2010, but substantially less income in 2011 and 2012:

The guidelines specifically allow averaging in determining gross income when establishing a prospective award: “[v]ariable income such as commissions, bonuses, overtime pay, and dividends, etc., should be averaged and added to the obligor’s fixed salary.” Tenn. Comp. R. and Regs. 1240-2-4-.03(3)(b).[ ]

Although that provision of the guidelines applies to variable components of income, the reasoning is just as applicable to situations where a parent is self-employed or whose total income is variable.

\* \* \*

While our courts have approved or endorsed a two year period for purposes of averaging, *see, e.g., Norton v. Norton*, No. W1999-02176-COA-R3-CV, 2000 WL 52819 at \*7 (Tenn. Ct. App. Jan. 10, 2000) (no Tenn. R. App. P. 11 application filed), other time periods have also been used. *See, e.g., Siegel v. Siegel*, No. 02A01-9708-CH-00198, 1999 WL 135090 at \*6 (Tenn. Ct. App. March 5, 1999) (no Tenn. R. App. P. 11 application filed) (“Based on the entire record, it appears that Husband’s earnings for the entire twelve months of 1996 best reflect his income and earning capacity for the purpose of determining child support and alimony.”); *Alexander*, 34 S.W.3d at 460 (four years income averaged). The time period to be used lies within the discretion of the trial court based upon the facts of the situation.

*Id.*, citing *Smith v. Smith*, M2000-01094-COA-R3-CV, 2001 WL 459108, at \*5–6 (Tenn. Ct. App. May 2, 2001). This is the second appellate case in the past two years which has approved a four-year averaging period. *See Weaver v. Weaver* (Court of Appeals at Nashville, December 28, 2012).

## 7. Overpayment of Child Support

*Huffman v. Huffman* (Court of Appeals at Nashville, May 1, 2013). This is a six-year-long child support modification case, with more to come. The father filed a petition to modify his child support obligation in 2006. The trial court ordered an upward deviation of father’s child support, and, on appeal, the Court of Appeals reversed for failure by the trial

court to explain its reasons for deviating from the guidelines. The case was remanded back to the trial court, which recalculated support and found that the father had overpaid his support by nearly \$40,000.00. Ah, well, said the trial court, that is unfortunate, but it would be unjust to make the mother repay the overpayment and therefore the trial court refused to enter a judgment in favor of dad. The father appealed again, and again the Court of Appeals reversed. As the Court of Appeals stated,

We are not aware of any authority that allows the trial court to exercise its discretion to forgive one party from reimbursing another for an overpayment of child support. The trial court's failure to award Father a credit or judgment in the amount of his overpayment resulted in an "injustice" to Father. See Eldridge, 42 S.W.3d at 85. Based on our review of the record, we conclude that under the circumstances presented here, the trial court abused its discretion in failing to award Father a judgment for the amount he overpaid child support over the six years this case was pending.

*Id.*

## **8. Bankruptcy, Child Support, and More...**

*In re Faith A.F.* (Court of Appeals at Nashville, July 24, 2013). Wow! If you need an instruction manual on the interplay between bankruptcy and child support, bankruptcy and civil contempt, imputation of income, and other issues, you have found it. Here, the trial court found Father in criminal contempt, civil contempt, imputed income for the purpose of setting child support, awarded attorneys' fees, put Father's time with the child on a short leash, and found the Father about as credible as Syrian president Bashar Al-Assad. The Court of Appeals opinion reminds us that (1) you can't hold an individual in criminal contempt without proper notice; (2) bankruptcy does not prevent (a) the setting of a child support arrearage, (b) the entry of a judgment for civil contempt, or (c) a lengthy jail sentence until the defendant

purges himself or herself of civil contempt; (3) income can be imputed for reasons other than voluntary underemployment, i.e., for failure to produce reliable evidence of income; (4) a parent's conduct can lead to suspension of parenting time; and (5) you only get attorneys' fees when you prevail in a custody case or dependent and neglect proceeding.

Excellent discussion of all of these issues, with one questionable holding: in discussing the civil contempt finding, the Court of Appeals noted that "Father *failed to sustain his burden* of showing that he was unable to pay the support." There are other cases that suggest that the burden of showing inability to pay is on the moving party (the mother, in this case). But this holding suggests that the burden may, at some point, shift to the defendant, which may be useful in non-payment cases to the plaintiff.

## 9. Trust Income

*Muhlstadt v. Muhlstadt* (Court of Appeals at Nashville, July 19, 2013). In this case, the father sought a decrease in his child support obligation and the mother sought permission to enroll the child in school in her school district. The trial court denied the father's request and granted the mother's request. The father appealed. On appeal, the Court of Appeals held that the trial court had erroneously assumed that Father would continue to receive \$22,000 in trust income, although he was not a beneficiary of the trust and received funds from the trust through gifts from his mother, who was a beneficiary. The father produced information from the trust to this effect, but the trial court held that the Father "has not proved that he cannot obtain \$22,000 per year from the trust at this time." The Court of Appeals found that the trial court wrongly criticized the father for not producing trust documents (tax returns, k-1s, etc.) to which he had no access, and remanded the case to the trial court to set child support in accordance with the guidelines.

On the issue of school choice, there seemed little doubt that the trial court had acted within its discretion in directing that the child be enrolled in school in Mother's district.

#### 10. Modification of Foreign (Re: Hawaiian) Decrees

*Johnston v. Harwell* (Court of Appeals at Nashville, July 16, 2013). Question 1: Can you register a child support decree from another state in Tennessee for the purpose of modification? Answer: Of course. "[T]he issuing state loses continuing exclusive jurisdiction "if all the relevant persons — the obligor, the individual obligee, and the child — have permanently left the issuing state, [because] the issuing state no longer has an appropriate nexus with the parties or child to justify exercise of jurisdiction to modify."

Question 2: Is the decree subject to modification under Tennessee law or, in this case, Hawaiian law? Answer:

[I]f all the parties reside in Tennessee, "the procedural and substantive law of [Tennessee shall apply] to the proceeding[s] for enforcement and modification" of the Hawaii divorce decree. Tenn. Code Ann. § 36-5-2613(b). "This section [of UIFSA] is designed to make it clear that when the issuing state no longer has continuing, exclusive jurisdiction and the obligor and obligee reside in the same state, a tribunal of that state has jurisdiction to modify the child support order and assume continuing, exclusive jurisdiction." *Butler v. Butler*, No. M2001-01341-COA-R3-CV, 2012 WL 4762105, at \*8 (Tenn. Ct. App. Oct. 5, 2012).

Question 3: So, if Tennessee law applies, can dad get rid of that pesky agreement he made in Hawaii to continue to pay child support until the children reach the age of 21, since child support ends in Tennessee at age 18 or when the class of which the child was a member at age 18 graduates from high school, whichever event occurs last? Answer: Not so fast:

Generally, an agreement that is merged into a court order becomes a disposition by the court; the “agreement or stipulation loses its contractual nature, and its provisions may be enforced by a court order.” *Brewer v. Brewer*, 869 S.W.2d 928, 932 (Tenn. Ct. App. 1993). “[T]he reason for stripping the agreement of the parties of its contractual nature is the continuing statutory power of the Court to modify its terms when changed circumstances justify.” *Penland*, 521 S.W.2d at 224.

When an obligor parent agrees to support his or her child beyond the age of 18, however, the agreement “retains its contractual nature, even when it is incorporated into a child support order, because such support falls ‘outside the scope of the legal duty of support during minority.’” *Butler*, 2012 WL 4762105, at \*10 (quoting *Penland*, 521 S.W.2d at 224-25).

Thus, agreements “for post-majority support are enforceable contracts, and the payment of college tuition is a valid contractual subject for a husband and wife in the throes of a divorce.” *Hathaway*, 98 S.W.3d at 678 (citing *Penland*, 521 S.W.2d at 224). “Such contractual obligations are binding upon the parties, and will be construed by courts by principles of interpretation as any other contract.” *Id.* (citing *Jones v. Jones*, 503 S.W.2d 924, 929 (Tenn. Ct. App. 1973)),

In this case, the duration provision of the Hawaii decree became a binding contract when the parties agreed to enroll it, without modification of the duration provision, as part of the July 2009 agreed order.

*Id.* So, in this case, the father won the battle (the enrollment of the decree in Tennessee and the application of Tennessee law) but lost the war (if you can’t change the contract in Hawaii, you can’t change the contract in Tennessee, and the agreement to pay child support beyond the age of majority is contractual in nature, not child support).

#### 11. Imputation of Income

*Rogin v. Rogin* (Court of Appeals at Jackson, July 10, 2013). In this case, there were 12 combined issues raised on appeal. (The Court of Appeals went to some pains to remind parties that only certain documents should be made part of the record on appeal, criticizing

the inclusion in the record of a number of items that should have been omitted.) The first issue addressed by the Court of Appeals concerned income for child support purposes: the mother earned over \$150,000 and the father, although previously employed earning up to \$95,000 per year, was currently unemployed earning nothing. The Court of Appeals found that the trial court had not made sufficient findings of fact and conclusions of law to determine whether Mother earned more or less than \$150,000 per year, and also found that the trial court incorrectly imputed income of \$36,000 per year to father. As the trial court stated, "The problem is that based on Father's education, his degree from Penn, his MBA from Vanderbilt, I can't put him in at minimum wage. I just can't. I've put more than that for people working part time at McDonald's. But that said, I do have an understanding of the present . . . workplace market is, and the notion that he could just easily fall into a \$250,000[.00] job isn't realistic either." Well, apparently the Court of Appeals felt that \$36,000 was unrealistic, as well. The Court of Appeals held that the father's job loss was not voluntary, that the mother had not met her burden of showing that the father was willfully and voluntarily underemployed, and that, in the absence of such a finding, the trial court erred in imputing *any* income to father.

The Court of Appeals also tossed out the trial court's order that the father contribute 15% of the children's private school education (based in part on tossing out the imputation of income to father for child support purposes) and upheld the trial court's order giving mother primary decision-making on educational issues for the children. Of more interest was the upholding of the trial court's decision not to award any alimony to the father, where the mother earned at least \$150,000 and the father earned nothing, and the mother had separate assets of over \$2.3 million and the father had separate assets of \$68,000. Here, the Court of

Appeals focused on the rather short length of the parties' marriage (seven years), the 17 month separation between the parties at the time of the divorce trial, and the approximate equal education of each of the parties to support the holding. The Court of Appeals did uphold an alimony *in solido* award requiring mother to reimburse the money father removed from the children's 529 accounts, with the money to go directly to the accounts and not pass through the father ("Rather than pay that directly to Mr. Rogin, I'm just going to cut out the middle man in order to make sure that those funds get refunded into [those] account[s].") Mother objected, of course, since dad had removed the money from the accounts instead of mom, but the Court of Appeals affirmed.

## 12. Social Security Disability Benefits

*In re Jordan H.* (Court of Appeals at Knoxville, filed March 25, 2014). This is easy:

SSI benefits are not subject to legal process for payment of court-ordered child support. *See Tenn. Dep't of Human Servs., ex rel. Young v. Young*, 802 S.W.2d 594, 599 (Tenn. 1990). SSI benefits, codified at 42 U.S.C.A. § 1381, *et seq.* (2003), were authorized by a 1972 amendment to the federal Social Security Act and were intended as "a Federal guaranteed minimum income level for aged, blind, and disabled persons." *Young*, 802 S.W.2d at 595 (quoting *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981)).

*Id.* The trial court's order attaching Father's entire SSI check to pay back due child support is reversed.

## 13. Fluctuating Income

*Allen v. Allen* (Court of Appeals at Nashville, filed October 9, 2013). The full story of this case is told in the Court's own summary:

Mother and Father were divorced in 2001 and the Final Decree required Father to pay a fixed amount to Mother each month as child support in addition to a percentage of his fluctuating income. Father was also ordered to provide Mother with proof of his income on a quarterly basis.

In response to Mother's motion to modify in 2003, the trial court averaged three years of Father's gross income and increased Father's monthly child support payments. Mother moved in 2011 to hold Father in contempt of court for failing to continue providing her with proof of his income and sought a child support arrearage based on Father's failure to pay a percentage of his fluctuating income for the years 2003 through 2010.

The trial court awarded Mother the arrearage she sought and found Father was in civil contempt for failing to continue providing Mother with proof of his income. The court awarded Mother her attorney's fees based on Father's civil contempt. Father appealed, and we reverse the trial court's judgment. The governing statute requires child support payments to be for a definite amount, not an amount that fluctuates. The existing order did not include the requirement that Father provide proof of income. Therefore, we also reverse the trial court's award to Mother of attorney's fees incurred in the civil contempt proceedings.

*Id.* As the Court of Appeals noted,

“The child support guidelines have evolved over time, but at least since the *Hanselman* opinion, in March 2001, the law has been that child support must be calculated in a definite amount that is payable in installments rather than in an amount that fluctuates month to month. *Hanselman*, 2001 WL 252792, at \*3. The *Hanselman* court specifically disapproved the practice of setting a percentage of fluctuating income as support.”

*Id.*

#### 14. **Capital Gains Count**

*Blackshear v. Blackshear* (Court of Appeals at Knoxville, March 19, 2014). The trial court in *Blackshear* determined that Father's income from his self-employment was \$2,500 per month, and dropped his child support from \$2,000 per month to \$89 per month, and

awarded him a substantial judgment for overpayment of his support obligation. On appeal, the Court of Appeals agreed with Mother that the trial court failed to include Father's capital gains in his income, which would have pushed his income to over \$9,000 per month if averaged over the last three years:

Under the facts of this case, we believe it is appropriate to average Father's variable income for the years 2009-2011 in order to accurately calculate Father's true income for child support purposes. The prorated amount of the 2009 capital gain must be averaged with any income from 2010 and 2011 in order to realistically determine Father's child support obligation. *See Moore v. Moore*, 254 S.W.3d 357, 359-60 (Tenn. 2007). "The fairness of a child support award depends on an accurate determination of both parents' gross income or ability to support." *Massey v. Casals*, 315 S.W.3d 788, 795 (Tenn. Ct. App. 2009).

#### 15. Attorneys' Fees

*In re Nathaniel* (Court of Appeals at Knoxville, March 17, 2014). The trial court in this case denied an application for attorneys' fees from parents who successfully warded off a termination of parental rights action by relatives. The Court of Appeals affirmed, finding that "we are aware of no statutory or precedential basis for an award to Respondents of additional attorney's fees under Tenn. Code Ann. § 36-5-103(c) in this termination of parental rights case where appointed counsel already have been compensated for their appointed work."

Judge Susano wrote separately to concur:

I do not believe the language of Tenn. Code Ann. § 36-5-103 is broad enough to encompass a dispute between two biological parents on one side and two third persons with no custodial rights on the other. As I parse the wording of § 36-5-103, it only pertains to a dispute between spouses or a dispute between a “spouse” and an “other person to whom the custody of the child, or children, is awarded.” Since this case does not present either of these factual scenarios, I would hold, as an additional basis for the Court’s decision, that the language of § 36-5-103 is simply not applicable to these facts.

## 16. Crime and Punishment

*Meeks v. Meeks* (Court of Appeals at Nashville, March 6, 2014). Can criminal activity by a parent be used to prove willful underemployment? You bet it can. As the Court of Appeals stated in *Meeks* in affirming the trial court’s finding that the father was capable of making \$6,000 per month, notwithstanding the father’s argument that he was facing criminal charges and therefore unable to work:

We have reviewed the pleadings and relevant testimony and find that the trial court did not abuse its discretion in finding Father to be voluntarily underemployed. A finding of underemployment “is not limited to choices motivated by an intent to avoid or reduce the payment of child support.” Tenn. Comp. R. & Regs. 1240-02-04-.04-(3)(a)(2)(ii)(I).

The Guidelines squarely address the question of whether child support should be reduced based upon criminal activity. *See also State ex rel. Laxton v. Biggerstaff*, No. E2009-01707-COA-R3-JV, 2010 WL 759842, at \*5 (Tenn. Ct. App. Mar. 5, 2010) (discussing the application of Tenn. Comp. R. & Regs. 1240-02-04-.04-(3)(a)(2)(ii)(I) in the context of a parent’s incarceration). Tennessee Rules and Regulations 1240-02-04-.04-(3)(a)(2)(ii)(I) states that, “criminal activity . . . shall result in a finding of voluntary underemployment . . . .” The Guidelines’ use of the term “shall” requires mandatory compliance. *See, e.g., Bellamy v. Cracker Barrel Old Country Store, Inc.*, 302 S.W.3d 278, 281 (Tenn. 2009) (quoting *Stubbs v. State*, 393 S.W.2d 150, 154 (1965) (“‘When ‘shall’ is used . . . it is ordinarily construed as being mandatory and not discretionary.”)).

*Id.* The regulations, for those interested, state as follows:

Pursuant to Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(I): A determination of willful and/or voluntary underemployment or unemployment is not limited to choices motivated by an intent to avoid or reduce the payment of child support.

The determination may be based on any intentional choice or act that adversely affects a parent's income. *Criminal activity and/or incarceration shall not provide grounds for reduction of any child support obligation.* Therefore, *criminal activity and/or incarceration shall result in a finding of voluntary underemployment or unemployment under this section*, and child support shall be awarded based upon this finding of voluntary underemployment or unemployment.

(Emphasis added).

**17. You Already Knew This, But...**

*Rentz v. Rentz* (Court of Appeals at Knoxville, July 30, 2014). Okay, you can read the guidelines, and you know that alimony payments received one parent from the other are not counted as income for child support purposes. (Under the guidelines, "Income for child support purposes includes but is not limited to...[a]limony or maintenance received from persons other than parties to the proceeding before the tribunal.") Self-evident it may be, but we now have two separate cases which affirm that this paragraph cannot be read to include alimony or maintenance paid by one parent to the other. (The argument goes: just because alimony from a third party *must* be included as income for child support purposes doesn't mean that alimony from the other parent *cannot* be included.) And, yes, faced with this argument, the child support recipient is entitled to attorneys' fees. *See also Ghorashi-Bajestani v. Bajestani*, No. E2013-00161-COA-R3-CV, 2013 WL 5406859 (Tenn. Ct. App. Sept. 24, 2013), perm. app. denied (Tenn. March 5, 2014).

### III. Civil Procedure

#### 1. Hard Facts Make Bad Law

*Turner v. Turner*, Court of Appeals at Jackson (July 7, 2014). *Turner* wins hands down the contest for the most disturbing case of the year, a case where law triumphs over common sense. Here, the parties were the parents of two children. Father filed a divorce petition against Mother in 1999. Mother's attorney lost contact with the mother in 2000, and was permitted to withdraw. In October 2000, the court found that mother had not had any contact with the children for over 10 months, granted father a divorce, and reserved the issue of mother's visitation with the children until mother proved she no longer was addicted to drugs. Father subsequently remarried, and, in July 2001, father filed a petition to terminate mother's parental rights in order to allow his wife to adopt the children. That petition was ultimately granted, after notice by publication and the entry of a default judgment against mother terminating her parental rights.

Nine years later, mother filed a petition to set aside the termination arguing that father did not make a good faith effort to find her in July 2001, and did not attest to his efforts to find her prior to attempting to serve her by publication, as required by statute. Mother offered *no* explanation for why she had waited nine years to file her petition, instead relying on father's errors in seeking the default judgment on the termination of her rights. The trial court agreed with the mother that father had failed to comply with the statute on service of publication and had not made a satisfactory effort to find mother prior to attempting to serve her by publication. (Mother's addiction to drugs, her itinerant lifestyle, and her nine year disappearance from her children's lives were not sufficient, apparently.) The trial court found the default judgment void, and set it aside.

The Court of Appeals affirmed, with a lengthy discussion of the difference between void and voidable orders, and the necessity of strict compliance with termination statutes. Finding that the original termination order was void, the Court of Appeals set the groundwork for the invalidation of the adoption order, and restored the mother to her pre-2001 role as the legal mother of the children.

It is hard to read the case without a growing distaste for the maxim that hard cases make bad law. Judge Paul Summers wrote a lengthy concurring opinion, arguing that while the Court of Appeals was right on the law, it was wrong on justice:

Surely this cannot be the law in Tennessee. If it is as my colleagues have convinced me, then it needs to change *ab initio*. The best way is for our Supreme Court to take this case on a Rule 11 application and reverse this Court's decision. That might obviate any other cases of unintended consequences, many of which we are unaware. Tell us that this was a voidable judgment and was valid because of the statute of repose, laches, due process, or fundamental fairness to the children and the new family. We need to settle this important question of law to all Tennessee families. This is a case that cries out for the need to secure settlement of questions of public concern. It is a classic Rule 11 application for permission to appeal.

*Id.*

## 2. Remarriage Is Not Always a Bed of Roses

*Lambert v. Lambert*, Court of Appeals at Nashville (July 18, 2014). *Lambert* involves the interpretation of an original Marital Dissolution Agreement and a second Marital Dissolution Agreement after the parties remarried and then divorced a second time. Of particular interest was the Court of Appeals' discussion of the role of the special master appointed by the trial court to assist in resolving the discrepancies between the two agreements. Here, the Court of Appeals noted that the findings of a special master, if adopted

concurrently by the trial court, are not appealable, so long as those findings are not findings of law or go to the ultimate issue in the case. As the Court of Appeals held:

The standard of review in situations involving the findings of a special master is set forth in Tenn. Code Ann. § 27-1-113: “Where there has been a concurrent finding of the master and chancellor, which under the principles now obtaining is binding on the appellate courts, the court of appeals shall not have the right to disturb such finding.”

*Id.* Citing *Bradley v. Bradley*, No. M2009-01234-COA-R3-CV, 2010 WL 2712533, at \*6 (Tenn. Ct. App. July 8, 2010). Under this standard, concurrent findings of fact by a special master and a trial court are conclusive and cannot be overturned on appeal. *Manis v. Manis*, 49 S.W.3d 295, 301 (Tenn. Ct. App. 2001). “This heightened standard of review applies only to findings that are made by both the [s]pecial [m]aster and the [c]hancery [c]ourt.” *In re Estate of Ladd*, 247 S.W.3d 628, 637 (Tenn. Ct. App. 2007).

*Id.* The Court of Appeals went on to note that the above standard only applies to issues that are properly assigned to a special master:

“However, a concurrent finding is not conclusive where it is upon an issue not properly referred to a special master, where it is based upon an error of law or a mixed question of fact and law, or where it is not supported by any material evidence.” *Bradley*, 2010 WL 2712533, at \*6 (citing *Manis*, 49 S.W.3d at 301).

“The trial court, however, may not refer all matters to the special master.” *Vraney v. Medical Specialty Clinic, P.C.*, 2013 WL 4806902, at \*33 (Tenn. Ct. App. Sept. 9, 2013). As the *Vraney* Court explained: The main issues of a controversy and the principles on which these issues are to be adjudicated must be determined by the trial court. Collateral, subordinate, and incidental issues and the ascertainment of ancillary facts are matters properly referred to a special master. *Id.* at \*34.

*Id.* In *Lambert*, the Court of Appeals held that the special master's recommendations, as adopted by the trial court, were not entitled to special deference because the issue referred to the Special Master was not collateral, subordinate or incidental; it was in fact the primary question in the controversy before the trial court. *Vraney*, 2013 WL 4806902, at \*34. While the interpretation of the two divorce decrees and marital dissolution agreements is somewhat thorny, "[m]ere inconvenience is not an acceptable basis for such a referral" to a special master. *Frazier v. Bridgestone/Firestone, Inc.*, 67 S.W.3d 782, 784 (Tenn. Workers' Comp. Panel Oct. 19, 2001).

### **3. Conflicts and Ethics, in a Slightly Different Light...**

*Maloney v. Maloney*, Court of Appeals at Jackson (July 17, 2014). Question: can the same law firm represent both the husband in a divorce action and the husband's girlfriend? Answer: "No!" says the trial court; "Not so fast," says the Court of Appeals. Here, the trial court thought it "improper for a single law firm to represent a party to a divorce and the paramour because there will be conflicts" and "Husband and his paramour each require independent counsel on what to say, when to say it, how far to say, when to be silent, which will necessarily place Husband and paramour in conflict one with the other, to preserve each person's attorney client privilege."

The Court of Appeals disagreed, finding that there was no proof of any conflicts and therefore Wife did not have standing to seek to disqualify Husband's attorney:

Given the seriousness of disqualifying the attorney chosen by one of the parties, the fact that the motion to disqualify was made by the opposing party, the vagueness of the reasons for disqualification, and the absence of evidence, we must reverse the trial court's decision and remand the matter for a hearing at which wife presents evidence of a conflict which she has standing to raise and Husband and Lott are given an opportunity to present evidence that there is no conflict, that adequate systems are in place to manage any conflict, or that Husband and Lott have waived any potential or existing conflicts.

*Taylor v. Taylor*, Court of Appeals at Nashville (June 30, 2014). From the Court of Appeals' own summary:

This is the second appeal in this divorce action. Husband appealed from the Final Decree of Divorce in 2012, and we affirmed the trial court in all respects in an opinion filed by this court on May 30, 2013. While the appeal was pending, the parties filed several motions in the trial court regarding a variety of financial obligations arising from the Final Decree of Divorce. Following one hearing, the trial court modified the division of the marital property; however, in our opinion which was filed a week earlier, we affirmed the division of the marital estate. Wife now appeals that ruling, and she raises several issues regarding, *inter alia*, the division of marital property, alimony, attorney's fees, and civil contempt. Finding the trial court erred in modifying the division of the marital estate after we had affirmed that decision, we reverse that modification. As for all other issues raised, we affirm.

*Id.* The decision by the Court of Appeals in its second opinion, which the husband did not dispute, was based on the doctrine of "law of the case." As described by the Court of Appeals, that doctrine is as follows:

We affirmed the trial court's 2012 Final Decree of Divorce in *Taylor I*, in which Wife was awarded all of the equity in the marital home; accordingly, the award of the equity in the marital home is the "law of the case," which doctrine binds the parties and the trial court on remand. The Supreme Court describes that doctrine as follows:

An appellate court's final decision in a case establishes the "law of the case" when a case is remanded for further proceedings. This "law of the case" is binding on the trial court during the remanded proceedings and is also binding on the appellate courts should a second appeal be taken after the trial court enters a judgment in response to the remand order. *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). While the doctrine applies only to issues that were actually decided by the court, explicitly or implicitly, it does not apply to dicta. [*Id.*]; *Ladd ex rel. Ladd v. Honda Motor Co.*, 939 S.W.2d 83, 90 (Tenn. Ct. App. 1996).

*Id.*

#### 4. "Void" Means Void, Regardless of Time and Place

*Evans v. Reid* (Court of Appeals at Knoxville, June 19, 2014). As the Court of Appeals summarized its reversal of the trial court's refusal to void its own order:

At an earlier time, Ashley Evans ("the petitioner") filed a petition against Nigel M. Reid ("the respondent") seeking an order of protection. The trial court dismissed the petition due to "[in]sufficient cause." In the same order, however, the court found "proof of the need of a restraining order." Accordingly, the court restrained the respondent from coming about, calling or harassing the petitioner or her family. Several years later, the respondent asked the court to void the restraining order, which, on its face, was still in effect. The court refused. The respondent appeals. We reverse the trial court and hold that (1) the trial court was without jurisdiction to issue the restraining order and (2) the restraining order is, consequently, null and void.

*Id.* The important practice tip to be learned from this case: the trial court, faced with a petition for an order of protection, can either dismiss the petition or grant the order of protection. It cannot dismiss the petition and grant a restraining order instead. As the Court of Appeals pointed out,

The only pleading before the trial court, when the subject order was entered, was the petition for an order of protection. Under the provisions of Tenn. Code Ann. § 36-3-605(b)(2010), the trial court's subject matter jurisdiction was essentially limited to one of two remedies, but not the imposition of both in the same case. It could "dissolve" the ex parte order of protection or "extend the order of protection for a definite period of time, not to exceed one . . . year." *Id.* Here, the trial court did one and tried to do a little bit of the other. The statutory scheme addressing orders of protection does not give a trial court jurisdiction beyond these two alternative remedies. *Id.* Therefore, the trial court's grant of a restraining order, after it had dismissed the petition, was done without subject matter jurisdiction and is void ab initio.

*Id.*

#### **4A. Fear Not! (O.P. Not!)**

*Hall v Hall* (Court of Appeals at Knoxville, September 15, 2015). Father sought and obtained an order of protection against mother, which was entered by agreement. A year later the father sought and received a one year extension of that order alleging fear on behalf of himself and the children. The Court of Appeals, upon review of the record, reversed. The father's allegations simply did not rise to the necessary threshold to justify the extension of an order of protection. "Father was unable to offer specific details regarding any occurrence during the year the order of protection was in effect that caused him to fear for his safety or that of his children if the order were not extended." The lesson: if you are not in fear of harm, an order of protection may not be the appropriate relief.

#### **5. Guardian ad Litem and the Passage of Time**

*Potter v. Paterson* (Court of Appeals at Knoxville, May 28, 2014). Here is the court's own summary of the case:

This post-divorce case involves the application of Supreme Court Rule 40A, which governs the appointment, role and duties of a guardian ad litem.

The guardian ad litem in this case, Janice Russell, was appointed on November 7, 2008. She filed a motion requesting the court to hold her ward's father, appellant Scott D. Paterson ("father"), in contempt. After father filed a response pointing out that Rule 40A, § 9(a)(4) did not authorize a guardian ad litem to file a contempt motion, the trial court, in response, entered an order on March 17, 2010, appointing Ms. Russell "attorney ad litem." Subsequently, Rule 40A, § 9 was amended to allow a guardian ad litem to "take any action that may be taken by an attorney representing a party pursuant to the Rules of Civil Procedure."

After the amendment took effect, Russell referred to herself in her filings as "guardian ad litem." The trial court followed suit in its final order. On January 20, 2011, the trial court entered an order that disposed of all matters relating to custody of the child.

More than a year later, father filed a petition to modify his child support. On May 16, 2013, the guardian ad litem filed a "motion for emergency hearing and motion for contempt." On May 20, 2013, the trial court conducted a hearing, after which it entered an order holding father in contempt on four counts, sentencing him to 40 days in jail, suspending all of his parenting time, and reducing contact with his daughter to one telephone call per week. Father appeals.

We hold that, pursuant to Supreme Court Rule 40A, § 5, the guardian ad litem's appointment terminated when, with the passage of time, the court's order disposing of the custody matters became final. Hence, the guardian ad litem had no authority to file her motion for "emergency hearing" and for contempt. We reverse the judgment of the trial court.

*Id.* In this case, the guardian ad litem appeared to want it both ways: to be considered a guardian ad litem when it helped her, and to be considered an attorney ad litem when that label was more helpful. (As the Court of Appeals stated, "[W]e have been cited to no precedent, nor have we found any, whereby a trial court changed its appointment of the same

person from “guardian ad litem” to “attorney ad litem” in an attempt to circumvent the limitations of a guardian ad litem’s authority under a Supreme Court rule.”) The Court of Appeals found it proper to consider Ms. Russell a “guardian ad litem” and noted that under Supreme Court Rule 40A, §5, “if no order specifies the duration of the appointment, the appointment *shall terminate automatically* when the trial court order or judgment disposing of the custody proceeding becomes final.” *Id.*

**6. “We Mean What We Say...” (Court of Appeals to Trial Court re *Culbertson*)**

*Culbertson v. Culbertson* (Court of Appeals at Jackson, April 30, 2014). From the Court’s own summary:

This is the second extraordinary interlocutory appeal in this divorce case and custody dispute.

In the first appeal, this Court held that the father did not automatically waive the psychologist-client privilege as to his mental health records by seeking custody or by defending against the mother’s claims that he was mentally unfit. While the first appeal was pending, the mother filed a motion asking the trial court to require the father to undergo a second mental health evaluation pursuant to Tenn. R. Civ. P. 35; the trial court granted the motion.

The Rule 35 evaluating psychologist concluded that the father did not pose a danger to his children. Dissatisfied with this conclusion, the mother again asked the trial court to compel the father to produce all of the mental health records from his treating psychologists.

After this Court rendered its decision in the first appeal, the trial court granted the mother's request and again ordered the father to produce all of the mental health records from his treating psychologists. The trial court reasoned that the father waived the psychologist-client privilege as to all of his mental health records by allowing the evaluating psychologists to speak to his treating psychologists, by providing mental health records to the evaluating psychologists, and by testifying that he had a history of depression and had undergone treatment for it. It also ordered the father to produce all of his mental health records because the mother needed them to prepare her case.

The father filed a request for a second extraordinary appeal, which this Court granted. We vacate the trial court's order as inconsistent with this Court's holding in the first appeal; we hold that there was at most a limited waiver of the psychologist-client privilege, only as to the privileged mental health information that the father voluntarily disclosed to the two evaluating psychologists involved in this case.

As for mental health records not subject to a limited waiver of the privilege, we hold that the standard for the trial court to compel disclosure of the records is not met in this case. We remand the case for factual findings on any privileged mental health records the father voluntarily disclosed and other proceedings consistent with this opinion.

*Id.* This a quick summary for a 60-page opinion authored by Judge Holly Kirby, which decides issues of jurisdiction, the difference between Rule 10 appeals and appeals of right, the core issue of whether the father's psychological records are subject to discovery because he provided them to court appointed experts, and even whether the case should be assigned to a different judge on remand. On that final issue, the Court of Appeals answered "yes" and explained that answer as follows:

In the case at bar, it appears that the trial judge had difficulty putting his previous views aside and complying with the holding in *Culbertson I*. We find as well that reassignment to a different trial judge is advisable to preserve the appearance of justice.

In assessing the third factor, whether reassignment would result in undue waste and duplication, we realize that the trial judge below has great familiarity with the case and specific knowledge of the parties. However, in light of the fact that this case has been the subject of *two* Rule 10 extraordinary appeals and Father has still not obtained a hearing on his request for unsupervised parenting time, we must conclude that reassigning this case to a different trial judge will not “entail ‘waste . . . out of proportion to any gain in preserving the appearance of fairness.’ ” *Mahoney*, 2011 WL 5436274, at \*10 (quoting *United States v. White*, 846 F.2d 678, 696 (11th Cir.1988)).

Therefore, under the specific circumstances of this case, we deem it prudent to reassign the case to another trial judge on remand.

*Id.*

**7. Rule 59 (and Rule 60)**

*Fry v. Fry* (Court of Appeals at Nashville, September 6, 2013). This is a case involving the division of a military retirement benefit and Rule 60 relief (twice). Here, the parties agreed to divide the benefit in their final decree of divorce, but were unable to reach an agreement on the appropriate formula to be used for the division of the benefit. In an appeal decided by the Court of Appeals in *December 2001*, the Court of Appeals instructed the trial court to divide the retirement benefit as follows:

**We reverse the judgment below and modify the trial court’s order to provide that the wife will be entitled to a part of the husband’s Navy pension according to the following formula:**

**$\frac{1}{2} \times 10 \times$  (retirement pay) (number of years in the Navy at retirement)**

The trial court dutifully entered an order in 2003 applying that formula to an order dividing the benefit. This was an unfortunate move, because apparently the division of military retirement benefits is done by months, not years. And so, for another 10 years after the entry

of the 2003 order, the wife was unable to receive her share of the retirement benefit. She finally filed another Rule 60 motion to modify the 2003 order to provide for a month-based formula rather than a year-based formula. The trial court denied the motion on the ground that it could not go against the Court of Appeals order, but stated that “this court hopes that the Court of Appeals will grant the Petitioner the requested relief.” It did. The Court of Appeals found this to be an extraordinary case in which relief was justified under Rule 60.05 notwithstanding the lengthy delay in arriving back at its doorstep. Costs were assessed against the Husband, who fought this case to the end.

*Kirk v. Kirk* (Court of Appeals at Jackson, September 6, 2013). This is a fascinating, fact intensive case involving a Rule 59 motion and a Rule 60 motion filed by Wife after the entry of the final decree seeking to reopen the case based on Husband’s alleged concealment of substantial farming assets which should have been disclosed during the divorce proceeds. The trial court found the proof overwhelming that there were numerous assets which the Husband did not disclose or which he purposefully undervalued, and the Court of Appeals affirmed. There is an excellent discussion of the difference between Rule 59 and Rule 60 (a Rule 60 motion filed prior to the expiration of 30 days from the entry of the final decree should be treated in the same manner as a Rule 59 motion), the trial court’s authority to deny a summary judgment motion notwithstanding the opposing party’s failure to comply with summary judgment rules, and the duty to supplement discovery. With regard to this duty, the Court of Appeals noted that

Pursuant to Rule 26.05(2) of the Tennessee Rules of Civil Procedure, a party has a duty to supplement or amend a prior discovery response if the party “knows that the response was incorrect when made,” or the party “knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.”

*Id.* citing Tenn. R. Civ. P. 26.05(2).

*Gonzalez v. Gonzalez* (Court of Appeals at Jackson, September 5, 2013). Finally, a Court of Appeals opinion that turns on the difference between a court “dismissing” a claim, and a court “denying” a claim. (I know, you thought they were pretty much the same thing. You were wrong.) Here, the trial court dismissed a divorce case based on Husband’s motion alleging that the marriage between the parties was void because Wife was married at the time of the divorce to another man in Chile. (The parties were married in the United States in 2001; her marriage in Chile was declared “null” in 2005.) Wife filed a Rule 60 motion challenging the trial court’s dismissal of the divorce after she obtained affidavits and other information from Chile showing that the “null” declaration in 2005 meant that the Chilean marriage never existed, and was void from the beginning. The trial court *sua sponte dismissed* the Wife’s motion without a hearing. The Court of Appeals held that it might be one thing if the trial court had *denied* the Rule 60 motion after a hearing, but that the trial court erred by dismissing the motion without a hearing. As the Court of Appeals stated:

To dismiss Mother’s petition without first considering whether her Rule 60.02 Motion met the grounds for relief pursuant to Rule 60.02, and without stating either the procedure utilized to dismiss the case or the grounds for the dismissal, was in error. *See generally* Lawrence A. Pivnick, Tennessee Circuit Court Practice § 28:8 (2012–13 ed.) (“[T]he first duty of the court is to determine if the motion for relief is legally sufficient.”).

*Id.* The Court of Appeals essentially found that it was not appropriate for the trial court to dismiss a Rule 60 motion on the ground that the case no longer existed. The Wife was entitled to a hearing on her motion, and the case was reversed to allow her that hearing.

*Worgan v. Worgan* (Court of Appeals at Knoxville, April 30, 2014). The parties signed a Marital Dissolution Agreement and a divorce decree was entered, incorporating the MDA. Eleven months later, the Wife filed a motion pursuant to Rule 60 to reopen the case because the MDA failed to include the division of one of Husband's pensions. The Wife alleged that this was through mistake or inadvertence, and that she thought the pension would be divided later. The trial court denied the Rule 60 motion, and the Court of Appeals affirmed, holding that:

The trial court found that wife had ample time to review the MDA before she signed it; that she did in fact review it; and that she told husband's attorney that she was going to take it to her attorney to review. Wife does not dispute these findings. It is obvious that husband did not hide the existence of his pension, because wife testified that she was aware of it but mistakenly thought it would be divided later.

A cursory reading of the MDA, however, should have put wife on notice that this document is designed to finally and forever conclude the parties' rights growing out of their marriage. We have observed that "[a] property settlement or marital dissolution agreement is essentially a contract between a husband and wife in contemplation of divorce proceedings." *Pylant v. Spivey*, 174 S.W.3d 143, 151 (Tenn. Ct. App. 2003).

An MDA "is to be looked upon and enforced as an agreement, and is to be construed as other contracts as respects its interpretation, its meaning and effect." *Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998). Moreover, generally speaking, "the parties are not entitled to a marital dissolution agreement that is different from the one they negotiated." *Long v. McAllister-Long*, 221 S.W.3d 1, 9 (Tenn. Ct. App. 2004).

There is no indication in the record that wife was deceived or misled in any way before she signed the MDA. Wife has not established any ground for reopening the final divorce judgment under Rule 60.02.

*Id.*

*Sykes v. Sykes* (Court of Appeals at Nashville, August 28, 2013). The parties entered into a 50/50 parenting plan adopted by the Court which required neither party to pay child support despite a substantial difference in their incomes. Mother filed a Rule 60 motion about 10 months later, seeking child support dating back to the entry of the final decree. The trial court found that the court discussed the issue with the mother at the time of the entry of the Final Decree and that the “deviation” was appropriate, although it was not described in the order. The Court of Appeals reversed, finding that the trial court failed to meet the necessary standards for deviating from child support as mandated by the rules and statute. Judge Cottrell filed a partial dissent, arguing that the Mother’s motion was in fact a petition to modify and that any relief should date back to the date of the filing of the petition, not the date of the divorce. The majority disagreed. This case is a renewed lesson that establishing child support is a tricky business

*Jarnigan v. Jarnigan* (Court of Appeals at Jackson, filed November 4, 2013). Remember this case when you are thinking about the importance of the day count contained on the first page of the Parenting Plan. Here, the parties signed a parenting plan that apparently gave father 183 days and mother 182 days of parenting time with the children each year, according to the day count on the first page of the plan. Mother later filed a Rule 60.02 motion arguing that the plan she signed, or thought she signed, gave her substantially more time with the children than the every other weekend and two afternoons each week that the

plan, as entered by the trial court, provided. (She testified that the plan she thought she was agreeing to was opposite.) The trial court agreed, and granted her Rule 60.02 relief based on mutual mistake, and entered a parenting plan consistent with the plan mother believed she was entering into.

On appeal, the Court of Appeals found that Rule 60 relief was appropriate because the plan, on its face, was inconsistent and irreconcilable: mother could not have 182 days a year on the one hand, and parenting time only every other weekend and two afternoons a week, on the other hand. Because the day count was inconsistent with the actual days, Rule 60 relief was merited. The Court of Appeals, however, reversed and remanded the order approving a parenting plan based on Mother's testimony as to the agreement of the parties, finding that the trial court had a duty to decide the parenting plan based on the best interest of the children, not what one party represented *was* the agreement of both parties.

***Gentry v. Gentry*** (Court of Appeals at Knoxville, May 28, 2014). While not strictly a Rule 59 or Rule 60 case, *Gentry* is instructive on the power of a trial court to reserve the right to modify a parenting plan in the future. (Hint: it may not have that authority.) Here, the trial court entered a parenting plan at the time of the divorce which, a year later, acting under Rule 60.01, the trial court recast the original plan as a "temporary plan" and allowed proceedings to modify it. The mother filed an interlocutory appeal, which was granted by the Court of Appeals, and the Court of Appeals found the trial court was without authority to re-characterize the original plan and to modify it, on the theory that law requires all divorce decrees to include "permanent parenting plans" and therefore the original plan was permanent, not temporary, and could not be modified absent compliance with the statutory framework for modifying final orders of the court.

5. **Finality of Unfinal Orders: Remembering Rule 54.02**

*Harness v. Harness* (Court of Appeals at Knoxville, November 21, 2013). Ex-husband filed petition to reduce his alimony, and a petition to reduce his child support, based on changed economic circumstances. Child support was decided first, with the child support magistrate setting the ex-husband's income at \$5,000 per month, reducing ex-husband's child support obligation, and stating that "balances of spousal support and child support shall be updated after the hearing on spousal support." Neither party appealed from the magistrate's decision, and the trial court confirmed the decision. The trial court later heard proof, and set aside order confirming magistrate's decision, finding that ex-husband's income for purposes of both child support and spousal support was \$9,900 per month.

The ex-husband appealed, arguing, among other things, that the magistrate's decision was final, and not subject to revision. The Court of Appeals affirmed the trial court, reminding the ex-husband (and us) of the importance of Rule 54.02:

Pursuant to Tennessee Rule of Civil Procedure 54, "any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties." Tenn. R. Civ. P. 54.02; *see also* Tenn. R. App. P. 3(a) ("[A]ny order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties."). Thus, motions seeking relief from a trial court's decision adjudicating fewer than all the claims, rights, and liabilities of all the parties, should be filed pursuant to Rule 54.02.

*Id.*

## 6. Credibility of Telephone Witnesses

*Kelly v. Kelly* (Tennessee Supreme Court, September 10, 2014). The trial court permitted witnesses to testify by telephone in a custody trial. The Court of Appeals found that the trial court's reliance on the credibility of a guidance counselor who testified by telephone was contrary to law, as the trial court could not "view" the testimony or "weigh" her credibility, and thus reversed the trial court's award of primary parenting to the mother. As the Supreme Court stated in reversing the trial court,

We agree with Ms. Kelly that telephonic testimony is more akin to live testimony than to documentary evidence. As Ms. Kelly argued in her brief:

Only the Trial Court heard the tone and inflection of [the counselor's] voice. The Trial Court was in the best position to determine whether [the counselor] sounded calm or agitated, at ease or nervous, self-assured or hesitant, steady or stammering, confident or defensive, forthcoming or deceitful, reasonable or argumentative, honest or biased. [The counselor] was a virtual live witness – linked by wire in open court – responding in her own voice in real time to questions on direct and on cross examination. [She] was not a cold transcript for the Court of Appeals to assess anew.

While we agree with Mr. Kelly that "telephonic testimony inhibits a trial court's ability to gauge witness credibility," we also believe that a trial court is better-situated to gauge the credibility of a telephonic witness than an appellate court. To the extent that the Court of Appeals majority rejected the weight the trial court ascribed to the counselor's testimony solely because she testified by telephone, we find this lack of deference erroneous.

*Id.* The Supreme Court went on to hold that

In light of the trial court's clearly articulated findings, we find no evidence that the court applied an incorrect legal standard, reached an illogical conclusion, or based its decision on a clearly erroneous assessment of the evidence. Appellate courts should reverse custody decisions "only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence." *Armbrister v. Armbrister*, 414 S.W.3d at 693 (quoting *Eldridge v. Eldridge*, 42 S.W.3d at 88).

The trial court applied the proper legal standards. Its custody ruling falls well within the spectrum of possible reasonable results. Granting the trial court the deference it deserves in ascribing credibility and weight to the witnesses' testimony, we find no basis to overturn the trial court's assignment of Ms. Kelly as W.K.'s primary residential parent.

*Id.*

## IV. Contempt

### 1. Criminal Contempt and Attorneys' Fees

*Lattimore v. Lattimore* (Court of Appeals at Nashville, filed October 24, 2013). Several lessons to be learned here: (1) allegations that a party did not pay alimony, maintain medical insurance, or maintain life insurance equals three criminal contempts, not 70, even if the proof at trial shows that the failure to pay alimony occurred 33 times, the failure to maintain medical insurance occurred 36 times, and the failure to maintain life insurance occurred once, *unless* the charging instrument (i.e., the Petition or Complaint in this instance) specifically identifies all 70 of the individual instances which constitute contempt; and (2) you can get attorneys' fees for prosecuting a criminal contempt, based on Tennessee Code Annotated section 36-5-103(c), which "clearly authorizes a recovery of reasonable attorney's fees incurred in enforcing an order awarding alimony." *Id.*

### 2. Simultaneous Civil and Criminal Trials?

*Norfleet v. Norfleet* (Court of Appeals at Nashville, April 9, 2014). Remember the good old days when it was pretty clear that you shouldn't try a criminal and civil contempt case at the same time, or a criminal contempt with another issue? Well, those days may be gone. In *Norfleet*, the Court of Appeals affirmed the trial court's conviction of Mother on several counts of criminal contempt over Mother's objection on appeal that the case should not have been tried together with a civil contempt and a change of custody action. Mother did not object at trial, and she did receive a written notice of rights from opposing counsel before the trial, but her lawyer raised a good point, acknowledged by the Court of Appeals in this case:

Mother relies on language in an unpublished opinion in which this court reversed and vacated a judgment for criminal contempt. Explaining our decision, we observed among other things that “[c]ivil and criminal contempt proceedings should not be tried simultaneously because of the significant differences in the respective burdens of proof and procedural rights accorded to the person accused of contempt.” *Cooner v. Cooner*, No. 01-A-01-9701-CV-00021, 1997 WL 625277 at \*15 (Tenn. Ct. App. Oct. 10, 1997).

*Id.* Good, but not good enough: the Court of Appeals reminded the parties that *Cooner* is an unpublished decision, and otherwise distinguished it away. But *Norfleet*, for now, is also an unpublished decision. So, the question: can you, or can't you, try a criminal contempt simultaneously with a civil contempt? For now, the answer is “yes.”

## V. Division of the Marital Estate

### 1. Division of Marital Debt

*Luplow v. Luplow* (Court of Appeals at Nashville, June 19, 2014). This case addressed a number of issues common to divorce actions, including the division of marital debt and the identification of separate property. Here, Husband had been sued for malfeasance by an employee of a car dealership at which he worked, and a judgment had been rendered against Husband of which Wife asserted she had no knowledge. The trial court found that the debt was marital and should be paid, in equal shares by the parties, from the proceeds from the sale of the parties' marital residence. The Wife appealed, arguing (1) the judgment was not a marital debt, and (2) the trial court erred in dividing the debt equally. The Court of Appeals held that the judgment was a marital debt, but that the trial court had incorrectly applied *Alford* and held that the judgment should have been allocated solely to Husband.

With regard to whether the debt was marital, the Court of Appeals made quick work of the issue:

Wife's contention that the judgment was not a marital debt is not well taken. "[M]arital debts' are all debts incurred by either or both spouses during the course of the marriage *up to the date of the final divorce hearing.*" *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn. 2003) (emphasis added). The judgment was rendered and the debt thereby incurred prior to the final divorce hearing; thus, we affirm the determination of the trial court that the judgment lien was marital debt and subject to equitable division.

*Id.* On the issue of how to allocate the debt, the Court of Appeals held as follows:

In *Alford v. Alford*, the Supreme Court held that four factors should be considered in dividing marital debt: (1) the debt's purpose; (2) which party incurred the debt; (3) which party benefitted from incurring the debt; and (4) which party is best able to repay the debt. *Alford*, 120 S.W.3d at 813 (citing *Mondelli v. Howard*, 780 S.W.2d 769, (Tenn. Ct. App. 1989)).

The final decree here does not show that the court applied these factors in dividing this debt; in our review, application of these factors does not support equal division of the debt. The judgment resulted from a suit for breach of contract and misrepresentation brought by Barry Bethel—a former sales manager at the Neill-Sandler car dealership where Husband was general sales manager—against the dealership, Husband, and others.

At trial, “Bethel testified that he requested [Husband] to negotiate the terms of his employment with Neill-Sandler and asked that his compensation plan be the same as [another sales manager]; Mr. Luplow agreed to both requests”; Bethel later learned that his compensation plan was less favorable than that of other sales manager. *Bethel v. Neill-Sandler Buick Pontiac GMC, Inc.*, M2011-00356-COA-R3-CV, 2012 WL 3027356, at \*1 (Tenn. Ct. App. July 24, 2012), appeal denied (Nov. 21, 2012).

The case proceeded to trial against Husband only, and the jury returned a verdict against him, awarding Bethel compensatory damages of \$62,083.186; Husband appealed, and the verdict was affirmed. *Id.*

The first and third *Alford* factors are not applicable in this case. Neither Husband nor Wife received a benefit from the debt and it served no discernable purpose in the context of the marriage. As respects the second factor, it is uncontroverted that Husband alone incurred the debt as the result of his conduct. Thus, the final factor we consider is who is best able to repay the judgment. In making a separate determination with respect to other marital debt, the trial court found that Husband was the “primary wage earner during the marriage” and had the “higher earning capacity of the parties.” The record supports these findings and, consistent with them, we have determined that Husband is best able to repay the judgment.

Applying the *Alford* factors, specifically, that Husband incurred the judgment debt as a result of his malfeasance and, considering the nature and amount of the parties' other debt, is best able to repay it, we reverse the trial court's equal division of the judgment and modify the final decree to allocate full responsibility for the judgment to Husband.

*Id.* The Court of Appeals was fairly proud of its decision concerning the application of *Alford* to the Bethel judgment, as shown by its continued reliance on *Alford* in reviewing whether a certain piece of property Wife had inherited from her father (the "Castleman Property") was Wife's separate property or whether it had been transmuted into marital property. Husband argued for transmutation based on the fact that the parties had taken out a line of credit against the property in their joint names and that Husband had paid the taxes for one of the last years of the parties' marriage. The trial court had found that the property was Wife's separate property notwithstanding the line of credit and the payment of taxes, and that the debt was Wife's separate debt. The Court of Appeals reversed on part of this determination, as well, holding that the property continued to be separate: the payment of taxes was a "de minimus" contribution and the fact that parties borrowed money against the property did not effect a transmutation of it in any fashion. (The trial court had also rejected Husband's assertions that he had made improvements to the Castleman Property, which the Court of Appeals affirmed.)

On the line of credit, the Court of Appeals found that the trial court had erroneously characterized it as a separate debt of the Wife:

The fact that the debt was secured by Wife's separate property, however, does not determine the appropriate classification of the debt. The record shows that Husband and Wife incurred the debt during the marriage; thus, it is marital debt. *See Alford*, 120 S.W.3d at 814.

*Id.* The Court of Appeals went on to hold that the Husband should be responsible for two-third of the line of credit, and the Wife responsible for one-third, completing a very rough visit by the Husband to the appellate courts.

## 2. Separate Property Contributions

*Hoggatt v. Hoggatt* (Court of Appeals at Knoxville, May 12, 2014). This case is remarkable not for its majority opinion, but for the spirited dissenting opinion filed by Judge Michael Swiney. The trial court determined the net value of the marital property in a 13-year marriage, deducted \$50,000 from that value and awarded it to the wife, and then divided the remaining estate 50/50 between the parties. This, in essence, left the wife with 2/3s of the marital estate and the husband with 1/3. The husband appealed, arguing that the \$50,000 or separate property contributed by wife to the marital estate had been transmuted into marital property, first by depositing the separate funds into a joint account, and later by using \$50,000 to pay down the debt on the marital residence.

The Court of Appeals held that there was no evidence that the trial court had returned to wife her *separate property*:

The trial court never expressly said it was awarding Wife \$50,000 as her separate property. At one point in its decree, the court said that it was giving Wife \$50,000 off the top of the value of the home “based on . . . Wife’s separate property contribution” and, in another place, the court said the award was “based on . . . Wife’s contribution of her separate property to the mortgage, . . .” The evidence preponderates that the distribution of \$50,000 to Wife was an “off the top” division of the marital estate to Wife because of her contributions of her separate property to the marriage.

*Id.* The majority opinion focused on the roughly \$119,000 contributed by the wife from her separate property to a marital estate that, in the end, was worth only about \$139,000, and

determined that the division of property, while not equal, was equitable, considering the wife's substantial contributions from separate property. Judge Swiney strongly disagreed:

In my view, this is not an equitable division of the marital estate under the evidence in this record. While it is correct under Tennessee law to consider Wife's contribution of her separate property which was transmuted into marital property, it is not equitable to give Wife what amounts to a dollar-for-dollar credit as to the \$50,000 payment because it treats \$50,000 of her once separate property, in effect, as if transmutation never occurred.

Just as the husband in *Brock v. Brock*, 941 S.W.2d 896, 901 (Tenn. Ct. App. 1996) cited and relied upon by the majority was "not entitled to an automatic dollar-for-dollar credit against the marital estate for the value of property owned by him at the time of the marriage, but no longer owned by him at the time of the divorce," neither is Wife in this case automatically entitled to a dollar-for-dollar credit.

While I am aware of Wife's separate property contribution as emphasized by the majority, I do not think this lessens the reality that what the trial court and the majority effectively did was look at \$50,000 paid from the parties' joint account, marital property, on the mortgage and then give Wife a dollar-for-dollar credit as to that specific payment.

*Id.* Judge Swiney went on to state that, "In the instant case... the majority has placed an inordinately high importance on Wife's contribution of separate property to the exclusion of other relevant factors," citing, among other things, the fact that the husband, through his contributions through work, had undoubtedly contributed substantially more funds to the marriage than the wife. It will be interesting to see whether this case goes any further, and to see more discussion of the "dollar for dollar" issue raised in both the majority and minority opinions.

### 3. “Deferred Distribution” or “Retained Jurisdiction” Method, on Steroids

*Stout v. Stout* (Court of Appeals at Knoxville, December 30, 2013). Alright, now that we know the difference between the “net present value method” and the “deferred distribution or retained jurisdiction method,” it is time to explore what exactly “retained jurisdiction” really means. For example, assume the parties enter into a divorce agreement in 1999 that the trial court will retain jurisdiction to divide the husband’s retirement account in the future. And assume that the parties later enter into an Agreed Order in 2001 reflecting the payment of a modest amount of money by the ex-husband to the ex-wife, and stating that this payment “is in lieu of and substitution and full satisfaction of any amounts which the [wife] was to receive from the [husband’s] retirement plan at his place of employment” and that “the [wife] shall not be entitled to any portion of the benefits due to the [husband] [from] his place of employment.” Sounds like the issue is settled, right?

Wrong. In *Stout*, the wife filed a petition more than a decade later seeking a portion of the husband’s workplace retirement account. The wife argued that the 2001 Order was “improvidently drafted and entered into as a mistake.” The husband objected, pointing to the clear language of the 2001 Agreed Order and the fact that it is way, way too late to file a petition under Rule 60 for relief from the 2001 Order. The trial court and the Court of Appeals disagreed, holding that (1) the trial court was authorized under the “retained jurisdiction” provision of the original order to entertain the wife’s petition 12 years later, and (2) that, by retaining jurisdiction, the trial court was vested with the authority to ignore the 2001 Agreed Order since it was inconsistent with the original divorce decree. The Court of Appeals also noted that the “trial court has the authority, pursuant to Tennessee Rule of Civil Procedure 60.01, to correct an error in a judgment *sua sponte* without limitation as to time.”

4. *Bertuca, Reborn!*

*Barnes v. Barnes* (Court of Appeals at Nashville, April 10, 2014). *Barnes* is a high-dollar case tried over five days on numerous issues, including the valuation of a dental practice and alimony. (The alimony issues are addressed earlier in these materials.) In this case, the Wife's expert valued the husband's interest in his dental practice at \$678,179. The Husband's expert (this will surprise you if you were born yesterday) valued the practice considerably lower—at \$50,000. The Husband's expert used an income approach to valuing the practice and deducted 15% from the actual value to reach his \$50,000 figure based on the lack of marketability of the practice. The trial court, relying in its words primarily on the Husband's expert, valued the practice at \$328,392.

The Court of Appeals reversed the trial court on the use of the marketability discount, relying on the *Bertuca* case decided several years ago by the Court of Appeals. As the Court of Appeals stated,

In *Anderson*, 2006 WL 2535393, at \*2, which was cited by the Court in *Bertuca*, an expert valuing a husband's interest in a company for divorce purposes similarly applied a 10% "marketability discount" to the husband's interest, which he said was what it would cost to market the husband's business interest for sale, in terms of advertising, broker fees, etc.

The Court of Appeals reversed the trial court's valuation to the extent that it included the 10% discount, finding it "inappropriate because no sale was ordered and there [was] no indication in the record that the husband ha[d] any intention of selling his minority stock." *Id.* at \*4. Consequently, the Court of Appeals removed the 10% reduction from the value of the stock and increased the trial court's valuation by that amount. *Id.* See also *Yates v. Yates*, No. 02A01-9706-CH-00122, 1997 WL 746377, at \*3-4 (Tenn. Ct. App. W.S. Dec. 4, 1997) (declining to discount the value of a husband's stock in a closely held corporation for lack of marketability).

Considering the reasoning of these cases, we likewise find that the trial court erred in applying a 15% discount for lack of marketability to the value of Husband's interest in the dental practice. Husband's expert, and also the trial court, utilized an income-based approach to valuing the dental practice, and the Court in *Bertuca* used an earnings-based approach. The trial court's valuation should not have been impacted by the lack of marketability of Husband's interest, unless of course there was some indication that a sale of his interest was necessary or desirable. Because Husband had no intention of selling his interest in the corporation, "the value of the business is not affected by the lack of marketability and discounting the value for non-marketability in such a situation would be improper." *Bertuca*, 2007 WL 3379668, at \*7 (citing *Anderson*, 2006 WL 2535393, at \*4).

The effect of the trial court's 15% discount for lack of marketability was that the trial court deducted \$57,951 from the practice value to reach a final value of \$328,392. Therefore, this same amount should be added back to the practice value, for a total practice value of \$386,343.

*Id.* The Court of Appeals also reversed the trial court on its decision, after hearing post-trial motions, to include the *pendente lite* alimony received by the Wife during the course of the divorce as an asset on her side of the ledger, and to "charge" her with these funds in the overall division of property. As the Court of Appeals noted,

Although Husband argued that the salary and *pendente lite* alimony Wife received during the divorce proceedings constituted marital property to be divided, not surprisingly, he did not offer to account for the expenditures he made for his own support during the divorce proceedings, nor did he suggest that the marital funds he used for his own support during that same time period should be returned to the marital estate for distribution. Because the trial court's \$57,000 award effectively required Wife to "account" for funds she spent during the divorce proceedings, without imposing the same requirement on Husband, we find that it was inappropriate to "charge" Wife with the receipt of \$57,000 in marital funds.

*Id.*

5. **Separate Property: Increased Value (*Huddleston and Tefler*)**

*Huddleston v. Huddleston* (Court of Appeals at Nashville, July 30, 2013). In this case, the parties were married in 1969, and divorced in 2011. The husband owned three plots of farm land at the time of the marriage, all of which substantially increased in value during the course of the marriage. The trial court found the increase to be marital property, but the Court of Appeals reversed. As the Court of Appeals stated,

In the present case the court determined that Wife “contributed to the appreciation [of the farm property] during the marriage.” The basis of the court’s holding was the following testimony of Wife:

[S]he worked a few years during the marriage but always maintained the marital home and performed the duties of homemaker such as laundry, ironing, cleaning, cooking meals, gardening, canning and freezing food from the garden, raking leaves, planting flowers, painting rooms, making curtains, and helped with farm chores such as driving the tractor, maintaining fencing, and cutting and stripping tobacco.

While the testimony supports a finding that Wife made contributions to the marriage as a homemaker, the evidence does not support a determination that her efforts contributed to the increase in the value of the property. The court made no determination as to the cause of the increase in value and there is no proof that the appreciation in value as testified to by Mr. Roberson was due to the efforts of either Husband or Wife.

Consequently, the court erred in determining that the increase in value of three lots Husband owned prior to the marriage was marital property and we reverse that portion of the final order.

*Id.*

*Telfer v. Telfer* (Court of Appeals at Nashville, June 28, 2013). This is an excellent case focusing on the interplay between tax filings and the appreciation in the value of separate property acquired by a spouse during the course of a marriage. Here, the Court of Appeals reversed a decision by the trial court finding that Wife's interest in an asset gifted to her by her family during the marriage was entirely her separate property. In doing so, the Court of Appeals summarized the standard for deciding whether appreciation was marital or separate property:

Whether a spouse substantially contributed to the preservation and appreciation of the other spouse's separate property is a question of fact. *Keyt*, 244 S.W.3d at 329 (citing *Sherrill v. Sherrill*, 831 S.W.2d 293, 295 (Tenn. Ct. App. 1992)). Such a contribution may be either "direct" or "indirect." Tenn. Code Ann. §36-4-121(b)(1)(D); *McFarland v. McFarland*, No. M2005-01260-COA-R3-CV, 2007 WL 2254576, at \*6; 2007 Tenn. App. LEXIS 509, at \*17-18 (Tenn. Ct. App. Aug. 6, 2007).

Regardless, it must satisfy two requirements. First, "some link between the marital efforts of a spouse and the appreciation of the separate property must be established before the separate property's appreciation is considered marital property." *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 746 (Tenn. 2002); *see also Keyt*, 244 S.W.3d at 329. Second, the contribution must be "real and significant." *Keyt*, 244 S.W.3d at 329; *Wright-Miller v. Miller*, 984 S.W.2d 936, 944 (Tenn. Ct. App. 1998) (citing *Brown v. Brown*, 913 S.W.2d 163, 167 (Tenn. Ct. App. 1994)).

However, the contributions of the spouse who seeks to have the appreciation deemed marital property "need not be monetarily commensurate to the appreciation in the separate property's value, nor must they relate directly to the separate property at issue." *Wright-Miller*, 984 S.W.2d at 944.

*Id.* Here, the Court of Appeals agreed that the payment by the parties of tax liabilities associated with the business interests gifted to Wife during the marriage constituted a real and

significant contribution to the value of those interests, citing, among other cases, *Schuett v. Schuett*, No. W2003-00337-COA-R3-CV, 2004 WL 689917; 2004 Tenn. App. LEXIS 193 (Tenn. Ct. App. Mar. 31, 2004). The Wife's attempt to distinguish *Schuett* was unsuccessful, in part because the parties in this case had liquidated a substantial joint account, largely funded with the Husband's own inheritance, to pay 2006 tax liabilities associated with the Wife's inherited businesses.

### **5B. More Separate Property**

*Luttrell v. Luttrell* (Court of Appeals at Jackson, January 28, 2014). There are a lot of lessons, some learned and some forgotten, in this case. In *Luttrell*, the parties had been married for some time when the wife discovered the husband was engaged in an extramarital relationship, and a divorce followed. The wife came from a wealthy family and had substantial separate assets, which the husband tried without success to get a share of. The trial court and the Court of Appeals found that

- The fact that the husband sat in on investment decisions, met with bankers, and both parties referred to the funds as "ours" did not make it so; the wife's separate assets remained separate;
- You don't commingle funds by filing joint tax returns;
- You don't commingle funds by contributing separate funds to the marital estate;
- Spending marital funds first, instead of separate funds, does not count as a substantial contribution to the appreciation in the value of the separate funds;
- If you (the husband) think your guitar collection is your separate property, you better bring some documents to prove it;
- If you can trace the \$6,800 you spent on a watch a number of years ago directly to your separate property, then the watch is separate as well;
- Those payments you made on the family condo in Florida were for the right to use the condo, not a contribution to its appreciation in value;
- Filing separate returns is not a dissipation of marital assets when you suspect your spouse of financial wrongdoing or criminal behavior (it doesn't help your spouse to refuse to answer questions about his conduct based on his 5<sup>th</sup> Amendment privilege);

- A 75/25 division of the marital estate in favor of the other party is equitable, even if you made bigger contributions to the acquisition of the estate, if you have a large separate estate and he doesn't.

*Id.* Finally, the Court of Appeals approved the imputation to Husband of \$134,000 per year for child support purposes, based on income that the Husband had earned in 1999 and 2000. Husband had voluntarily quit traditional employment at that time and, despite his education, had not returned to a traditional workplace nor had he been successful in working for himself.

This may be a correct interpretation of the law, but it shows the ease with which different results can be found in similar cases: in *Wheeler*, discussed elsewhere in these materials, the mother had earned hundreds of thousands of dollars annually until she quit work in 2001. Mr. Wheeler's efforts to have the trial court and the Court of Appeals impute income to her or use her income as a shield to prevent him from paying alimony went unheeded, on the theory that mother's decision to stay at home was agreed between the parties and the children benefitted from having her at home. Those questions were left unasked and unanswered in *Luttrell*, but the results are strikingly different.

## 6. Separate Property and Oral Agreements

*Vachon v. Vachon* (Court of Appeals at Nashville, February 27, 2014). *Vachon* is a big case, with a lot of big issues. Among them is a dispute concerning wife's inherited funds. In this case, the wife inherited money from her father, put the money into a separate account, and proceeded to spend it. She then reimbursed the account from marital funds, testifying that the parties had agreed for her to do so and that the account would remain her separate property. The husband disagreed with this assertion, stating that he had not agreed that the account would be reimbursed from marital funds and retain its separate nature. The trial court believed wife, and the Court of Appeals affirmed.

The Court of Appeals reversed the trial court for taking into account tax consequences of the award to husband of his interest in certain retirement plans. You might have thought this was consistent with T.C.A. 36-4-121(c)(9) (“In making an equitable division of marital property, the court shall consider all relevant factors including the tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, *and other reasonably foreseeable expenses associated with the asset...*”)(emphasis supplied), but you would be wrong, according to *Vachon*. In this case, the Court of Appeals stated that

“This Court has previously held that transfer costs and fees are not proper deductions when the record contains no evidence that a party intends to sell an asset; unless the trial court contemplates the sale of property as part of the division of the marital estate, the value of the property should be based on its present value without deducting costs that might be incurred if the property were sold.” *Watson v. Watson*, W2004-01014-COA-R3-CV, 2005 WL 1882413 (Tenn. Ct. App. Aug. 9, 2005) (citing *Waits v. Waits*, No. 01-A-01-9207-CV00288, 1993 WL 49564, at \*9–10, 1993 WL 49564 (Tenn. Ct. App. Feb.26, 1993). Where there is no proof that a party intends to dispose of an asset in the near future, exactly when the assets will be subject to income taxation and the amount of taxes that will be due are matters of speculation. *Jekot v. Jekot*, 232 S.W.3d 744, 749 (Tenn. Ct. App. 2007) (citing *Hasty v. Hasty*, No. 01-A-01-9504-CH00176, 1995 WL 567313, at \*3 (Tenn. Ct. App. Sept. 27, 1995).

*Id.*

The trial court also awarded the wife 10 years of alimony *in futuro* at \$7,500 per month, but the Court of Appeals vacated that award and remanded the case for additional findings:

“We are, however, unable to affirm the nature, amount, or duration of the alimony awarded by the trial court. Although the court’s ruling included language regarding the possibility of rehabilitation—in that the court considered Wife’s potential post-divorce standard of living—the court did not make a finding that long-term support was necessary as required by *Gonsewski*. The court’s ruling does not indicate why rehabilitative or transitional alimony may have been inappropriate in this case; further, the court does not provide a basis for the amount of the award or the duration of the award. Without sufficient clarity as to the factual and legal basis, we cannot affirm the nature, amount, or duration of the alimony award to Wife.

## 7. Fairness Matters

*Haggard v. Haggard* (Court of Appeals at Jackson, May 28, 2013). While this case primarily concerned itself with the propriety of the trial court making a change to its own order upon a motion to alter or amend filed by the Wife, there is one nugget that should give hope to folks who believe that results ought to be not only legal, but fair:

We agree with Husband’s contention that a marital property division is not rendered inequitable simply because it is not mathematically equal, *see Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996), but a marital property division must nevertheless “reflect essential fairness in light of the facts of the case.” *Id.*

## 8. Second Marriage

*Sartain v. Sartain* (Court of Appeals at Nashville, June 27, 2013). Parties marry. Parties divorce. Wife awarded 36% of Husband’s military retirement. Parties remarry before Husband begins to draw his retirement. Parties divorce again. Wife awarded 45% of Husband’s military retirement. Question: Is Wife entitled to receive the 38% share of Husband’s retirement which he drew during the second marriage, or did the second marriage “cancel” her 36% interest in Husband’s retirement?

Answer: the remarriage did not affect her right to receive 36% of Husband's retirement, as her separate property, which he drew during the parties' second marriage. As the Court of Appeals stated,

“[W]e agree with Wife that the award to her from the parties' first divorce of 36% of Husband's retirement pay, whenever he started drawing it, became her separate property when the parties divorced in 1997. Husband had signed an enforceable contract to pay Wife that amount upon his retirement, and that obligation was never canceled. As the court in *Hurst* pointed out, had Wife herein married someone else after the parties' first divorce, Husband would have been required to pay her the percentage of his retirement pay that he had agreed to, and that he had been ordered to pay.”

*Id.* Luckily for the Husband, it appears that the Wife will receive a total of 45% of his retirement pay, rather than 45% plus 36%. But he will have to reach back to 2006, when he started drawing on his retirement, to provide Wife with her 36% interest that he believed, until 2013, had been “canceled.”

#### 9. **Unequal is Not Inequitable**

*McCoy v. McCoy* (Court of Appeals at Knoxville, filed November 4, 2013). You know that case you have been looking for where the Wife got most everything and the Husband got mostly debt? Well, you found it. The Husband, whose behavior during the marriage had gone from fair to atrocious, appealed from a trial court decision that gave the Wife all of the equity in the house owned by Husband prior to the marriage, all of the equity in the house the parties purchased during the marriage, short term alimony, and attorneys' fees. He also complained that the parenting plan did not give him sufficient time with the children. The Court of Appeals affirmed the trial court on every issue except the children, and gave the Husband four weeks in the summer instead of the two weeks awarded by the

trial court. The Court of Appeals reasoned that, since most of the house equity was given to the Wife as alimony *in solido*, the actual property division was relatively close to equal, but the trial court did not abuse its discretion in any event.

#### **10. Dissipation, Murder and Legal Fees**

*Lloyd v. Lloyd* (Court of Appeals at Nashville, filed April 24, 2014). This is, in part, a dissipation case. It is also a case involving the rights of pro se defendants and the manner in which the trial court should deal with incarcerated parties. In *Lloyd*, the Husband murdered two individuals, and the Wife sued for divorce. The trial court granted the divorce and found that the Husband had dissipated \$85,000 of marital property in paying for his legal defense in the murder trials for his two victims. The Court of Appeals affirmed, finding that

The determination of whether a dissipation of marital assets occurred is a factual inquiry. *Altman v. Altman*, 181 S.W.3d 676, 682 (Tenn. Ct. App. 2005). Dissipation of assets requires a showing of intentional, purposeful, and wasteful conduct. *Id.* The party alleging a dissipation of marital assets has the burden of persuasion and the initial burden of production. *Id.* “After the party alleging dissipation establishes a prima facie case that marital funds have been dissipated, the burden shifts to the party who spent the money to present evidence sufficient to show that the challenged expenditures were appropriate.” *Id.* (citing *Wiltse v. Wiltse*, 2004 WL 1908803, at \*4 (Tenn. Ct. App. Aug. 24, 2004); *Bratcher v. Bratcher*, 26 S.W.3d 797, 799 (Ky. Ct. App. 2000); *Turner v. Turner*, 809 A.2d 18, 52 (Md. 2002); *Anderson v. Anderson*, 514 S.E.2d 369, 380 (Va. Ct. App. 1999)).

The evidence does not preponderate against the court’s determination that Husband dissipated \$85,000.00 of marital funds. The \$75,000.00 incurred in the defense of Husband’s criminal case was based on his illegal conduct that was intentional, purposeful and had produced no benefit to his family.

With respect to the \$10,000.00 the court determined that, given the facts of the divorce case, including Husband's acknowledgment of the grounds for divorce, his incarceration, and the wrongful death judgment entered against him, the numerous motions he filed-which had to be defended by Wife-caused her to unnecessarily expend marital funds; this finding is supported by the record. As required by the procedure set forth in *Altman*, Husband has failed to introduce any proof that the \$85,000.00 was an appropriate expenditure of marital funds.

*Id.*

## 11. Twenty-Five Years and Statutes of Limitation

*Cohen v. Didier* (Court of Appeals at Nashville, August 19, 2014). The Court of Appeals' own summary says it best:

This appeal involves the execution of documents in furtherance of the property division in a divorce decree. The parties were divorced many years ago. To carry out the property division, the final decree of divorce ordered the parties to execute copyright assignments. Twenty-five years later, the ex-husband filed this action to compel the ex-wife to execute the copyright assignments. The ex-wife argued that the action was barred by the ten-year statute of limitations applicable to an action on a judgment. Relying on *Jordan v. Jordan*, 147 S.W.3d 255 (Tenn. Ct. App. 2004), the trial court held that execution of the documents was a ministerial act to effectuate the property division in the divorce decree and was not execution on a judgment, so the action was not barred by the statute of limitations. After the ex-wife still failed to execute the copyright assignment documents, the trial court designated the clerk of the court to act for the ex-wife to execute them, pursuant to Tenn. R. Civ. P. 70. The ex-wife appeals. Discerning no error, we affirm.

## VI. Jurisdiction

### 1. Time of Filing

*Iman v. Iman* (Court of Appeals at Nashville, July 16, 2013). This is a good case on jurisdiction under the UCCJEA. Here, Father was the primary parent and had moved to Florida. Mother filed a petition to modify and then moved to Florida herself to be closer to the child. Father sought to dismiss on jurisdictional grounds, but the trial court denied the motion to dismiss, heard the case, and the Court of Appeals largely affirmed. In doing so, the Court of Appeals disposed of the father's issue concerning jurisdiction by pointing out that jurisdiction attached at the time of the filing of the Petition, not the date of trial:

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The UCCJEA provides that where there is a dispute about the proper construction of any section of the UCCJEA, the official comments "shall constitute evidence of the purposes and policies underlying such sections . . . ." Tenn. Code Ann. § 36-6-203. This Court has previously relied on the Official Comments in interpreting the provisions in the UCCJEA regarding exclusive, continuing jurisdiction. *See In re Marquise T.G.*, No. M2011-00809-COA-R3-JV, 2012 WL 1825766, at \*5 (Tenn. Ct. App. May 18, 2012); *Conover*, 2010 WL 3420548, at \*4; *Highfill v. Moody*, No. W2009-01715-COA-R3- CV, 2010 WL 2075698, at \*5 & n.4 (Tenn. Ct. App., May 25, 2010); *Cliburn*, 2002 WL 31890868, at \*8.

Therefore, we conclude that the question of jurisdiction is decided at the time of commencement of the proceeding. This holding is in accord with our established precedent. *See In re J.B.W.*, 2007 WL 4562885, at \*3 (Tenn. Ct. App. Dec. 27, 2007) (holding that "[t]he trial court did not lose subject matter jurisdiction over the petition just because the parties moved after the complaint was filed"); *Staats*, 206 S.W.3d at 549 (holding that jurisdiction in a UCCJEA case attaches at the commencement of a proceeding).

Indeed, this Court has held that “[c]hanges in circumstances occurring after [the commencement of the proceeding] have no relevance with respect to jurisdiction over the petition to modify.” *Busler v. Lee*, No. M2011-01893-COA-R3-CV, 2012 WL 1799027, at \*3 (Tenn. Ct. App, May 17, 2012). Because both Mother and the child lived in Tennessee at the commencement of the proceeding, the trial court did not lose exclusive, continuing jurisdiction merely due to the fact that all the parties moved to Florida while Mother’s modification request was pending.

*Id.* The Court of Appeals did remand the case to the trial court for an order containing findings of fact and conclusions of law, and a finding that the modification of the parenting plan was in the child’s best interest. The Court of Appeals held that the failure of the trial court to enter such findings was contrary to Rule 52.01, and, also, that this failure precluded the Court of Appeals from the award of attorneys’ fees to the mother:

The central issue in this case was the modification of the trial court’s prior parenting schedule to award Mother equal visitation with the child. Because the trial court failed to make any findings supporting the modification, we have vacated the trial court’s order modifying the schedule. Thus, Mother has not prevailed on the central issue in this case. Accordingly, we decline to award her attorney fees on appeal.

*Id.*

## 2. UCCJEA, Applied

*Miljenovic v. Miljenovic* (Court of Appeals at Knoxville, December 17, 2013). Parties divorce in New Jersey in 2006. Mom moves to Tennessee with the minor children as allowed by the Final Decree. Dad stays in New Jersey. Several changes to the parenting agreement are made over the next several years. In 2012, Dad files a petition in Tennessee to register the New Jersey divorce order and subsequent consent agreements, and in 2013 files a petition to modify the parenting arrangement. Trial court grants Dad immediate care of the minor

children, and Mom files an emergency appeal. Court of Appeals reverses, finding that the Tennessee court did not have subject matter jurisdiction to modify the original custody order: the New Jersey court had not found that it lacked continuing jurisdiction or that Tennessee would be the best place to decide parenting issues, and there was no emergency concerning the children. This case is interesting primarily because the mother and children had resided in Tennessee for over six years, and it was the out-of-state parent seeking to invoke Tennessee jurisdiction, not the Tennessee parent.

### 3. **Makeup Time and Jurisdiction**

*Taylor v. McClintock* (Court of Appeals at Nashville, July 25, 2014). The summary from the Court of Appeals is clear:

This appeal involves a Tennessee court's jurisdiction to modify a parenting order entered by a court in another state. The parties were divorced in Florida, and the Florida court designated the mother as the primary residential parent of the parties' only child. Soon thereafter, the father moved to Tennessee.

Years later, after many parenting disputes, the Florida court entered an order granting the father "make-up" parenting time by allowing the child to live in Tennessee with the father for a defined period of time that exceeded six months. At the same time, the Florida court granted the mother permission to relocate to Alabama.

After the child had lived with the father in Tennessee for over six months in accordance with the Florida order, the father filed a petition in the Tennessee trial court below, seeking to modify the Florida parenting plan to designate him as the primary residential parent. The trial court held that it did not have subject matter jurisdiction to modify the Florida parenting order under the Uniform Child Custody Jurisdiction and Enforcement Act. The father now appeals.

We reverse the Tennessee trial court's holding that it lacked subject matter jurisdiction to adjudicate the father's Tennessee custody petition, and remand for further proceedings.

*Id.* There are a lot of moving parts in this case. The “make up time” father was allotted under the Florida decree was from January 2013 until the beginning of the 2013-2014 school year, and was a consolidated amount of time based on previous Florida orders awarding father makeup time in smaller increments. Accordingly, the child had attended school in Tennessee from January 2013 until the end of the 2012-2013 school year. Mother had moved to Alabama in the summer of 2013, so neither party remained in Florida. Nonetheless, the Tennessee trial court concluded that Florida remained the child’s home state and that Tennessee did not have jurisdiction to modify the Florida parenting plan. The trial court further found that the child’s time in Tennessee was only a “temporary” absence from Florida and therefore did not count in the six-month home state determination under the UCCJEA.

The Court of Appeals accepted as fact all of the findings of fact by the Tennessee trial court, in the absence of a transcript of any proceedings in Tennessee, but overturned the trial court’s determination that it did not have subject matter jurisdiction based on a relatively straightforward application of the law. First, the Court of Appeals noted that, under Tennessee law, Florida had lost “continuing, exclusive jurisdiction” when both parents and the child no longer resided in Florida. As the Court of Appeals stated, “Determining where an individual ‘presently reside[s]’ does not involve a technical inquiry into the individual’s legal domicile under state law. Rather, the sole question is whether the relevant individuals ‘continue to actually live within the state’ or have ‘physically le[ft] the state to live elsewhere.’” *Id. citing Staats v. McKinnon*, 206 S.W.3d 532, 541-42 (Tenn. Ct. App. 2006).

Second, the Court of Appeals held that Tennessee had jurisdiction based on a “home state” analysis, in that the child had resided in Tennessee for over six months for a legitimate reason. The Court of Appeals distinguished other, similar cases on the ground that, because

the mother had moved from Florida to Alabama, neither party intended the child to return to her former home state of Florida.

Third, the Court of Appeals remanded the case to the trial court to determine whether there were any custody proceedings other than enforcement proceedings ongoing in the state of Florida that would lead the Tennessee court to decline to exercise jurisdiction, or whether there were other considerations that might support a decision not to exercise jurisdiction. This was necessary, explained the Court of Appeals, because the trial court had come to the conclusion that it did not have subject matter jurisdiction and therefore did not address whether it should decline to exercise jurisdiction on the ground that another state would be better set to handle this case. I suspect this is not the last decision on this case we will see.

## VII. Marriage

### 1. Voidable, Not Void

*In re Estate of Betty Meek* (Court of Appeals at Nashville, June 4, 2014). Every once in a while a case comes along to re-educate us on the difference between a *void* marriage and a *voidable* marriage. *Meek* is such a case. Here, after the marriage of two elderly individuals ended with the wife's death, the wife's family sought to have the marriage declared void in an effort to avoid paying the husband a statutory share of the wife's estate. The Court of Appeals reversed the trial court's granting of summary judgment to the executor's petition to declare the marriage void, noting as follows:

A marriage that is void is a nullity from the beginning "as if it had never been." *Brown v. Brown*, 29 S.W.3d 491, 494-495 (Tenn. Ct. App. 2000) (classifying marriages prohibited by law as void from the beginning); *Gordon v. Pollard*, 336 S.W.2d 25, 27 (Tenn. 1960) (recognizing that a marriage prohibited by statute is void "as if it had never been")...

"A voidable marriage differs from a void marriage in that the former is treated as valid and binding until its nullity is . . . declared by a competent court." *Brewer v. Miller*, 673 S.W.2d 530, 532 (Tenn. Ct. App. 1984) (citing *MacPherson v. MacPherson*, 496 F.2d 258, 262 (6th Cir. 1974)). A voidable marriage is a valid marriage until avoided by appropriate legal proceeding. *See Woods v. Woods*, 638 S.W.2d 403, 405 (Tenn. Ct. App. 1982) (stating the marriage was "a valid marriage which at most was voidable because of the impotence of the deceased and was valid until avoided by the legal proceeding instituted by defendant.").

A marriage is void ab initio if it is entered into: (1) when either party was already lawfully married; (2) . . . (3) when the parties are within prohibited degrees of kinship; or (4) *when, for any other reason, the marriage was prohibited by law, and its continuance is in violation of law.* *Coulter v. Hendricks*, 918 S.W.2d 424, 426 (Tenn. Ct. App. 1995) (quoting 2 Gibson's Suits in Chancery § 1147 note 10 (5th ed. 1956))...

The Executors contend “the marriage was prohibited by law, and its continuance is in violation of law” and, therefore, void because Plaintiff falsely signed the application for marriage.

*Id.* While there was no dispute that the husband misrepresented his age, birthday, and number of prior marriages on the application for a marriage license, and that doing so is a misdemeanor under Tennessee law, the Court of Appeals found no authority for such misrepresentations resulting in a marriage “prohibited by law” or that the continuation of the marriage “is in violation of law.” While these misdeeds may “provide grounds to rescind or annul the resulting marriage,

“[T]hat fact alone does not render the marriage a nullity as if it never occurred. Our public policy would never condone the potential consequences, indeed abuses, that could result if we accepted the Executors’ novel theory. Accordingly, because the parties’ marriage was not prohibited by statute, it was not void, merely voidable. *See Coulter*, 918 S.W.2d at 427 (When a marriage is not prohibited by statute and the grounds the grounds for the annulment of the marriage “are such that the parties may subsequently ratify the marriage, [the marriage] is voidable, rather than void.”).

*Id.* The Court of Appeals also reversed the trial court’s determination that the Husband was estopped from claiming an elective share and exempt property, items to which the Court of Appeals found he was statutorily entitled as he and Ms. Meek were married at the time of her death. Finally, the Court of Appeals sent back to the trial court for further hearing the issue of whether the husband was equitably estopped from claiming a years’ support and homestead rights, since the “trial court is to consider the totality of the circumstances when a surviving spouse’s claim of homestead and year’s support are at issue.” *Id.*

## VIII. Mediation

### 1. *Bah*, Revisited, in Mediation

*Vinson v. Vinson* (Court of Appeals at Jackson, September 11, 2013). This is a case which the AOC's very brief description hardly does justice. It involves the enforceability of a mediated parenting plan, paramour provisions, alleged underemployment, bankruptcy and other issues, all wrapped up in a case in which the Husband ultimately represented himself *pro se* on appeal. The parties had mediated a parenting plan for the summer of 2011, and then went to court where the trial court accepted parts of the mediated settlement for a permanent parenting plan and rejected others. The Court of Appeals initially clearly described the role of the trial court in reviewing mediated parenting plans:

As we noted in *Greer*, While an agreement on parenting issues would ideally reflect the parties' considered judgment on the arrangement that would best fit the needs of their children, it is also recognized that other factors can come into play in such an agreement, such as the original dysfunction in the parties' relationship, inequality of resources, reluctance to involve the children in the litigation, or even the parties' desire to get the divorce "over with."

For that reason, the trial court has broad discretion to determine an appropriate parenting plan in light of the evidence adduced at a hearing and the best interest of the children, even where the parties have reached an agreement on such issues. *Id.* at \*7. Simply put, "parents cannot bind the court with an agreement affecting the best interest of their children," so the trial court was not bound to approve the mediated parenting plan. *See Fletcher v. Fletcher*, No. M2010-01777-COA-R3-CV, 2011 WL 4447903, at \*9 (Tenn. Ct. App. W.S. Sept. 26, 2011) (citing *Tuetken*, 320 S.W.3d at 272).

*Id.* quoting *Greer v. Greer*, No. W2009-01587-COA-R3-CV, 2010 WL 3852321, at \*7 (Tenn. Ct. App. Sept. 30, 2010) (citing *Tuetken v. Tuetken*, 320 S.W.3d 262 (Tenn. 2010); *Coats v. Coats*, No. M2007-01219-COA-R3-CV, 2008 WL 4560238, at \*11 (Tenn. Ct. App. Oct. 8, 2008)). Having found that the Court could vary from the mediated agreement as necessary for the best interest of the children, the Court then went on to find that most of the provisions in dispute did not represent a variation between the mediated plan (which was established for a specific time period) and a permanent plan intended to govern the ongoing relationship between the parents and the children.

Of interest was the following: (1) the Court of Appeals approved a plan which did not provide specific time to the father, but rather a flexible schedule consisting of one weekend a month and one overnight per week depending on his work schedule; (2) awarded mother every Christmas Eve and Christmas morning with the children; and (3) kept in place a paramour provision on the ground that neither party objected to such a provision at trial. With regard to the parenting schedule, the Court pulled the *Bah* card out of the dustbin of Tennessee family law history:

Thus, while virtually all divorced parents must work outside the home, and some parents must work atypical hours, it is not punishment to the parent to consider the effect of her work schedule on the child. Rather, it is the court's job to ensure that the everyday quality of the child's life is not sacrificed to meet the parents' needs or desires. Consideration of how "child-friendly" each parent's schedule must necessarily be part of that determination. "[T]he child's best interest [is] the paramount consideration. It is the polestar, the *alpha and omega*."

*Id.* quoting *Bah v. Bah*, 668 S.W.2d 663, 665 (Tenn. Ct. App. 1983) (emphasis in original) as set forth in *Wall v. Wall*, No. W2010-01069-COA-R3-CV, 2011 WL 2732269, at \*27-28 (Tenn. Ct. App. July 14, 2011).

On the issue of willful underemployment, the Court of Appeals reversed the trial court's order setting child support based on father's 2010 income when his 2011 income was considerably lower. (Father had three jobs in 2010 and then took a slightly lower-paying job in 2011 as his primary job.) In reversing the trial court for failure to make a finding that the father was willfully underemployed, the Court of Appeals noted that

We have reversed child support awards in previous cases when trial courts have imputed income to a parent but failed to make a finding of voluntary underemployment. *See, e.g. Via v. Via*, No. M2006-02002-COA-R3-CV, 2007 WL 2198187, at \*6 (Tenn. Ct. App. July 23, 2007) ("The trial court abused its discretion in imputing income to Wife based upon no finding of willful and/or voluntary unemployment or underemployment."); *Kelley v. Kelley*, No. M2004-01202-COA-R3-CV, 2005 WL 2240964, at \*4 (Tenn. Ct. App. W.S. Sept. 15, 2005) ("In the absence of a written finding that Mr. Kelley was willfully underemployed, or that a deviation from the [Guidelines] was otherwise warranted, under T.C.A. § 36-5-101(e)(1)(A), the trial court is obligated to base the child support award upon Mr. Kelley's actual income at the time of the hearing.")

*Id.* The case was remanded with instructions to the trial court to reset father's child support based on his actual income, not an imputed income based on willful underemployment.

## IX. Parentage

### 1. Surrogacy Contracts and Termination of Parental Rights

*In re Baby* (Tennessee Supreme Court, September 18, 2014). From the opinion of the Tennessee Supreme Court:

[P]ublic policy of this state does not prohibit the enforcement of traditional surrogacy contracts, but does impose certain restrictions. As is relevant here, our public policy requires compliance with the statutory procedures for the termination of parental rights and does not allow parties to terminate the parental rights of a traditional surrogate through judicial ratification of a surrogacy contract prior to the birth of the child.

Accordingly, the contractual provisions in this case circumventing the statutory procedures for the termination of parental rights are unenforceable. We further hold that the juvenile court properly exercised jurisdiction over the issues of paternity and custody.

We vacate the portion of the juvenile court's order terminating the parental rights of the surrogate, but otherwise affirm the judgments of the juvenile court and the Court of Appeals. Because the surrogate retains parental rights unless and until such rights are terminated in a future proceeding, we remand the case to the juvenile court to address the issues of visitation and child support.

*Id.* Here, the parties entered into a traditional surrogacy contract, the surrogate's rights and those of her husband were terminated by agreement prior to the birth of the child, and the surrogate changed her mind shortly after the birth of the child. The Juvenile Court terminated her rights, and the Court of Appeals affirmed. The Supreme Court reversed. In doing so, the Supreme Court noted that Tennessee statutes "establish who qualifies as a legal parent and the manner in which parental rights may be terminated," and that a surrogacy contract cannot substitute for those requirements:

“We conclude that the enforcement of a traditional surrogacy contract must occur within the confines of the statutes governing who qualifies as a legal parent and how parental rights may be terminated.”

*Id.* Further:

Because the Surrogate is the biological mother of the Child, see Tenn. Code Ann. §36-1-102(10), she qualifies as a legal parent, see *id.* § 36-1-102(28)(A). Our statutes provide no mechanism by which a biological birth mother—including a traditional surrogate—may use a contract to avoid attaining the status of a legal parent or to negate parental status prior to the birth of a child. Had the General Assembly intended to authorize such a procedure, it could have done so, as evidenced by the enactment of a statutory procedure permitting the custodian of an embryo to enter into a written contract relinquishing all rights and responsibilities regarding the embryo to an intended recipient parent. See *id.* §§ 36-2-402(1), -403(a)(1)–(2).

As noted, parties to a traditional surrogacy contract must comply with our statutory procedures in order to terminate the parental rights of a traditional surrogate. Our statutory procedures unequivocally prohibit the voluntary relinquishment of a biological birth mother’s parental rights prior to birth through either surrender or parental consent to adoption. *Id.* § 36-1-111(d)(2).

Thus, the provisions of the contract at issue that attempt to circumvent statutory procedure by terminating or negating the parental rights of the Surrogate prior to birth contravene the public policy of our state. Those provisions are therefore unenforceable and without legal effect.

*Id.* The Court held that the juvenile court has jurisdiction to determine paternity and custody matters, and in certain termination matters, but cannot terminate parental rights in an involuntary proceeding absent a finding that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated. The case was remanded to the juvenile court to determine visitation and child support issues, along with a plea to the legislature to address “fundamental issues related to surrogacy.”

## 2 But Not All Hodge-Like Situations Are Equal

*Purdy v. Smith* (Court of Appeals at Nashville, May 23, 2014). The *Purdy* case involves a matter similar to Hodge, but one which was handled differently, and thus produced different results. In *Purdy*, the father avoided as long as he could service of a paternity action and failed to appear for a hearing in which default judgment was granted against him, together with an ongoing child support obligation. Later, when finally brought into court, the father requested and received a DNA test which proved that he was not the father of the child at issue. He requested relief from the default judgment and from his future child support obligation, but only prevailed on the second request. As the Court of Appeals held,

In light of Tenn. Code Ann. § 36-5-101(f)(1), this court has consistently upheld “the prohibition against retroactive modification of child support in the face of equitable defenses.” See *In re Christopher A.D.*, No. M2010-01385-COA-R3-JV, 2012 WL 5873571, at \*4 (Tenn. Ct. App. Nov. 20, 2012) (citing cases upholding the prohibition); *State ex. rel. Letner v. Carriger*, No. E2011-01853-COA-R3-CV, 2012 WL 3553400, at \*3 (Tenn. Ct. App. Aug. 20, 2012); *In re Treasure D.I.*, No. E2011-01499-COA-R3-JV, 2012 WL 629363, at \*3 (Tenn. Ct. App. Feb. 28, 2012).

In *In re Treasure D.I.*, 2012 WL 629363, at \*1, Eric Jackson believed that he was the father of the child at issue and signed a waiver declaring that he was the child’s father and agreeing to pay child support. After the child was emancipated, Mr. Jackson learned that he was not the child’s biological father; he filed a petition to forgive the child support arrearage that he owed. *In re Treasure D.I.*, 2012 WL 629363, at \*1. The trial court denied the petition, and this court agreed that the trial court was “without authority to forgive any portion of [Mr. Jackson’s] child support arrearage—even where later paternity testing establishes that [Mr. Jackson] is not the biological father of the Child—because such forgiveness constitutes an unlawful retroactive modification of a valid child support order.” *Id.* at \*3.

*Id.* The Court of Appeals then proceeded to distinguish *Hodge* from the case at hand on the ground that the father in *Hodge* had pursued a paternity fraud claim against the mother, not a Rule 60 attack on the validity of the child support order. The lesson: think “fraud,” not “relief” when you find a client who has been wrongly identified as the father and wants his child support back or a judgment for support set aside.

### 3. Kitchen Sink

*Emmanuel v. Scritchfield* (Court of Appeals at Jackson, August 14, 2013). This is a complex case involving several states and several parentage/parenting/child support issues.

Here is the nutshell version from the Court:

This appeal involves jurisdiction as to a parentage petition and related issues. The mother of the subject child lives in New York and the father lives in Tennessee. The child lives with the mother in New York. The mother filed this parentage petition in Tennessee.

The Tennessee juvenile court entered an order establishing the father’s parentage and adjudicating child support, the designation of the primary residential parent, and the allocation of the parties’ residential parenting time. The mother appeals, challenging in part the jurisdiction of the juvenile court to adjudicate custody and child support.

We affirm the juvenile court’s final order on the father’s parentage. We vacate the final order on the designation of primary residential parent and the allocation of residential parenting time, as the Tennessee court did not have jurisdiction over these issues under the Uniform Child Custody Jurisdiction and Enforcement Act.

We hold that the Tennessee court had jurisdiction to adjudicate child support, but vacate its final order on child support because the determination is based in part on the adjudication of the primary residential parent and the allocation of residential parenting time.

*Id.* Very interesting, but you will have to read it for yourself, because, with very few exceptions, I try not to use Memorandum Opinions under Rule 10 in these materials, and this is such an Opinion.

## X. Parenting Issues

### 1. Original Plans

*Kelly v. Kelly* (Court of Appeals at Knoxville, August 6, 2013). In this case, the Court of Appeals reversed the trial court's designation of the primary parent (changing the primary parent from mom to dad), criticized the trial court for relying on certain telephone testimony and for its wording of the mother's decision to take a child from Nashville to Chattanooga, reversed the trial court on its division of assets, and modified the alimony award to Wife—all based on the record before it and without need for remand. With regard to the change in the designation of the primary parent, the Court of Appeals found that the child's preference should have been given more weight, that the reliance by the trial court on telephone testimony from a counselor who told the court that he believed that children were better off with their mothers was misplaced, and that the child needed the stability he would more easily find with his father. **The Supreme Court overturned the Court of Appeals on these issues in an opinion reported elsewhere in these materials (the Civil Procedure section).**

On the division of property, the Court of Appeals found that it was inequitable that mother was awarded \$237,000 in net assets and the father was awarded a negative \$213,000 in net assets. As the Court of Appeals noted,

While several of Husband's financial decisions resulted in losses, it is inappropriate to saddle him with all those losses just as it would be inappropriate to award him all the gains if they had been successful. Those losses are a part of the marital estate just as are any gains.

*Id.* The allocation of net assets was modified to award Wife a positive net worth of \$85,000 and the husband a negative net worth of -\$61,000, which the Court of Appeals found was not

ideal but equitable. Wife's alimony award was cut from \$5,000 per month for ten years to \$4,000 for four years and \$3,000 per month for another four years, and changed from rehabilitative to transitional alimony.

*Wood v. Wood* (Court of Appeals at Jackson, May 16, 2013). In this case, the trial court awarded primary parenting responsibilities to the father, notwithstanding allegations of physical abuse and alcohol abuse, perhaps because those allegations went both ways. Of interest was the Court of Appeals footnote concerning the different standards for parenting decisions found in the Tennessee Code:

The trial court in this case expressly relied on the factors contained in Tennessee Code Annotated Section 36-6-106(a). There are currently two different statutes setting out non-exclusive lists of factors for the trial court to apply when designating a primary residential parent and adopting a parenting plan consistent with the child's best interest. Tennessee Code Annotated § 36-6-106 sets forth factors for courts to consider in divorce cases or any other proceeding that requires it "to make a custody determination regarding a minor child."

Tennessee Code Annotated § 36-6-404(b) sets forth factors that a trial court is to consider when determining the designation of a primary residential parent and the division of residential parenting time. *See Bryant v. Bryant*, No. M2007-02386-COA-R3-CV, 2008 WL 4254364, at \*5-6 (Tenn. Ct. App. Sept. 16, 2008). The list of factors in Tennessee Code Annotated Section 36-6-404(b) for the court to consider in determining a parenting plan are substantially similar to the best-interest factors set out in Section 36-6-106(a), and both statutes allow for consideration of any other factors the court deems relevant. *See Thompson v. Thompson*, No. M2011-02438-COA-R3-CV, 2012 WL 5266319, at \*6 (Tenn. Ct. App. Oct. 24, 2012). "[I]n most cases, the analysis and the result would be the same regardless of which set of factors is applied." *Id.*

In this case, we will consider the factors as relied on by the trial court, as well as two of the factors contained in Tennessee Code Annotated Section 36-6-404(4), as Mother argues that they support her argument on appeal, as discussed *infra*.

*Id.*

*Homes v. Homes* (Court of Appeals at Knoxville, February 3, 2014). *Homes* is an interesting case. The parties agreed to equal time throughout the year but not to which of them would be the primary residential parent. They went to court on that issue, together with an expert who prepared a parenting evaluation. After hearing from the parties and the expert, the trial court discarded the parents' agreement and named the father the primary residential parent during the school year, with mother to have alternating weekends, and the mother the primary residential parent during the summer, with the father to have alternating weekends. The mother appealed, and the Court of Appeals affirmed the trial court:

The court found that the parents were unable to agree or cooperate on certain matters, noting that they "fight like dogs." The court opined that the best way to arrange co-parenting in this case was "to have one parent have custody during the school year and the other parent to have custody during the summer months, and to have each of them have the decision making authority during that part of the year in which they have primary custody."

The court found that the alternate-week schedule would not be successful over an extended period because of the parental differences of opinion. Therefore, the trial court crafted a plan that was intended to "minimize the [Children's] exposure to harmful parental conflict" as provided in Tennessee Code Annotated §36-6-404 (a)(3). The trial court also determined that this would provide the Children "continuity of contact with each of the parents and to grow up knowing and being close to their mother and their father," which relates to the "love and emotional ties between the parent and Children" as well as "the importance of continuity" in Tennessee Code Annotated §36-6-106 (a)(1) and (3).

*McDaniel v. McDaniel* (Court of Appeals at Nashville, July 29, 2013). This case revolves around three words: "maximum participation possible". Here, the trial court found both parties to be fairly equal in the parenting department, but awarded the father primary

residential parenting with 245 days to 120 days for the mother. The Court of Appeals found fault with that award, stating that,

Tennessee Code Annotated § 36-6-106(a) specifically provides that, taking into account the children's best interests, the trial court shall adopt a parenting plan and schedule that permits each parent to enjoy the maximum participation possible in the children's lives that is consistent with the factors set forth in the statute.

As noted above, the majority of witnesses testified and the trial court found that *both* parents were equally capable and active in the children's lives and in caring for them and the primary reason Father was designated as the primary residential parent was the factor of continuity, which was primarily dependent on who was awarded the marital residence.

We also find it significant that Father submitted a proposed parenting schedule that provided Mother with 39 more parenting days than the schedule adopted by the trial court. For reasons unexplained by the record, the trial court did not make findings to state why Father's plan, or a plan more similar to his plan, was not in the children's best interests nor did the court make findings to state why a substantial reduction in Mother's parenting time from Father's plan was in the children's best interests.

*Id.*

*Strickland v. Strickland* (Court of Appeals at Nashville, September 9, 2014). This is the second appeal from the same case. In the original appeal, the Court of Appeals held that the trial court had erred in granting mother only 120 days of parenting time, and remanded for a new hearing. On remand, the trial court granted mother 122 days of parenting time and she again appealed, complaining that the trial court's decision was inconsistent with the Court of Appeals' mandate. The result this time around: Affirmed! The difference? The father had moved from Cookeville to Lebanon, while in the first appeal the parties were living in the same town. The 122 days maximized the mother's time when the parties lived so far apart.

(But see *Armbrister*, where the parties lived in different states?) The mother was also found to be voluntarily underemployed and assessed with child support based on her historic earnings.

## 2. Modification of Parenting Plans

### A. Decision-Making

*Smart v. Smart* (Court of Appeals at Nashville, July 31, 2013). In *Smart*, the trial court modified an equal time parenting plan to give the mother the majority of time with the parties' children, but kept the decision-making joint between the parties. The father and mother both appealed, and the Court of Appeals affirmed the change in time, but modified the plan to give mother primary decision making on major issues. (Among the father's missteps in this case was his refusal to allow his daughter to attend an aunt's wedding because it interfered with the child's time with him, and his testimony, "I don't want to get along with [mother's family].") As the Court of Appeals held,

"We agree with Mother and amend the Permanent Parenting Plan to change the decision making authority from "joint" to "Mother" for Child's educational decisions, non-emergency health care, and religious upbringing. Mother shall remain the decision maker for Child's extracurricular activities. See *Dalton*, 858 S.W.2d at 326 (joint decision-making is not possible between parents who are unable to communicate effectively concerning their children)."

*Id.*

### B. Other Issues

*Meso v. Marker* (Court of Appeals at Nashville, December 19, 2013). The father petitioned the court to modify custody to make the father the primary parent of the parties' child. The trial court heard the proof and then continued the case to allow the father to bring the child to court to testify. After hearing the child, the trial court granted the father's petition.

Mom appealed. The Court of Appeals affirmed. Of interest are at least two sub-issues addressed by the trial court: (1) The Court of Appeals found that the trial court had wrongly modified the permanent parenting plan pending the trial in the absence of an agreement between the parties to do so or a finding that not modifying the plan would subject the child to a likelihood of substantial harm, in violation of Tenn. Code Ann. §36-4-405 (b).; and (2) The Court of Appeals found that the trial court properly allowed the father to read from the mother's deposition under Tenn. Rule Civ. Pro. 32.01(2), overruling mother's claim that her deposition could only be used for impeachment purposes. On the first point, the Court found no prejudice to the mother, and declined to allow the error to affect the resolution of the case.

### **C. Another Kitchen Sink**

*Austin v. Gray* (Court of Appeals at Nashville, filed December 18, 2013). Parents divorced in 2005. Minor child placed with Mother. Later, after lots and lots of problems, the father filed an action seeking to change custody to him, and the trial court granted that relief. Mother appealed, and the Court of Appeals affirmed. An excerpt from the Court of Appeals summary is instructive:

The court found that Mother's mental health, Mother's attitude and untoward actions directed at Father, the child's manipulation and power struggles with his parents; the child's enrollment in an out-of-state boarding school, and multiple other factors demonstrated that a material change in circumstances had occurred and that it was in their son's best interest for Father to serve as the primary residential parent with sole decision-making authority. Mother appeals claiming the trial court erred in determining that a material change in circumstances existed and that a modification was in the child's best interest.

*Id.* While it seems self-evident from the record that there had been substantial changes of circumstances from the entry of the original order, and the Court of Appeals agreed, at least

one footnote concerning changes is worthwhile in light of the recent *Armbrister* case by the

Tennessee Supreme Court:

The Supreme Court recently explained in *Armbrister* that it is no longer mandatory for the parent seeking modification of a residential parenting *schedule* under subsection (a)(2)(C) of Tennessee Code Annotated § 36-6-101, to show that the material change in circumstances could not reasonably have been anticipated when the residential parenting plan was originally established. *Armbrister v. Armbrister*, \_\_ S.W.3d \_\_, No. E2012-00018-SC-R11-CV, 2013 WL 5688775 at \*13 (Tenn. Oct. 21, 2013).

When determining whether an alleged material change in circumstances had been established, inquiring whether the facts or circumstances reasonably could have been anticipated at the time of the initial custody decree was articulated as merely one factor in the analysis; this single factor was never intended to be outcome determinative. *Id.* at \*14 (citing *Blair*, 77 S.W.3d at 150; *Kendrick*, 90 S.W.3d at 570; *Cranston*, 106 S.W.3d at 644; see also *Boyer v. Heimermann*, 238 S.W.3d 249 at 256 (Tenn. Ct. App. 2013))

*Id.* Why is this significant? Because, at least according to the Court of Appeals, whether the change is foreseeable is still a *factor* in a child custody decision, even if it is not determinative.

#### **D. And Another...**

*Rousos v. Rousos* (Court of Appeals at Nashville, August 26, 2014). *Rousos* is an interesting and fact-intensive post-divorce parenting case involving three children, aged 15, 12 and 10 at the time of the five-day trial in April 2013. The case originated with the father's request to modify an equal time parenting arrangement to permit the oldest child to spend more time with the father, and to maintain the equal time parenting arrangement for the younger children. Mother responded by seeking primary residential care of all three children, and both sides filed numerous contempt allegations against the other. At trial, the mother

introduced the testimony of two expert witnesses, and the oldest and middle children were both called to testify. While the experts both testified that mother was the appropriate party to have primary care of all three children, the trial court was impressed by the testimony of the children and changed the parenting schedule for the oldest child to a 255 day/110 day plan in favor of the father, and kept the 182.5/182.5 plan for the two youngest children. The trial court also made the father the primary decision maker for education and medical decisions for all three children. The trial court found father guilty of two counts of criminal contempt and awarded mother \$25,000 in attorneys' fees. (Total attorneys' fees at trial: \$178,520.49 for the mother, and \$57,145.00 for the father.) Both sides appealed.

On appeal, the Court of Appeals recited lengthy facts and findings by the trial court demonstrating poor conduct by the father, and other facts and findings by the trial court demonstrating poor conduct by the mother. (Among other things, the mother argued at trial and on appeal that father would not be able to help the oldest child in math because he had poor grades in that subject, as evidenced by father's report cards going all the way back to *middle school*, which were introduced into evidence at trial. The Court of Appeals noted that, "[S]ince that time, [father] had earned an engineering degree in electromechanical engineering with a minor in math. Therefore, we are confident that Father will be able to assist the oldest child with his assignments.")

Nonetheless, the Court of Appeals found that the trial court had properly weighed the evidence, including the testimony of the children, and reached a result consistent with the law on parenting issues. The Court of Appeals affirmed the trial court in every respect on the parenting issues, finding that the trial court's decisions were well-reasoned and within the court's discretion. Among the issues addressed by the Court of Appeals were the preference

for keeping siblings together, the effect of a child's testimony on his or her preference, and the allocation of decision-making responsibility when the parents are unable to effectively communicate with each other.

The Court of Appeals reversed on the issue of attorneys' fees awarded to mother, holding that the trial court had originally informed the parties that it was reserving a decision on attorneys' fees until after a trial on the father's allegations of contempt by mother, but then entering a judgment against father prior to holding that trial. The case was remanded to the trial court to hold such a hearing, and then to allocate attorneys' fees as it saw fit.

### **3. Material Changes**

*Armbrister v. Armbrister* (Tennessee Supreme Court, October 21, 2013). The parties divorced in 2009 and father was awarded 85 days with the children. He remarried, and filed a petition to modify the parenting plan to give himself more time, alleging that he had remarried, changed his worked schedule, and was now better able to spend parenting time with the children. The trial court agreed, and increased father's time from 85 days a year to 144 days a year. The Court of Appeals reversed, and the Supreme Court then reversed the Court of Appeals, in a ruling certainly intended to ensure that domestic court judges do not run out of things to do over the next ten-fifteen years or so.

The *Armbrister* decision by the Court of Appeals focused in part on the lack of an unforeseeable change in circumstances. The Supreme Court held that the "foreseeability" of a change was immaterial when the issue before the Court was one of parenting time, not of custody. As the Court held,

We conclude that when the issue is modification of a residential parenting schedule, section 36-6-101(a)(2)(C) provides the governing standard for determining whether a material change in circumstances has occurred.

We further conclude that section 36-6-101(a)(2)(C) abrogates any prior Tennessee decision, including Blair, Kendrick, and Cranston, which may be read as requiring a party requesting modification of a residential parenting schedule to prove that the alleged material change in circumstances could not reasonably have been anticipated when the initial residential parenting schedule was established.

Consistent with section 36-6-101(a)(2)(C), we hold that facts or changed conditions which reasonably could have been anticipated when the initial residential parenting schedule was adopted may support a finding of a material change in circumstances, so long as the party seeking modification has proven by a preponderance of the evidence “a material change of circumstance affecting the child’s best interest.” Tenn. Code Ann. § 36-6-101(a)(2)(C) (2010).

*Id.* That standard alone would have been sufficient to make family law practitioners and judges sit up and take notice, but the Supreme Court then added another zinger concerning the parenting time awarded to the father by the trial court:

Our conclusion that the proof supports the trial court’s findings that Father established a material change in circumstances and that modifying the residential parenting schedule is in the children’s best interests certainly should not be viewed as calling Mother’s parenting skills into question. To the contrary, the proof overwhelmingly establishes, as Father put it, that Mother is “a great Mom.” The modification does, however, allow Father to move closer to the statutory goal, which is to allow both parents to enjoy the “maximum participation possible” in the lives of their children. Tenn. Code Ann. § 36-6-106(a) (Supp. 2013).

*Id.* So, floodgates, here you go: *Armbrister* may be the most important case of the year in family law cases, even if the “maximum participation possible” language is “dicta,” as some have put it. Try telling Judge Clark her language is meaningless...

4. **Passports: If You Say You Will Cooperate, Cooperate!**

*Heilig v. Heilig* (Court of Appeals at Jackson, February 28, 2014). The lesson in this case is simple: if you sign an agreed order to cooperate on passports, then you better cooperate, or a contempt sanction may be in your future. Also, moving out of state may not help you, since this type of agreement may not be a custody matter.

5. **Grandparent Visitation**

*Lovlace v. Copley* (Supreme Court of Tennessee, September 6, 2013). Here is how the Supreme Court described the outcome, after taking on appeal a Court of Appeals decision that included three separate opinions from the three-judge panel below:

In this grandparent visitation case, we must determine, in the absence of a controlling statutory provision, the appropriate burdens of proof and standards courts should apply where a grandparent and a parent seek to modify and terminate, respectively, court-ordered grandparent visitation.

We hold that when a grandparent or a parent initiates a proceeding to modify or terminate court-ordered grandparent visitation, courts should apply the burdens of proof and standards typically applied in parent-vs-parent visitation modification cases.

Thus, the burden of proof is upon the grandparent or parent seeking modification or termination to demonstrate by a preponderance of the evidence both that a material change in circumstances has occurred and that the change in circumstances makes the requested modification or termination of grandparent visitation in the child's best interests.

Applying this holding, we conclude that the record in this case supports the trial court's judgment modifying grandparent visitation. However, we conclude that the trial court failed to make sufficiently specific findings of fact to support its judgment finding the mother in contempt of the order granting grandparent visitation.

Accordingly, we reverse the Court of Appeals' judgment, reinstate that portion of the trial court's judgment which modified the grandparent visitation arrangement, and vacate those portions of the trial court's judgment finding the mother in contempt and ordering her to pay a portion of the grandparents' attorney's fees.

*Id.* In reaching this result, the Supreme Court addressed a variety of issues, including the interplay between the grandparent visitation statutes and the adoption statutes (the Court found that there was no conflict between the two sets of statutes where the mother had agreed to allow the grandparents continued visitation when the biological father's rights were terminated); the definition of a "grandparent" (when the grandfather married the grandmother who had adopted the father whose rights had been terminated in the adoption, that grandfather became the grandfather of the grandchild under Tennessee statutes); and other questions. By far the most important holding was that grandparents and parents essentially find themselves on equal footing for modification of grandparent visitation orders once the original order has been entered. Also, the Supreme Court tossed out a contempt sanction against the mother which had started at \$75,000, was reduced in a post-trial hearing to \$32,000, and was later remanded by the Court of Appeals to the trial court to reset the damage award. The Supreme Court simply did away with the contempt finding and the attorneys' fee award altogether.

*In re Landon R.W.* (Court of Appeals at Nashville, May 2, 2014). In this case, the grandparents sought regular visitation with their grandchild. The mother had permitted the grandparents a few hours once a month and a few overnights, as well, and had continued to

permit such visitation even after the filing of the visitation petition. The trial court dismissed the grandparent visitation petition on the ground that the mother did not oppose giving the grandparents time with the child, and the Court of Appeals affirmed:

Although Mother allowed the Grandparents to act as Landon's primary caregivers for a number of years, they are not legally recognized as his parents, and the statute does not provide the relief that they seek. "The Grandparent Visitation Statute 'cannot be used by grandparents who think they are entitled to more or different visitation in the absence of a finding that the parents actually or effectively 'opposed' visitation.'" *Uselton v. Walton*, No. M2012-02333-COA-R3-CV, 2013 WL 3227608, at \* 12 (Tenn. Ct. App. June 21, 2013) (quoting *Huls*, 2008 WL 4682219, at \*8).

The evidence does not preponderate against the trial court's finding that Mother does not oppose visitation as contemplated by Tenn. Code Ann. § 36-6-306(a). Accordingly, Tenn. Code Ann. § 36-6-306 is not implicated, and the court did not err in dismissing this case.

*Id.*

***Huffman v. Huffman*** (Court of Appeals at Knoxville, August 30, 2013). The trial court dismissed an action by grandparents seeking visitation with a grandchild. The trial court found that the grandparents did not have a significant relationship with the child prior to the mother ceasing contact because of a falling out with the grandfather, and denied grandparent visitation. On appeal, the Court of Appeals held that (1) the parent opposed grandparent visitation, (2) the grandparents did in fact have a significant relationship with the child, and (3) the grandparents failed to prove that the failure to allow visitation would cause a substantial harm to the child. As the Court of Appeals stated,

The mere fact that a significant existing relationship exists will not suffice for a showing of substantial harm. If proof that a significant relationship existed is sufficient to show substantial harm to the child if the relationship is terminated, then the General Assembly would not have included the additional language and requirement concerning substantial harm and how to determine if such harm is likely.

*Id.*

*McGarity v. Jerrols* (Court of Appeals at Knoxville, August 27, 2013). This is a compelling companion case to Huffman, and again addresses in great detail the requirement that a grandparent seeking court ordered visitation with a grandchild prove that the lack of visitation will cause substantial harm or severe emotional harm to the grandchild, and that the failure to sustain such proof is fatal to a grandparent's case. In *McGarity*, all other elements of proof were either sustained or stipulated. But there was no agreement on the harm that might come to the child, and the Court of Appeals found that the child crying when leaving the grandparents or brightening when referring to his grandmother was not sufficient proof of substantial harm or severe emotional harm to require court intervention. As the Court of Appeals concluded:

[W]e must agree with Appellants that the only evidence in the record regarding the risk of substantial harm or severe emotional harm is in Appellants' favor: that the child became confused and upset by the visitation and that the child may learn that his biological father voluntarily relinquished his rights to him when he is cognitively unable to understand.

Under these circumstances, we conclude that the evidence preponderates against the trial court's finding that Grandparents met their burden to show that the child will likely suffer substantial harm or severe emotional harm as a result of the loss of the relationship. Without a finding of severe emotional harm, Grandparents have failed to prove the threshold requirement of substantial harm. Without a showing of substantial harm, the trial court erred in granting grandparent visitation.

*Id.*

*Useton v. Useton* (Court of Appeals at Nashville, June 21, 2013). From the Court's own description:

This is a grandparent visitation case. The biological parents of the child at issue were never married. When the child was born, the father was in the military and away most of the time. The mother permitted the father's parents, the petitioners in this case, to have liberal visitation with the child. As time went on, the mother got married and had children with her new husband.

When the subject child was five years old, the mother limited the grandparents' visitation with the child, but she did not end it. Dissatisfied with the limitations, the grandparents filed this petition for court-ordered visitation pursuant to the Grandparent Visitation Statute, Tennessee Code Annotated § 36-6-306. The trial court granted the petition and ordered a visitation schedule that essentially allowed the grandparents to have the father's visitation rights when he was away. The court-ordered schedule even provided for visitation for the grandparents in the event the father chose to exercise all of the visitation to which he was entitled.

The mother now appeals. We hold that the trial court erred in essentially placing the paternal grandparents in the stead of the father, and that the Grandparent Visitation Statute is not applicable because there was no proof that the mother opposed the grandparents' visitation before the grandparents filed their petition for court-ordered grandparent visitation. Therefore, we reverse and dismiss the petition with prejudice.

*Id.*

## 6. **Mental Condition**

*Belardo v. Belardo* (Court of Appeals at Nashville, filed November 1, 2013). This is a long, fact intensive case with a few nuggets useful to custody cases. Here, the trial court awarded mother primary care of the parties' child, and the Court of Appeals affirmed. Of interest is the father's insistence that the mother suffered from some sort of mental disease,

and the mother's acknowledgement that she had been under the care of a psychiatrist but that this should not weigh against her in the court's custody analysis. Without going into all of the details of the case (apparently, for instance, the father believed it was not right for mother to walk on the grass while she was pregnant, nor should she drink soft drinks), the mother's mental health was "the largest point of contention at trial." Here is the Court of Appeals' summary:

[According to the trial court], "Mother's depression and suicidal tendencies had been in remission since September 2011; so the Court finds that Mother has her problems, but she has them under control." Implicitly, the trial court found that this factor favored neither party. Father disagrees, and argues that because of Mother's ten hospitalizations prior to the divorce trial, this factor should weigh in his favor. We agree with the trial court.

*Id.* As the Court of Appeals stated, "The parties cite no cases in which a parties' mental health issues, if appropriately treated, were found to weigh in favor of naming the other parent primary residential parent."

## 7. Termination of Visitation, Revisited

*F.A.B. v. D.L.B.* (Court of Appeals at Nashville, October 29, 2013). The Court of Appeals' summary, which is easier to read but not necessarily more interesting, states as follows:

This post-divorce appeal involves the suspension of parenting time. The mother made repeated allegations that the father was abusing their child; the father denied all of the allegations. After numerous proceedings, the father asserted that the mother was coaching the child to make false allegations of abuse and asked the trial court to terminate the mother's parenting time. The trial court ordered a psychological evaluation of both parties and the child.

After considering the evaluations and substantial testimony, the trial court determined that the father had committed no abuse and found that the child would be emotionally harmed by continued contact with the mother. The trial court then suspended the mother's parenting time and enjoined all contact with the child until the mother obtains mental health counseling and treatment. The mother appeals. Based on our careful review of the record, we affirm.

*Id.* The allegations made by the mother (and child) against the father, included, according to the court record, "Beatings, drugs, nightly anal penetration by Father, trips to hotels for multiple members of Father's church to inflict still more abuse. Coercing a child into making such monstrous allegations against his own father can have crippling psychological effects and be ruinous to the child's relationship with his father." *Id.* In affirming the termination of mother's visitation with the child, the Court of Appeals noted that

[T]here is a specific process the trial court must follow when limiting, suspending or terminating visitation. First, the trial court must make a specific finding, based on definite evidence, that visitation would cause harm to the child. After making this finding, the trial court must then determine the least restrictive visitation plan as available and practical. In determining the least restrictive visitation plan, the trial court must make specific findings, based on definite evidence, that any less restrictive visitation would be harmful to the child. The burden of proof on both the issue of harm and the least restrictive visitation plan, is on the party seeking to restrict visitation.

*Id.*, quoting *Rudd v. Rudd*, No. W2011-01007-COA-R3-CV, 2011 WL 6777030, at \*6 (Tenn. Ct. App. Dec. 22, 2011). Excellent case for anyone facing unmerited, unlikely allegations of abuse by one parent against another concerning their children.

#### 8. Can 91 days Be "Maximum Participation Possible"?

*Rucker v. Harris*, Court of Appeals at Nashville (July 15, 2014). If you are looking for a case in which the courts are not jumping on the "maximum participation possible"

language to increase the non-custodial parent's time with the children, this is your case. Here, the trial court awarded the father 91 days of time with the children, and the mother the balance. The father appealed, and the Court of Appeals affirmed. In affirming, the Court of Appeals noted that the father actually had *more* time than the 91 days set out by the trial court, cited the relatively new definition of a "day" under the guidelines, but did not how many more days the father actually had, did not remand the case to the trial court for a calculation of child support based on its decision that dad had more time than he was credited, and did not fault the trial court for not conducting a thorough analysis of the custody factors found in the applicable statutes.

## XI. Prenuptial (and Postnuptial) Agreements

### 1. Public Charge Exception

*O'Daniel v. O'Daniel* (Court of Appeals at Knoxville, June 26, 2013). *O'Daniel* affirms the existence and viability of the “public charge” exception to the enforcement of an alimony provision in a prenuptial agreement, and also makes clear that you can except out the alimony bar without affecting other obligations under the prenuptial agreement. After an extensive discussion of the “public charge” exception to the enforcement of alimony provisions in a prenuptial agreement, and finding that this was an appropriate case in which to recognize the exception (the Wife had developed a potentially life-threatening illness after the marriage which would require extensive medical treatment in the future), the Court of Appeals held as follows:

Having held that the public charge exception applies in this case, we do not need to tarry long on the trial court’s decision holding that its award of 67 months of health insurance coverage to Wife is not alimony. We agree with Husband’s argument that an award in a divorce judgment directing a party to pay the premiums for health insurance for the other party made pursuant to Tenn. Code Ann. § 36-5-121(k) is properly categorized as alimony.

This Court has stated that “[a]n order requiring one party to pay the health insurance premiums of the other is regarded as an award of alimony and is subject to the provisions contained in section 36-5-121(a).” *Guiliano v. Guiliano*, No. W2007-02752-COA-R3-CV, 2008 WL 4614107 at \*4 (Tenn. Ct. App. W.S., filed Oct. 15, 2008); *see also Sheppard v. Sheppard*, No. M2009-00254-COA-R3-CV, 2010 WL 3749420 at \*9 (Tenn. Ct. App. M.S., filed Sept. 27, 2010) (stating that “an order to pay health insurance premiums is regarded as a form of alimony . . .”); *Wilson v. Moore*, 929 S.W.2d 367, 375 (Tenn. Ct. App. 1996) (observing that requiring a party to provide his or her ex-spouse “with medical insurance was a proper form of rehabilitative support”).

We affirm the trial court’s decree directing Husband to pay for 67 months of health insurance for Wife, but we do so because the parties’ prenuptial agreement limiting alimony has been voided. *Cary*, 937 S.W.2d at 782. In affirming the trial court, we do not mean to suggest or imply that 67 months of health insurance coverage is sufficient. It clearly is not. Wife is in her mid-thirties with a life-threatening condition for which there is no cure. Her condition was first diagnosed after the parties married. She is in need of long-term financial assistance from Husband.

On remand, the trial court will re-examine anew the issue of Wife’s entitlement to alimony. In doing so, the court “must void the provision [limiting or waiving alimony] and award alimony in accordance with the factors set out in Tenn. Code Ann. § 36-5-101 (1991 Repl. & Supp. 1995).” *Id.*

We affirm the alimony award of 67 months of health insurance. In doing so, however, we do not intend to limit the discretion of the trial court to this award and/or other monetary awards to Wife. Now that the waiver of alimony provisions have been found to be void, it is for the trial court to award alimony according to the facts and law of this case.

*Id.*

## 2. **Words are Important**

*Heaton v Heaton* (Court of Appeals at Knoxville, August 29, 2014). This is a fascinating case, including a spirited dissent by Judge Susano, in which the trial court sought

to "reform" a prenuptial agreement or bend its language in order to reach a more equitable result (in the court's opinion) or to avoid a windfall to the husband. The prenuptial agreement was a "title controls" agreement, meaning that property, regardless of whether it was acquired before or during the marriage, would go to the party in whose name the property was held. If the property was titled in both names, then according to the prenuptial agreement, it would be equally divided.

So, using wife's funds and wife's credit, the wife purchased a property on which to build a home and wife was solely obligated on the debt. At closing, she was told by the title agent that Tennessee law required the husband's name to be on the title. Wife objected at closing, but closed the loan and purchase nonetheless, and later paid the husband to be the general contractor responsible for building the house on the property. At the divorce trial, the judge believed these facts mandated the award of the home and all the equity to the wife.

The Court of Appeals reversed, finding that there was no ambiguity in the prenuptial agreement, wife bought the property even after being told it had to be purchased in joint names, and husband was entitled under the prenuptial agreement to 50% of the co-owned property. Additionally, the Court of Appeals returned the case to the trial court for an award of Husband's attorneys' fees incurred in enforcing the agreement. There would be no "reform" of the contract, and no wiggling out of its clear language.

## XII. Relocation

*Redmon v. Redmon* (Court of Appeals at Jackson, April 29, 2014). The Court of Appeals' summary:

This appeal involves post-divorce parental relocation. The parties were divorced in Tennessee, and the mother was designated as the primary residential parent for the parties' minor child. After the divorce, the mother graduated from a nurse practitioner program and obtained a job offer in Mississippi. She notified the father of her intent to relocate with the parties' child. The father objected and filed a petition opposing her relocation. At trial, the father argued that the proposed relocation did not have a reasonable purpose under Tenn. Code Ann. § 36-6-108(d)(1), in that the mother failed to apply for nurse practitioner jobs in Tennessee. The trial court agreed with the father and denied the mother permission to relocate with the child. The mother appeals. We hold that, by failing to submit proof of comparable jobs in Tennessee for which the mother was qualified, the father did not meet his burden of proving that the mother's proposed relocation did not have a reasonable purpose. Therefore, we reverse.

*Id.* This was an interesting result, particularly considering the language found in *Hudson v. Hudson* (Court of Appeals at Nashville, November 3, 2009) in which the appellate court stated that

We also agree with Father that the economic reasons for relocation presented by Mother are insufficient. It is undisputed that Mother never looked for employment in Nashville. This fact alone is fatal to Mother's contention that she could only find suitable employment in Hopkinsville. Because of this, Father is correct in his assertion that there are no other economic factors to couple with the lower cost of living to constitute a "reasonable purpose."

*Id.* Why is this not helpful to the father in this case, particularly the language that "this fact alone is fatal to Mother's contention that she could only find suitable employment in Hopkinsville"? Because (drumroll, please, and think back to your first day in law school):

“this excerpt...is *dicta*.” (The mother in Hudson was permitted to move for a different reason, and the father presented evidence at trial that the mother could find comparable jobs in Nashville.) In any event, because the burden of proof is on the non-moving parent to show that the move does not have a reasonable purpose, the burden is on that parent to produce the evidence to support that contention, including evidence that the mother could find comparable jobs at home.

*Rudd v. Gonzalez* (Court of Appeals at Nashville, February 28, 2014). This is an excellent relocation case, involving claims of vindictiveness and lack of reasonable purpose, and attorneys’ fees. The Mother/primary parent, who after the divorce was diagnosed with multiple sclerosis, sought to relocate from Nashville to Illinois to obtain retraining in her chosen medical field. The Father objected claiming that the move was vindictive and without a reasonable purpose. The trial court, in a well-thought out decision by Judge Philip Smith in Nashville, much of which is quoted in the appellate decision, allowed the move, and the Court of Appeals affirmed.

In affirming, the Court of Appeals quickly brushed aside the claims of vindictiveness, pointing out that the Mother had permitted Father parenting time in excess of the time set out in the parties’ parenting plan. There was apparently no question that the mother had difficult feelings toward the father, but there was no proof that she had employed those feelings against him regarding the parties’ child:

If vindictiveness could be established merely by proving that the primary residential parent retained bad feelings toward the other parent in the wake of the divorce, few divorced parents would ever receive court permission to relocate with the parties’ child. As the trial court wryly observed, “[T]hese parties were married and then they got divorced. There is no requirement that they be friends.”

*Id.* The Court of Appeals spent considerably more time on the “reasonableness” issue, ultimately finding that the father had not met his burden of proof in showing that the mother did not have a reasonable purpose in making the move. As the Court of Appeals stated,

In all cases, the reason for the proposed relocation must be “substantial when weighed against the gravity of the loss of the non-custodial parent’s ability ‘to participate fully in their children’s lives in a more meaningful way.’ ” *Webster*, 2006 WL 3008019, at \*14 (quoting *Aaby*, 924 S.W.2d at 631).

In the case at bar, the trial court held that Mother’s “desire . . . to retrain in her area of expertise is reasonable.” It also made a factual finding “that retraining in her area of expertise is not available in Nashville despite [Mother’s] efforts . . . to attempt to have Vanderbilt to retrain her in her area.”

As to Mother’s arrangement with SIU, the trial court found “that the program at Southern Illinois University created for her retraining is the only program available to her at this time.” From our review, these findings are supported by the evidence in the record.

*Id.* The principal issue raised by the father was that the mother did not have a job offer in Illinois, only a hope of an offer and a faculty position at Southern Illinois University. The Court of Appeals found that the mother’s desire and opportunity to retrain in the area of her specialty were reasonable and sufficient to permit the move. Finally, the Court of Appeals also upheld an award of \$60,000 in attorneys’ fees to mother, which the court characterized as a portion of her fees. The combined total fees were \$197,000, which the trial court found reasonable under the circumstances of the case.

*Thorneloe v. Osborne* (Court of Appeals at Knoxville, August 26, 2013). This is an interesting case, but not quite as interesting as the quick blurb on the AOC’s website might indicate. Here, the mother sought to relocate to Wisconsin with the children after marrying her new husband. The father objected, arguing that the move did not have a reasonable

purpose, was vindictive and would take the children away from their father and their ordinary activities. The trial court denied the move, and the mother appealed.

On appeal, the Court of Appeals affirmed, focusing almost exclusively on the “reasonable purpose” standard. The Court of Appeals that, where the mother had a job in Tennessee but did not have one in Wisconsin; where the marriage agreement with her new husband kept their finances separate; and where mother argued that the schools in Wisconsin were better than the schools in Tennessee but testified that she intended to put the children in private school, that the trial court got it right in finding the lack of a reasonable purpose to the move. The Court of Appeals made no findings on whether the move would pose a threat of specific and serious harm to the children, but did find that it was in the best interest of the children not to move. The Court of Appeals also agreed with the parties’ parenting plan should be modified and the father’s child support should be changed.

Now, the interesting part: the mother, but not the father, still resided in Tennessee. The father had moved to Asheville, North Carolina. In fact, at the time of the hearing on appeal, father had assigned his parenting time to his new wife and his parents, and was deployed to Egypt. The Court of Appeals was asked to consider this as a post-judgment fact, but held that these facts did not “affect the position of the parties or the subject matter of the action.”

*Rutherford v. Rutherford* (Court of Appeals at Nashville, May 7, 2013). In this case, despite a spirited dissent, the Court of Appeals reversed the trial court’s decision granting father’s petition in opposition to relocation. The reversal was based on the fact that the father’s petition was untimely filed. As the trial court held,

Because Father failed to file a written petition in opposition to Mother's proposed relocation within thirty days of receipt of her certified letter, we find the trial court erred in conducting any further analysis pursuant to section 36-6-108. The decision of the trial court is reversed, and Mother is permitted to relocate to Omaha, Nebraska, with the minor child.

*Id.* Judge Stafford, the dissenter-in-chief, argued that the father should have had an opportunity to seek an enlargement of the time period for responding to the relocation under Rule 6.02 of the Tennessee Rules of Civil Procedure. The majority disagreed, holding (in part through a separate concurring opinion filed by Judge Kirby) that the time periods set out in the Relocation Statute were meant to be strictly construed, and the filing of a petition in opposition more than 30 days after receipt of notice of relocation was untimely and caused the dismissal of the petition. Also, there is a lengthy discussion in the majority opinion concerning the meaning of the word "shall." Bill Clinton would have been proud.

*Iman v. Iman* (Court of Appeals at Nashville, November 19, 2013). This is a long (19 pages) and interesting case that addresses a number of important issues involving the relocation of both parents from Tennessee to Florida, and its effect on a parenting schedule. As such, it is not specifically a "relocation" case because the Tennessee relocation statute is not involved. Instead, the principal question first addressed by the Court of Appeals is whether the trial court in Tennessee retained jurisdiction after both the mother and father, and the child, had relocated to Florida. The answer: it does, as long as the Petition itself is filed prior to the move, which occurred in this case. That being true, Tennessee continued to have "continuing, exclusive jurisdiction" over the Mother's Petition to modify parenting.

The Father also requested that the Court dismiss the case based on *forum non conveniens*, which the Court of Appeals characterized as a "drastic remedy to be exercised

with caution and restraint.” The Court did not see this case as one justifying such a drastic remedy, and noted that the single out-of-state witness desired to be called by the Father may have been able to testify telephonically, and the Father’s alleged inability to have the witness at trial was not sufficient to invoke the doctrine. The Court of Appeals also reviewed and disposed of issues concerning material changes of circumstances and the difference between modifying a parenting schedule and modifying custody.

In the end, however, the Court of Appeals sent the case back to the trial court for lack of findings of fact and conclusions of law as required by statute. So, this case is Chapter 1. Chapter 2 is on the way.