

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 21st 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.

2013 COMPREHENSIVE CASE LAW UPDATE
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Covering Cases from January 2013 to December 2013

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, and anyone who is interested in obtaining an emailed version of this entire section is welcome to simply send an email to gregory.smith@stites.com asking for the presentation, and one will be sent to you straightaway.

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I. Alimony

1. What is “Periodic” Alimony?

Averitte v. Averitte (Court of Appeals at Nashville, January 29, 2013). In this case, the parties’ Marital Dissolution Agreement provided for the payment of “periodic” alimony over an eight year period, but had no contingencies for its modification or termination. Wife remarried. Husband sought to terminate his alimony obligation on the theory that the *in futuro* statute refers to “periodic” alimony, and thus his obligation should terminate. The trial court agreed, but the Court of Appeals did not, holding that the failure to include termination or modification language in the Marital Dissolution Agreement was game, set and match. It was “relevant” that the word “periodic” was used and that the word is used in the *in futuro* statute, but not controlling.

2. No Unilateral Action

Wilkinson v. Wilkinson (Court of Appeals at Jackson, February 19, 2013). In *Wilkinson*, the parties’ Marital Dissolution Agreement provided that Husband’s alimony obligation would “self-terminate” in the event of Wife’s cohabitation. Husband later “self-terminated” his alimony after finding evidence that the Wife was cohabitating with another individual. The Court of Appeals did not reach the same issue addressed in *Beck*, but did note that, “We caution litigants, however, that they rely on “self-terminat[ion]” clauses at their peril,” citing cases that make clear that only the court can terminate alimony, not the parties themselves. (Presumably, this does not include provisions which provide that alimony automatically ceases upon remarriage?) Additionally, the Court of Appeals reiterated that a finding of contempt is not necessary for the award of attorneys’ fees at both the trial level and the appellate level where there is a provision in the final decree allowing for the recovery of fees upon breach of the contract.

Finchum v. Finchum (Court of Appeals at Nashville, February 13, 2013). This is a mixed bag case, important for two reasons. The parties' divorce agreement provided that Husband would pay rehabilitative alimony which would terminate upon Wife's death. When Wife remarried and her job prospects improved, Husband stopped paying alimony and filed a petition to terminate his alimony payments. The trial court entered summary judgment against Husband, finding that the alimony was contractual in nature and not subject to termination or modification upon Wife's death or remarriage, and found Husband in contempt for stopping his alimony payments prior to filing his petition. Husband appealed. The Court of Appeals reversed on the issue of whether his rehabilitative alimony was subject to modification (it is, by statute), but affirmed an award of attorneys' fees for the contempt related to Husband's unilateral cessation of alimony payments. The case was remanded to the trial court for a hearing on both issues.

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.

3. "Cohabitation" Defined

Maybe v. Maybe (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.

4. ***Gonsewski, We Hardly Knew Ye***

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 5th 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.

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

II. Child Support

1. Adult Disabled Child

Cook v. Hess (Court of Appeals at Nashville, April 23, 2013). *Cook* in many ways is a companion case to *Shaw*, but is more complex and addresses a number of different issues. First, it was decided under the new T.C.A. 36-5-101(k), not the older version that applied in *Shaw*. Second, *Cook* involved a young man who had suffered throughout his life from *spina bifida*, but had graduated from high school and was working at Home Depot where he had his own health insurance. The trial court continued child support beyond his high school graduation based on

the fact that he was “severely disabled” under the statute and found the court had jurisdiction to continue to require the father to provide support because he had agreed to do so in the parties’ marital dissolution agreement.

Because Father and Mother had agreed that Father would continue to pay child support after Preston reached majority until the trial court made a determination, the child support order remained in effect at the time when Mother filed her petition, and the trial court therefore had jurisdiction to extend the support obligation.

Id. The Court of Appeals further found that the father was responsible for a share of the son’s medical expenses and that the son’s income from his employment does not necessarily affect the father’s child support obligation.

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. College Obligation as a Contract

Powers v. Powers (Court of Appeals at Jackson, April 30, 2013). *Powers* involves the enforcement by mother of an agreement by dad to pay college expenses for the parties' minor daughter. The trial court found that dad owed such expenses, and that mother was entitled to her attorneys' fees for pursuing her claim despite the fact that the final decree did not have an attorney fee provision. The father appealed. On appeal, the Court of Appeals found that the trial court properly held that the father had a valid contractual obligation to pay college expenses; that the expenses were correctly identified by the trial court; and that the mother did not have to provide father with receipts for such expenses prior to trial. However, the Court of Appeals vacated the attorney fee award to mother, holding that, in the absence of a fee provision in the parties' Marital Dissolution Agreement, and the lack of any statute allowing for the award of fees in such cases, the attorney fee award by the trial court should be overturned. The Court was careful to talk about the difference between statutes concerning "minor" children and emancipated children, and the fact that payment of college expenses is not a form of "child support" for which fees may be awarded.

4. Are Car Payments Child Support?

Carroll v. Carroll (Court of Appeals at Nashville, January 30, 2013). In this case, a divorce complaint was filed. Husband paid Wife's car payments directly instead of paying child support to Wife. Wife admitted she would have used the child support to make her car payments. Wife sought retroactive child support, which was denied by the trial court. Affirmed on appeal. As the Court of Appeals stated:

Tennessee's Child Support Guidelines provide that unless the rebuttable presumption provisions of section 36-5-101(e) have been established by clear and convincing evidence, a judgment for initial support must include an amount of monthly support dating back to when the parties separated. Tenn. Comp. R. & Reg. 1240-2-4-.06(1)(b)(1). The trial court concluded, and we agree, that Husband satisfied his child support obligations from the date of the parties' separation through August 2010 by paying the amount due on the automobile Wife drove. Husband made the payments directly instead of paying Wife, who would have used the same money to make the same payments. To hold that these payments did not constitute child support would be to elevate form over substance.

Id.

5. Statute of Limitations

Johns v. Johns (Court of Appeals at Jackson, filed November 17, 2013). This is an interesting case in which a mother obtained a judgment for back due child support against father in Arkansas, and renewed that judgment several times, most recently in 2007. The father moved to Tennessee and the mother sought to register and enforce the Arkansas judgment in Tennessee. The father won at trial, with the trial court finding that the Arkansas judgment was unenforceable in Tennessee due to the 10-year statute of limitations for enforcing judgments in Tennessee.

The Court of Appeals reversed, reminding the trial court that the judgment statutes "are not the only ones applicable to this particular foreign judgment, however, as this judgment is one for child support arrearages..." *Id.* The Court of Appeals noted that, under The Full Faith and Credit for Child Support Orders Act of 1994 (FFCCSOA), courts "shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation." Because it was clear that the statute of limitations in Arkansas allowed the collectability of the judgment, it was permitted in Tennessee. The Father

argued that the Mother had not raised this claim in the trial court, and therefore it was waived, but the Court of Appeals held that

It is incumbent upon the courts to apply the controlling law, whether or not cited or relied upon by either party.” *Nance by Nance v. Westside Hosp.*, 750 S.W.2d 740, 744 (Tenn. 1988) (citing *City of Memphis v. Int’l Brotherhood of Electrical Workers*, 545 S.W.2d 98 (Tenn. 1976); *Simmons v. State ex rel. Smith*, 503 S.W.2d 103 (Tenn. 1973)); see also *Coffee v. Peterbilt of Nashville, Inc.*, 795 S.W.2d 656, 659 n.1 (Tenn. 1990) (“It is the duty of this Court to apply the controlling law, for which there is a basis in the record, whether or not cited or relied upon by the parties.”). Thus, we find it appropriate to apply the FFCCSOA to this matter even though Mother did not cite it before the trial court.

Id.

6. Health Insurance?

Gaddes v. Gaddes (Court of Appeals at Nashville, February 1, 2013). The parties entered into a parenting plan which provided, *inter alia*, as follows:

[Father] shall continue to maintain health insurance for the benefit of the parties’ two minor children, and the parties shall each pay one-half of any expenses not covered by insurance.

Id. Later, father refused to pay dental and optical expenses, asserting that he was only obligated to pay ½ of uncovered medical expenses, and the order did not require him to pay ½ of uncovered dental and optical expenses. The trial court agreed with the father, and the mother appealed. The Court of Appeals reversed, finding that the father was, in fact, liable for ½ of these expenses because (1) the parenting plan simply said that the parties would each pay ½ of “any expenses not covered by insurance”; (2) the parties had previously shared dental and optical expenses; and (3) the father had previously asserted in a separate pleading that mother was responsible for ½ of dental expenses, so he was judicially estopped from asserting otherwise in this case. The question: do you need all three of these, or just one, in order to parlay “uncovered

expenses” into dental, optical, counseling, baseball, school lunches, and other expenses not covered by health insurance?

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. Car Expenses as Discretionary Expenses

Jesse v. Jesse (Court of Appeals at Nashville, filed November 7, 2013). This one is relatively easy except for two troubling issues not addressed by the court. The parties agreed on a child support arrangement in 2008 in which neither party paid support to the other because each party earned about the same income and they shared equal time with the children. The trial court approved the agreement and entered an order to that effect. Later, the mother sought to go back and invalidate that order, and the trial court again approved it but modified the order to give each parent credit for the car and gas expenses associated with their employment. The mother appealed and the Court of Appeals affirmed, finding that the trial court had the authority to deviate from the guidelines even with expenses that are not specifically identified as reasons for deviation under the guidelines.

The troubling issues: (1) the father drove 300 miles round trip to work every day, and the mother drove 120 miles round trip to work every day; and (2) the father's annual gas and car expenses were \$17,000 per year, and the mother's annual gas and car expenses were \$2,500 per year. These facts raise two questions: (1) first, is either parent sane enough to raise the children, considering the lengths of their commutes, and (2) why does the father drive three times further than the mother, but gets seven times more credit? Like the mysteries of the universe, there are some mysteries still around the practice of domestic law.

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.

III. Civil Procedure

1. Appeals, the Non-Frivolous but Non-Compensable Kind

Massey v. Cassals (Court of Appeals at Jackson, December 26, 2013). This is *Massey II*. In *Massey I*, the Court of Appeals found that Father’s IRA account was exempt from creditors under Tennessee law, and reversed the trial court’s dismissal of the Father’s motion to quash the garnishment issued by the Mother’s counsel. The case goes back to the trial court, which promptly vacates its previous order but then, again, denies the Father’s motion to quash the garnishment. (Apparently, the trial court found that the Court of Appeals only required it to strike its original order, but that the court was free to do the exact same thing a second time. Said the Court of Appeals: “We are somewhat perplexed by the trial court’s ruling on remand...”)

Well, you know how it ends, kind of. First, the Court of Appeals found itself powerless to order that the trial court restore the Father to the status quo before the two wrongful garnishments, because he had not pleaded for this relief below. And, second, the Court of Appeals held that it was unable to award Father his attorneys’ fees, even on the second appeal, based on the American rule. Aha! You say, what about that “frivolous appeal” thing? Unfortunately for the Father, the Court of Appeals thought about that, but found that his appeal

was not frivolous, and it could only award fees where the appeal was frivolous, not where the appellee's position was frivolous. But remember: certain IRAs and other retirement accounts are in fact exempt from garnishment, if not from silly attacks.

2. Recusal of Trial Judge

In the Matter of Jacob H.C. (Court of Appeals at Nashville, March 25, 2013). Easy recusal case. Court affirmed trial court's denial of motion to recuse, finding that the fact that the court knew and was on a first name basis with the father of one of the parties is not sufficient cause to require recusal. Nor is the statement from the father of the party to the judge, "Glad you could help."

3. 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.

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

Uria v. Uria (Court of Appeals at Nashville, February 6, 2013). While there were several issues in this appeal, the primary lesson is found in the Court of Appeals’ dismantling of the reasons given by the trial court for granting a Rule 60.05 motion filed 73 months (yes, that is a “seventy three”) after the entry of the original child support award. The Court of Appeals found that the trial court incorrectly held that the original divorce complaint in this matter was based on irreconcilable differences (in fact it alleged inappropriate conduct, abandonment and adultery), and that the parties’ mediated settlement agreement was revised at the final hearing (the agreement, in fact, had not been approved by the trial court and the parties were instructed to bring proof of income to the final hearing). Additionally, the Court of Appeals noted that the father had paid the original child support for over six years before bringing his Rule 60 action, so he was hard-pressed to argue that he had brought it within a reasonable period of time. Interesting case.

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.

4. Rule 60.02 and Willfulness

Butler v. Vinsant (Court of Appeals at Nashville, April 15, 2013). This is a meaty Rule 60 case. Mother filed a petition for paternity, for child support, custody, and to relocate. Father filed his own petition, but it was established as a different case. Mother's case moved forward. Father changed lawyers and then waited six months to answer mother's petition, thinking all along that his original lawyer would let him know if something was going on. Default judgment was awarded against father, although the apparent evidence was that Father exercised week-to-week parenting time with the children. Default judgment was awarded to mother, and father

appealed. On appeal, the Court of Appeals affirmed, first looking to the question as to whether the father had a meritorious defense to the judgment (he did), and then to the question of whether father's failure to respond was "willful" (it *was* willful, according to the trial court and the Court of Appeals). As the Court of Appeals stated,

Because Father's failure to appear and defend Mother's Amended Petition was inexcusable, he is not entitled to Rule 60.02 relief. *See Riggs*, 2011 WL 5090888, at *5 (holding that because the defendant failed to prove that their negligence was excusable, they "failed to carry their burden of proving entitlement to relief under Rule 60.02 of the Tennessee Rules of Civil Procedure.")

Id. Judge Kirby wrote a strong dissent on the issue of whether father's failures were excusable, ending her opinion with this colorful language: "Even a deadbeat can rightfully assume that his attorney will at least tell him what has been filed in his case."

5. Appeals from Juvenile Court

Clark v. Cooper (Court of Appeals at Knoxville, March 18, 2013). This case reminds us that appeals from custody decisions in Juvenile Court go straight to the Court of Appeals; appeals in dependency cases go to the Circuit Court. In *Clark*, the parents gave custody of their child to the grandparents. Later, the mother sought to recover custody in Juvenile Court. The Juvenile Court denied the mother's motion, referring first to the case as a "custody" case and later, in denying a motion to alter or amend, referring to the case as a "dependency" case. Mother appealed to the trial court, which dismissed her appeal because it found the case was a custody case instead of a dependency case. The mother appealed to the Court of Appeals, which found that the trial court was right in deciding that the case was a custody case, but wrong in dismissing the appeal:

When a case has been appealed to the wrong court, the appropriate course of action is for the court lacking jurisdiction to transfer the case to the correct court. *In re D.L.D., Jr.*, E2009-00706-COA-R3-JV, 2010 WL 653252, at *1 (Tenn. Ct. App. Feb. 24, 2010), *no appl. perm. Appeal filed*; *In re Estate of White*, 77 S.W.3d 765, 769 (Tenn. Ct. App. 2001).

Id.

6. Findings of Facts: Required Reading

Pandey v. Shrivastava (Court of Appeals at Jackson, February 22, 2013). In this case, the trial court heard four days of testimony in a divorce case and found that mother should be the primary parent and be permitted to relocate with the parties' minor child out of state. The father appealed, and the Court of Appeals remanded the case to the trial court for findings of fact and conclusions of law, which are required by Rule 52.01 of the Tennessee Rules of Civil Procedure "in all actions tried upon their facts without a jury." As the Court of Appeals summarized,

Although trial courts have broad discretion in fashioning a parenting arrangement, the decision "must be based on the proof at trial and the applicable principles of law." *Morris*, 2011 WL 398044, at *8. We cannot discern, from the trial court's order, what "proof at trial" affected the trial court's ruling, nor can we tell whether the trial court applied the appropriate legal analysis in making its decision.

We do not know what factors, if any, the trial court considered in naming Mother the primary residential parent and fashioning the parenting schedule. During the trial court's oral remarks at trial, counsel for Father asked the judge if he had applied the best interest analysis, to which the judge responded, "Yes." However, later in the proceedings, the judge stated that he had "considered 108 factor as justifying such a move [to Arkansas]." As noted above, the parental relocation statute, Tenn. Code Ann. § 36-6-108, was inapplicable in this case. Not knowing which analysis the trial court applied, we are simply left to wonder why the trial court chose to place Akul with Mother in Arkansas over Father in Memphis.

Id.

7. Unclean Hands

Jolley v. Jolley (Court of Appeals at Nashville, January 31, 2013). The Husband claims no interest in certain property, which is sold during divorce in violation of statutory restraining order. An Agreement is entered dividing all other property. Husband then claims that the proceeds from the sale of the property belong to him. Wife disagrees, and claims the proceeds are hers. The trial court awards the entire proceeds to Wife, based on Husband's unclean hands for his duplicity and his violation of the restraining order. Affirmed.

8. Grounds for Divorce

Longanacre v. Longanacre (Court of Appeals at Nashville, January 16, 2013). One case. Three opinions. The main question was whether the trial court appropriately granted Wife's complaint for a legal separation and dismissed Husband's complaint for divorce. The majority opinion found no grounds to grant Husband's complaint. The dissent (Judge Cottrell) quoted *Earls v. Earls* on this question:

While there appears to be some lack of unanimity in appellate decisions on the specific words to be applied in defining inappropriate marital conduct, the basic question remains whether either or both of the parties engaged in a course of conduct which (1) caused pain, anguish or distress to the other party and (2) rendered continued cohabitation "improper," "unendurable," "intolerable" or "unacceptable." See Tenn. Code Ann. § 36-4-101(11) (Supp. 1999); *Gardner v. Gardner*, 104 Tenn. 410, 412, 58 S.W. 342, 343 (1900); *Garvey v. Garvey*, 29 Tenn. App. 291, 299-300, 203 S.W.2d 912, 916 (1946); *White v. White*, Carrol Eq. No. 3, 1988 WL 101253 at *1 (Tenn. Ct. App. Oct. 3, 1988) (no Tenn. R. App. P. 11 application filed); *Brown v. Brown*, No. 02A01-9108-CV-00168, 1992 WL 5243 at *3 (Tenn. Ct. App. Jan. 16, 1992) (no Tenn. R. App. P. 11 application filed).

Over twenty-five years ago, this court recognized as inappropriate marital conduct the everyday treatment of a spouse “by which love, the vital principle which animates a marriage, is tortured to death; with the result that the once happy joinder becomes nothing less than a ‘bridge of groans across a stream of tears.’” *Newberry v. Newberry*, 493 S.W.2d 99, 101 (Tenn. Ct. App. 1973).

Both parties’ actions and statements establish the undisputed fact that their prior conduct toward each other has caused pain and distress such that each party has determined that cohabitation is improper, unendurable, and unacceptable. Therefore, I would find that the evidence preponderates against the trial court’s finding that inappropriate marital conduct was not proved.

Id., citing *Earls v. Earls*, 42 S.W.3d 877, 891-93 (Tenn. Ct. App. 2000). Judge Cottrell went on to opine that Wife’s jealousy toward Husband’s family and the destructive nature of that jealousy on Husband’s relationship with his family members was reason enough to grant Husband a divorce.

The concurring opinion by Judge Clement found error in even reviewing whether the Husband could appeal the grant of a legal separation from Wife, opining that only the party asking for a legal separation should be permitted to appeal from the denial of a legal separation. In summary, the Court of Appeals affirmed the award of a legal separation to Wife and an award of *in futuro* alimony to her.

9. 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.

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. **Spring Break or Not?**

Adkisson v. Adkisson (Court of Appeals at Knoxville, March 11, 2013). This case is a reminder that parties can fight about anything and everything. There is a lot more to the opinion than the spring break issue, but here the father was held in criminal contempt of court for taking the children on a trip beginning when the children were let out of school, and returning them the night before school resumed. The problem? The parenting plan gave the father “spring break,” which mother and the trial court found to be only the weekdays that the children were out of school. The Court of Appeals reversed this contempt, finding that, based on past behavior and common usage, the spring break included the weekends before and after the weekdays in which the children were out of school.

V. **Division of the Marital Estate**

1. **Identification of Separate and Marital Property**

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.

4. 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.

5. 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."

6. 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.

7. “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."

VI. Jurisdiction

1. Appeals from Juvenile Court

In re Britany, P.D. (Court of Appeals at Nashville, April 22, 2013). In this case, the parties litigated in Juvenile Court a "Petition for Custody and to Determine Parenting Plan and, in the Alternative, Petition for Dependent and Neglect." The Juvenile Court did not find the child dependent and neglected, but awarded the father custody. Mom appealed to the Circuit Court, which transferred the case to the Court of Appeals on the theory that appeals from dependent and neglect cases go to Circuit Court, but appeals from custody cases go to the Court of Appeals. The Court of Appeals reversed, holding that under both Tennessee Code Annotated § 37-1-159(a) and *In re D.Y.H.*, 226 S.W.3d 327 (Tenn. 2007), cases tried that involve a contemporaneous hearing concerning both custody disputes and dependent and neglect

allegations, regardless of whether those dependent and neglect allegations are sustained, go to Circuit Court upon appeal where the parties are entitled to a *de novo* hearing.

2. 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:

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.

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.

VII. 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.

VIII. Parentage

1. 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.

2. Down the Rabbit Hole...

Danelz v. Gayden (Court of Appeals at Jackson, March 25, 2013). In the third appeal involving the responsibility of the defendant Gayden to pay child support for a child he never knew was his, the *child* may have hit the jackpot. Quick summary: mother had a sexual relationship with Gayden while married to Mr. Danelz, and conceived a child. Mother and Mr. Danelz later divorced, but at that time mother claimed that Mr. Danelz was the father and he paid child support to mother pursuant to the divorce decree. (Mr. Danelz was apparently unaware that the child may not be his.) Within months after the child's emancipation, the child filed a petition for back support against Gayden. The claim was initially dismissed by the trial court but reversed by the Court of Appeals, which remanded the case to the trial court to determine whether Gayden

was the biological father. He was, according to DNA testing. In the second appeal, the Court remanded the case to the trial court for failure to join Mr. Danelz as an indispensable party. The third appeal addressed the issue, as stated by the trial court, of “whether or not Jordan has the right to seek retroactive child support from his newly discovered biological father while the true oblig[e], his mother, is judicially estopped from enforcing her right.” The trial court, relying on *Lichtenwalter v. Lichtenwalter*, 229 S.W.3d 690 (Tenn. 2007), said no.

Well, apparently children in paternity/parentage cases have different rights under Tennessee law than do children of divorce, according to *Danelz v. Gayden III*. Here, in a thorough review of the applicable statutes, the Court of Appeals found that the trial court got it wrong, and that in parentage actions, adult children may seek child support directly from their parents, and that the right to child support accrues directly to the child, rather than through the parent. As held by the Court of Appeals:

The parentage statutes specify that an adult child must bring the parentage action within the statutory time deadlines. *See* Tenn. Code Ann. § 36-2-306. Once parentage is established by genetic testing, the statutes set forth certain actions to be taken by the trial court:

(a) Upon establishing parentage, the court shall make an order declaring the father of the child. This order *shall* include the following: . . . Tenn. Code Ann. § 36-2-311(a) (emphasis added). Section 36-2-311 states that the trial court is to include in its order various identifying information about the child’s mother and father, a determination as to the child’s name on the birth certificate, and determinations as to custody, visitation, and parental access. Tenn. Code Ann. § 36-2-311(a)(1)-(10). The statute also directs the trial court to include in its order a “[d]etermination of child support” pursuant to Chapter 5 of Title 36. Tenn. Code Ann. § 36-2-311(a)(11)(A).

Section 36-2-311 details the considerations for the trial court in making an award of retroactive child support and sets forth reasons for which the trial court may deviate from the child support guidelines. Tenn. Code Ann. § 36-2-311(a)(11). In addition, it directs the trial court to include in the order a “[d]etermination of the liability for counsel fees to either or both parties. . . .” Tenn. Code Ann. § 36-2-311(a)(14).

Id. The Court of Appeals also noted that

The statutes setting forth the procedure for the genetic testing to determine parentage reiterate that the trial court is to award child support once parentage has been established. *See* Tenn. Code Ann. § 24-7-112(b)(2)(D)(ii) (“[T]he court shall, upon motion by the other party, establish that individual as the father of the child in question, and *shall* order child support as required by the provisions of title 36, chapter 5.”) (emphasis added).

Id.

In *Lichtenwalter*, the Tennessee Supreme Court rejected a request by an adult child that child support due to his or her mother under a divorce decree should be paid to the child. In *Lichtenwalter*, the Supreme Court found that § 36-5-102(c)(2)(A) mandated that child support “shall be paid either to the clerk of the court or directly to the spouse, or other person awarded [] custody of the child or children” or be paid to “the appropriate person or agency providing care or support for the child.” *See* Tenn. Code Ann. §§ 36-5-102(c)(2)(A), -101(d)(8). But the Court of Appeals in *Danelz* emphasized that there is a different statute that controls for paternity/parentage cases, and that this statute allows adult children to pursue an independent action for child support so long as the action is filed within a specified time after emancipation.

In making its rulings, the Court of Appeals rejected a variety of arguments raised by Gayden. For example, Gayden argued that since the child had not paid his own child rearing expenses (his mother and Mr. Danelz paid these expenses), the child did not have a claim for unpaid child support. The Court of Appeals rejected this based on the fact that the legislature did not make an exception in the parentage statutes for this sort of situation. Gayden also argued that

the finding that he was the legal father—a determination mandated to be made by the trial court in an earlier appeal-- was not correct. The Court of Appeals found this time around that this was immaterial, since under the parentage statutes, the biological father *is* the legal father, and that Mr. Danelz was not an indispensable party to the parentage action.

The Court did offer Gayden a slender branch of relief, but almost in the same breath took most of it away. The Court noted that

“[C]ircumstances such as those stressed by Dr. Gayden may be taken into account in the trial court’s determination of the *amount* of the award of retroactive child support. The parentage statutes state that the trial court may consider a deviation from the amount of the child support award as calculated under the child support guidelines based on the extent to which the father did not know, and could not have known, of the child; the mother’s intentional failure or refusal to notify the father of the child; and the mother’s attempts to notify the father of her pregnancy or the child.

Id. citing Tenn. Code Ann. § 36-2-311(a)(11)(A)(i-iii) and *State ex rel. Kennamore*, 2009 WL 2632759, at *2-3. However, the Court of Appeals noted that *Kennamore* involved a mother’s petition for child support after the mother had withheld from the father knowledge of the child. In this case, the Court of Appeals questioned whether the child—who is the only party to this action and apparently withheld nothing—is subject to the same equitable considerations as the mother might be under *Kennamore*.

All in all, a very important case which may open up an entirely new source of child support litigation between adult children and their long lost parent(s).

3. Legal Father versus ?

Price v. Price (Court of Appeals at Jackson, April 19, 2013). *Price* involves a long marriage, two children, and the discovery by the husband that he was not the biological father of either one of the children. After making the discovery, the father filed for divorce. Mom

answered by asserting that the husband, as the legal father of the children (i.e., the individual she was married to during the conception and birth of the children), should be required to pay child support. Among other things, the mother argued, the father had held the children out as his own, put them on his insurance, and generally done the things parents are expected to do for their children (but not necessarily the neighbor's children). The trial court and the Court of Appeals rejected each of mom's arguments, summarizing its holding in a succinct but case-laden paragraph (which I have broken into four paragraphs) worth reading:

In this appeal, Wife seeks to impose a child support obligation upon a man shown not to be the biological father of the children at issue. Put simply, this is swimming against the tide.

Tennessee statutes and case law aim to require child support from the child's biological father and relieve all others of such obligation. "Tennessee law strongly favors requiring biological parents to bear responsibility for their own children, and [] this policy also favors relieving putative fathers of the burden of supporting children who have been shown, through conclusive evidence such as DNA testing, not to be their natural offspring." *State ex rel. Dancy v. King*, No. W2010-00934-COA-R3-JV, 2011 WL 1235597, at *6; 2011 Tenn. App. LEXIS 163, at *16 (Tenn. Ct. App. Apr. 5, 2011) (quoting *State ex rel. Johnson v. Mayfield*, No. W2005-02709-COA-R3-JV, 2006 WL 3041865, at *5; 2006 Tenn. App. LEXIS 693, at *15 (Tenn. Ct. App. Oct. 26, 2006); *Taylor v. Wilson*, No. W2004-00275-COA-R3-JV, 2005 WL 517548, at *4; 2005 Tenn. App. LEXIS 134, at *11 (Tenn. Ct. App. Mar. 3, 2005)).

"Tennessee does not provide for the imposition of a child support obligation upon an individual unless that person has a duty to support his or her natural or adopted child." *Braun v. Braun*, No. E2012-00823-COA-R3-CV, 2012 WL 4563551, at *3; 2012 Tenn. App. LEXIS 701, at *6 (Tenn. Ct. App. Oct. 2, 2012) (quoting *Harmon v. Harmon*, No. 02A01-9709-CH-00212, 1998 WL 835563, at *5; 1998 Tenn. App. LEXIS 816, at *13 (Tenn. Ct. App. Dec. 3, 1998)).

“In the absence of a formal adoption, a man is not obligated to provide support for a child when it is shown by clear, strong, and convincing evidence that he is not the natural parent of the child.” *Braun*, 2012 WL 4563551, at *3; 2012 Tenn. App. LEXIS 701, at *7 (quoting *Harmon*, 1998 WL 835563, at *5; 1998 Tenn. App. LEXIS 816, at *14).

Id.

4. Surrogacy Agreements

In re Baby (Court of Appeals at Nashville, January 22, 2013). In this short, but fascinating case, the Court of Appeals upheld a decision by Judge Betty Adams Green enforcing a surrogacy agreement over the objections of the biological mother. The “intended parents” lived in Italy; the surrogate lived in Tennessee. The surrogacy agreement had been ratified by the Juvenile Court several weeks before the child’s birth, but the surrogate changed her mind after the birth of the child. The Court of Appeals found that the agreement was valid, that the Juvenile Court had jurisdiction over both the agreement and the contest over the agreement, and that it was of no significance that the intended parents were married after the birth of the child rather than prior to the birth. As the Court of Appeals stated, adopting the language of the Juvenile Court,

It would be absurd to adopt the position that this was not a surrogate birth because the Intended Parents were married 20 days after the birth of the child. The obvious intent is for the child to be raised in a stable, loving home by committed parents. That is exactly what was intended and what is before this court. The United States Supreme Court in *Green v. Bock Laundry Machine Co.*, 409 U.S. 504 (1989)[,] made it abundantly clear that all statutes should be interpreted with the premise that our legislature did not intend on absurd or manifestly unjust results. The Court agrees with counsel that “to have the child’s entire destiny hinging on the timing of her parents’ marriage is absurd.”

Id. The Court of Appeals also found that there was no requirement that the surrogate have legal counsel because there was no termination of parental rights involved in enforcing the surrogacy

agreement (the biological mother had been represented by counsel in the execution of the surrogacy agreement, which provided that the biological mother had no intent to have a parental relationship with the child), and that there was no need to conduct a best interest analysis in enforcing the surrogacy agreement, as no such analysis was required by Tennessee law. This was a case involving fantastic lawyering on behalf of the intended parents, and it is well worth reading by anyone who gets close to these agreements.

5. Termination of Parental Rights

In re Taylor B.W. (Tenn. Sup. Ct., February 21, 2013). I rarely include termination of parental rights cases in these summaries, because I would have to read twice as many cases as I do now. But occasionally, and particularly when the Supreme Court gets involved, I do so. In *Taylor*, the court's own summary says it all:

Mother and Father entered into a marital dissolution agreement and a parenting plan for their two minor children. Mother subsequently injected Father with a chemical used to euthanize animals. She pleaded guilty to the attempted second degree murder of Father and was sentenced to twelve years incarceration.

Mother and Father entered into an amended parenting plan that provided for the children's visitation with their maternal grandmother and with Mother in prison. The amended parenting plan also provided for the resumption of the original parenting plan after Mother's release from prison. Father remarried while Mother was incarcerated. Father and Stepmother filed a petition for termination of Mother's parental rights and a petition for adoption by Stepmother.

The trial court found that there was a statutory ground for termination of Mother's parental rights and that termination of Mother's parental rights was in the best interests of the children. The trial court subsequently amended its order, concluding that termination of Mother's parental rights was not in the best interests of the children and denying the petition for termination of Mother's parental rights. Father and Stepmother appealed, and the Court of Appeals reinstated the original order.

We conclude that Father and Stepmother failed to prove by clear and convincing evidence that termination of Mother's parental rights is in the best interests of the children. Accordingly, we reverse the Court of Appeals and reinstate the amended order of the trial court.

Taylor is a fact-intensive case, so you can't assume that every attempted murder by one parent against the other will have a happy ending for the attempted murderer, but it tells us that conduct, as in the *Mayfield* case, is not always a good barometer of expected results. Bad conduct may lose the war, but not every battle.

IX. Parenting Issues

1. Original Plans

a. Determining 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.

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.

Maupin v. Maupin (Court of Appeals at Knoxville, April 29, 2013). This is a fascinating case which primarily involves a trial court's order concerning the custody of three children, two sons and a daughter. The mother was involved in an affair during the marriage, which resulted in conduct by the father described in some detail by the Court of Appeals:

We have read the testimony of the boys, recorded in chambers, and it is obvious that they have adopted the views of Father. They talk about how they do not love their mother because she does not ever do anything for them. They call her a liar. They talk about how their mother is trying to harm Father, and turn their sister against them. We fully recognize that Father, on occasions, lied to the trial court....[citing several examples]...

~~Yet another example is Father's denial of doing anything to alienate the children from Mother, contrary to volumes of evidence that he did. Still another example is Father's praise of Mother in the notes he wrote to try to regain her love compared to his later pronouncements – when she spurned him – that she was a worthless, lazy, liar who did not even love her children...There is obviously a weakening of the bond between Mother and the boys. Mother deserves some credit for weakening the bond in the first instance by spending time with her lover rather than the children, but the record clearly shows that Father has played on that weakness from the day of separation to present.~~

Id. Despite these findings by the Court of Appeals, backed up by extensive citations to the record, the Court of Appeals still affirmed the trial court's placement of the boys with the father and the daughter with the mother. The one change to the plan adopted by the trial court? The Court of Appeals ordered family counseling, and set forth the language it found appropriate related to that counseling. It was clear that the Court of Appeals was frustrated with the father's

conduct in a number of different ways, but also that it did not believe the fix was to place all of the children in the care of the mother.

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.

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.

2. **Modification of Parenting Plans**

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.

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 *Ambrister* 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: *Ambrister* 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. Designation of Primary Parent

Garrett v. Garrett (Court of Appeals at Knoxville, April 12, 2013). The parties divorced. The parties shared equal time with the children, but mom was named primary residential parent. Mom then enrolled the children in the zoned public school close to her home. Dad objected, and

the school system intervened to help the children stay in their pre-divorce schools. The trial court changed the primary residential parent to dad to allow this to happen. Mom appealed. The Court of Appeals reversed, finding that there was not an unforeseen change of circumstances that would have permitted the trial court to change custody, and that there was no effort by the trial court to look at the various elements that make up the best interest determination for change of custody purposes. The Court of Appeals stated that

Additionally, it was entirely foreseeable and reasonably anticipated that the Parents would live in different school zones, thereby necessitating a decision regarding which school the Children should attend in accordance with relevant policies regarding enrollment. We agree that Mother should have discussed the issue with Father before enrolling the Children in the new school. However, we decline to hold that her failure to speak with Father before enrolling the Children in school pursuant to the established enrollment policy was an unforeseen material change in circumstance that necessitated a change in custody. With these considerations in mind, we conclude that Father failed to establish that a material change in circumstances had occurred.

Id.

Jacobsen v. Jacobsen (Court of Appeals at Nashville, April 5, 2013). There is a lot going on here, but the main focus of the case is on the Court of Appeals' reversal of the custody issues by the trial court based on the Court of Appeals finding that the father was potentially guilty of abuse toward the mother, and therefore not suited to be named the primary residential parent. Additionally, the Court of Appeals reversed the trial court's division of the marital estate in the father's favor (68% to 32%) and changed the division to only slightly favor the father. This is a good opinion for those who wonder whether (1) spousal abuse can be serious enough to convince an appellate court to make a change of custody based on its de novo review of the record (it can), and (2) whether an appellate court will, in fact, address and change an asset division that is heavily weighted to one party or the other (it will).

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.

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. Jerrolds (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. **Trial De Novo and Conduct**

In re Zamorah B. (Court of Appeals at Nashville, February 28, 2013). *Zamorah B.* makes clear two things that we should already know: (1) an appeal from the referee to the Juvenile Judge is an appeal de novo, and thus the standard applied by the Juvenile Judge is *not* whether there has been a change of circumstances since the referee's decision, but what is in the best interest of the child; and (2) a parent's efforts to prevent the other parent from having a relationship with a child may have adverse consequences—in this case an award of primary parenting responsibilities to the other parent. It is a good reminder for clients who are determined to give as little time as possible to the other parent.

7. **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."

8. 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.

X. Prenuptial (and Postnuptial) Agreements

1. And Now for Something Completely Different...

Bengs v. Bengs (Court of Appeals at Nashville, April 23, 2013). *Bengs* is a rare case dealing specifically with the enforceability of a postnuptial agreement, as opposed to a prenuptial

agreement. It is interesting to see that the approach by the Court is essentially the same as the approach to a prenuptial agreement, although according to the Court of Appeals, it is more contractual in nature:

Post-nuptial agreements are to be interpreted and enforced in the same manner as any other contract. *Bratton v. Bratton*, 136 S.W.3d 595, 601 (Tenn. 2004). Where the facts are not in dispute and the language of the contract is clear and unambiguous, our interpretation of the contract is a question of law. *Id.* We review questions of law *de novo*. *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 342 (Tenn. 2005). Our Supreme Court addressed the requirements of a valid contract in *Doe v. HCA Health Servs. of Tenn., Inc.*:

A contract must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced. Indefiniteness regarding an essential element of a contract may prevent the creation of an enforceable contract. A contract must be of sufficient explicitness so that a court can perceive what are the respective obligations of the parties.

[Citing] 46 S.W.3d 191, 196 (Tenn. 2001)

Id. The principal issue addressed by *Bengs* was whether the postnuptial agreement between the parties was vague because they did not determine the value of a home being awarded to the Wife. That issue was pretty straightforward. What is interesting is the ease with which the agreement was enforced as a contract between the parties, where the court found “there is no allegation that any information pertaining to marital assets or otherwise relevant the agreement was withheld or that Husband entered into the agreement under anything other than his own free will; both parties are provided for adequately.” *Id.*

2. 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.

XI. Relocation

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."

Johnson v. Johnson (Court of Appeals at Nashville, January 31, 2013). This is a case in which the trial court rejected mother's effort to relocate the parties' daughter to California based on expert testimony to the effect that relocation "would pose a threat of specific and serious harm to the child that outweighed the threat of harm to the child from a change of custody." Although it is difficult from reading the opinion how the harm to the daughter would be different from the harm to any child from such a move in a divorced family, this case nonetheless shows that the use of an expert in relocation cases may be enough to stop the relocation altogether. In the words of the expert,

I believe it would cause her substantial emotional harm to move to California. Tennessee is her home. Her father is here. Her friends are here. Her school is here. She has established real - - her teachers, her brother, real connections with people that, in essence, she would have to give up for long extended periods of time if she were to move to California.

Id. The Court of Appeals suggested that the mother could have retained her own expert instead of relying on prior appellate cases in which experts did not testify.

Toyos v. Hammock (Court of Appeals at Jackson, January 17, 2013). This opinion is 57 pages long. Ouch. I'll let you read it yourself. It is notable for (1) remanding the case to the trial court to allow the father to "have his day in court" on the relocation issue, and (2) affirming the

award of attorneys' fees and expenses to the mother even while remanding the case to the trial court. The mother was permitted to remain relocated with the child pending the outcome of the hearing on remand. Otherwise, the case is principally notable for the wealth of minutia that makes up the opinion. Ouch, again.

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.

