The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Lori R. Holyfield

Office Address: (including county) Physical Address: 1500 Munford Avenue, [redacted]
Mailing Address: P.O. Box 725
Munford, Tipton County, Tennessee 38058

Office Phone: 901-492-1830 Facsimile: 901-472-7985

Email Address: Lori@LoriHolyfield.com

Home Address: (including county) [redacted]

Home Phone: n/a Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally, you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to laura.blount@tncourts.gov .

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Presently, I am self-employed. I operate my law office using the name Lori R. Holyfield, Attorney at Law.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I was admitted to practice in 2012. My Tennessee Board of Professional Responsibility number is 031369.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee is the only state in which I have ever been licensed to practice law, and the only state in which I have ever sought admission to practice.

I have been continuously licensed to practice law in Tennessee since October 29, 2012. My license is active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No, I have never been denied admission to, suspended, or placed on inactive status by the Bar of any state.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Since the completion of my legal education, I have held the following positions:

- Lori R. Holyfield, Attorney at Law, Munford, Tennessee
  - Attorney and Owner (April 30, 2016–Present)

- Douglass & Runger, Bartlett, Tennessee
  - Associate Attorney (February 24, 2014–April 29, 2016)

- Ferrell Law Firm, PLLC, Germantown, Tennessee
  - Associate Attorney (October 29, 2012–February 23, 2014)
  - Law Clerk (July 30, 2012–October 28, 2012).

While I was in law school, I served as a law clerk to the Honorable Karen R. Williams, Judge of the Shelby County Circuit Court, Division III, during the 2011–2012 term. I also served as a research assistant to Christina Zawisza, then the director of the University of Memphis Cecil C. Humphreys School of Law Child and Family Litigation Clinic, during the 2010–2011 academic year. Additionally, I performed various freelance research projects as a consultant to local attorneys.

Prior to law school, I was employed at the Advertising Checking Bureau, Inc., where I served as a market research analyst for cooperative advertising in the electronics sector from June 2006 to July 2009. I left this employment to begin law school.

During college, I was employed via the Rhodes Student Associate Program in the Geographic Information Systems (GIS) laboratory for the 2005–2006 academic year. Prior to that, I was employed as a student worker in the Rhodes College Financial Aid Office in the 2003–2004 and 2004–2005 academic years. In addition, I tutored several high school mathematics students during college.

During high school, I tutored high school mathematics students and assisted my father as a runner in his real estate appraisal business from 2000–2002. I also briefly worked at a Krystal fast food restaurant in the summer of 2000 and at the Cordova Bowling Center in the summer of 2002.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

I have been employed continuously since July 30, 2012, the Monday following the July 2012 bar examination. I was not employed between my graduation and the bar examination because I was studying for the examination and caring for my oldest child, who was less than six months old at the time. I have not been unemployed after graduation for longer than six months.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I practice almost exclusively in the area of family law. Currently, divorce and post-divorce matters in which I represent a party constitute about 60% of my case load. Juvenile court matters involving child support, child custody, and dependency and neglect make up 25% of my case load. About 10% of my practice involves matters in which I have been appointed by the court to serve as a guardian *ad litem* to represent the best interests of minor children or adults with diminished capacity, such as in a conservatorship proceeding. The remaining 5% of my practice is devoted to terminations of parental rights and adoptions.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

During my legal career, I have represented parties in trial courts in several hundred civil cases. By my estimate, I have appeared before judges in evidentiary hearings on no less than three hundred (300) days. Some of these days involved short hearings on temporary relief, while others were extended bench trials. I have also appeared for at least eight hundred (800) motion hearings and several hundred uncontested divorce final hearings.

To the best of my recollection, I have been personally involved in each such case, and I have only had co-counsel in one trial court matter. Thus, although I have utilized the services of administrative assistants and law clerks, I have been solely responsible for the legal advice and advocacy provided in each case, except that one.

Additionally, I have consulted with parties regarding out-of-court transactional matters, including the drafting and review of documents such as antenuptial and postnuptial agreements, residential lease agreements, noncompete agreements, quitclaim deeds, wills, powers of attorney, and living wills.

I have served as counsel of record in ten (10) cases in the Tennessee Court of Appeals. I had co-counsel in one such case; in the remainder, I was the only attorney representing my client. I appeared for oral argument in five (5) of these cases; the rest of them were decided summarily or on briefs.

I have also provided consulting, drafting, research, and writing services to several other licensed attorneys in conjunction with submissions to trial courts, the Tennessee Court of Appeals, and the Tennessee Supreme Court.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Matters of special note include the following published opinions:

***Karen Abrams Malkin v. Reed Lynn Malkin ("Malkin I")*, 475 S.W.3d 252 (Tenn. Ct. App. 2015).**

In this case, I represented a former wife regarding her former husband's third petition to modify his alimony *in futuro* obligation to her. Prior to their 1998 divorce, the parties were married for almost twenty years and had two children, both of whom were adults at the time the third petition

to modify was filed. The former husband was an attorney, who was retiring, and the former wife had spent significant time out of the workforce raising the parties' children.

The trial court granted the former husband's petition, finding that the former husband's retirement constituted a material change in circumstances that warranted a reduction of his alimony obligation. The trial court found that the primary factor in the original alimony award had been the former husband's income, and therefore, the court reduced the former husband's alimony by the same percentage as the reduction in former husband's income.

I appealed this ruling on the former wife's behalf, arguing that the trial court erred when it focused so heavily on the former husband's income to the exclusion of other factors. The former husband had significant assets that could be exhausted to satisfy his alimony obligation, the income he chose to draw from his retirement was in his sole discretion, he did not provide any proof of his monthly expenses, and the former wife still needed the alimony.

The Court of Appeals reversed the trial court, reinstated the existing alimony obligation, and remanded the case to the trial court for an award of attorney fees to my client. The former husband filed a Tennessee Rule of Appellate Procedure 11 application for permission to appeal to the Tennessee Supreme Court, which was denied.

***Karen Abrams Malkin v. Reed Lynn Malkin ("Malkin II")*, 613 S.W.3d 122 (Tenn. Ct. App. 2019).**

In this case, I again represented the former wife regarding the former husband's fourth petition to modify his alimony *in futuro* obligation. In his fourth petition, the former husband alleged that a material change in circumstances had occurred and that the existence of a material change had "already been adjudicated" in *Malkin I* and that the reinstatement of the alimony obligation was itself the material change in circumstances.

The trial court granted the petition, reducing the alimony obligation. The former husband then filed a motion to alter or amend, requesting a further reduction, which was also granted. The trial court entered a judgment against the former wife for the former husband's alleged overpayment of alimony during the pendency of his petition.

I appealed on the former wife's behalf. The Court of Appeals, finding that the former husband had failed to meet his burden of proving a material change in circumstances that had occurred subsequent to the hearing on the prior petition, again reversed. The Court of Appeals reinstated the alimony obligation and remanded the matter for an award of attorney fees incurred by my client to defend against the former husband's fourth petition in the trial court and on appeal. The former husband filed a Tennessee Rule of Appellate Procedure 11 application for permission to appeal to the Tennessee Supreme Court, which was denied.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I was listed as a Rule 31 Family Mediator from 2022 through 2024. I am presently in the process of reinstating my listing. I have mediated approximately 15–20 family law matters, including divorce and child custody matters pending in the circuit, chancery, and juvenile courts of Tipton County and Shelby County, since April 2022. Family law matters are deeply personal and factually-driven. Therefore, the significance of each case is primarily to the family involved in the case.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have served as a guardian *ad litem* in approximately 4-5 cases per year since 2014, usually as an advocate for minor children in the context of child custody cases. I have never served as a conservator or trustee.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

As a law student, I participated in the Child and Family Litigation Clinic at the University of Memphis Cecil C. Humphreys School of Law. As a part of that clinic, I was admitted to practice under the supervision of the clinical director pursuant to Tennessee Supreme Court Rule 7, Sec. 10.03. The clinic's case load involved service as a guardian *ad litem* in the Juvenile Court of Memphis and Shelby County pursuant to Tennessee Supreme Court Rule 40.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the

body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Prior to this application, I have never applied for appointment to any judicial position, either to the Governor's Council for Judicial Appointments or to any other commission or body.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

The University of Memphis Cecil C. Humphreys School of Law, Memphis, Tennessee
August 2009–May 2012

- Juris Doctor (J.D.), 2012, *cum laude*
    - *The University of Memphis Law Review*
        - Editorial Board, Senior Notes Editor
    - Class Rank: Top 10%
    - Child and Family Litigation Clinic
    - CALI Excellence for the Future Awards: Torts, Income Taxation
    - Legal Methods – Best Legal Memorandum Award and Best Legal Brief Award

Rhodes College, Memphis, Tennessee
August 2002–May 2006

- Bachelor of Arts (B.A.) in Psychology, 2006
- National Merit Scholarship
- Cambridge Scholarship
- Rhodes Student Associate in Geographic Information Systems

The University of Memphis, Memphis, Tennessee
June 2005-July 2005

- I took a summer course in Theatre Arts and transferred the credits to Rhodes College. No degree was sought or awarded.

PERSONAL INFORMATION

15. State your age and date of birth.

I am forty-one (41) years old. I was born on [redacted], 1984.

16. How long have you lived continuously in the State of Tennessee?

I have lived continuously in the State of Tennessee since birth, for a total of forty-one (41) years.

17. How long have you lived continuously in the county where you are now living?

I have lived continuously in Tipton County, Tennessee since October 19, 2007, a period of eighteen (18) years. Prior to that date, I was a resident of Shelby County, Tennessee from birth.

18. State the county in which you are registered to vote.

I am registered to vote in Tipton County, Tennessee.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have not served in the military.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

I have never pled guilty, been convicted, or placed on diversion for violation of any law, regulation, or ordinance, other than minor traffic offenses.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No, to the best of my knowledge, I am not presently under federal, state, or local investigation for possible violation of a criminal statute or disciplinary rule.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

I have responded to two formal complaints through the Board of Professional Responsibility. Both complaints were filed by individuals who were not my clients. Both complaints were dismissed after I responded. I have also had one or two requests for information from the Board via the Consumer Assistance Program that were resolved to the mutual satisfaction of myself and my client without requiring any formal response from me.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No, a tax lien or other collection procedure has not been instituted against me by federal, state, or local authorities or creditors within the last five (5) years.[1]

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No, I have never filed bankruptcy.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No, to my knowledge, I have never been a party in any legal proceedings.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

[1] An IRS tax lien was instituted against me prior to the last five (5) years and was released by the IRS in 2021.

Journey Church, Millington, Tennessee

- I have attended this church, which was formerly known as Lighthouse Fellowship Church, continuously since 1999.
- I have never held an office in our church, other than being a voting member of the congregation in prior years. However, at various points, my husband and I have served as leaders of the young adult group. We have also helped with church events and the mobile food pantry, and our oldest daughter and I serve in the nursery one Sunday per month.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No, other than social media chat groups tailored to women and mothers, I have never been a member of an organization, association, club, or society that limits its membership to those of any particular race, religion, or gender. I would of course withdraw from participation in any group if required by the Rules of Judicial Conduct.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

At various times in my legal career, I have held memberships in the Memphis Bar Association and the Tennessee Bar Association. I am currently a member of the Tipton County Bar.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Super Lawyers® Rising Star

- 2017
- 2018
- 2019
- 2020
- 2021
- 2022

30. List the citations of any legal articles or books you have published.

Lori R. Holyfield, Note, *One Fell Through the Cracks: Why Tennessee Needs an Initial Outpatient Commitment Statute*, 42 U. Mem. L. Rev 221 (Fall 2011).

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I have not taught any law school courses, CLE seminars, or other law-related courses during the last five (5) years.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

From 2012 to 2020, I was a Tennessee Notary Public based in Shelby County, where my office was located. From 2023 to present, I have been a Tennessee Notary Public based in Tipton County.

Tennessee Notaries Public are elected by the legislative body of the county in which they submit their application. I have never held, or been a candidate or applicant for, any other public office.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

I have never been a registered lobbyist.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached four (4) examples of my written work, as follows:

(1) *Brief of Appellee, Heather Danielle Rader Blount*

(2) *Preliminary Report and Recommendations of Guardian ad Litem*

(3) *Wife's Memorandum on Marital and Separate Property*

(4) Lori R. Holyfield, Note, *One Fell Through the Cracks: Why Tennessee Needs an Initial Outpatient Commitment Statute*, 42 U. MEM. L. REV 221 (Fall 2011).

Items (1), (2), and (3) are entirely my own work.

Item (4), my Law Review Note, is primarily my own work. However, I received substantial input and assistance from my editors, particularly with regard to proofreading and Bluebook citations.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

Serving the people of the State of Tennessee as a judge is both a high honor and a sacred trust. Judges must serve with integrity, dedication, and proficiency in the law. Since I began my legal education, I have always had a natural aptitude for, and enjoyment of, legal research, analysis, and writing, which are skills well-suited to this position. Appellate judges must interpret the law as enacted by the General Assembly. Ideally, they provide attorneys and judges across the state with legal principles that are easily understood and applied. Because few cases advance to the Tennessee Supreme Court, in many instances, the analysis from the Court of Appeals provides the only interpretative guidance for trial court judges and practitioners. The development of the law is important work, and my strengths would benefit the work of the Court.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

Throughout my legal career, I have provided many hours of uncompensated and reduced-fee services to people who cannot afford counsel. *Pro se* parties, even those with meritorious cases, are at a severe disadvantage when the opposing party is represented. The need for an attorney often arises unexpectedly, particularly in family law, and parties and their children may be irreparably harmed without timely and affordable representation.

The Rules of Professional Conduct strongly encourage pro bono service, and I firmly believe that no one should be able to "buy justice." Therefore, I have often provided services at a reduced cost or without any payment when I feel that the client has a just cause. I have also taken appointments representing indigent parties or their children in Shelby, Fayette, and Tipton Counties, which are compensated at AOC rates and usually exceed the compensation caps found in Tennessee Supreme Court Rule 13, Section 2.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I seek appointment to the Western Section of the Court of Appeals. The twelve (12) judges of the Court of Appeals decide civil appeals from Tennessee trial courts. Although the Court is composed of four (4) judges from each Grand Division of our State, the judges serve statewide.

I am a strong and diligent legal analyst and writer, which makes me an excellent fit for this position. I have followed the work of the Court of Appeals diligently for the past ten (10) years, and I enjoy listening to or watching the Court's oral argument days and reading the opinions produced by the Court. I am also relatively young, which would bring a unique perspective and allow me to serve on the Court for many years.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I plan to continue participating at Journey Church, in the Tipton County Bar Association, and in the Tipton County Republican Party if I am appointed to serve on the Court of Appeals.

If opportunities arise to teach Continuing Legal Education courses or educate the public about the judicial system, I would certainly be interested in doing so. I would also want to engage in activities that promote public confidence in and knowledge of the judiciary and court processes and in opportunities to mentor young people, to the extent allowed by the Rules of Judicial Conduct.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I am the first lawyer in my family and the first grandchild on both sides to graduate from college. I was born in Memphis to a secretary and a forklift operator (who later became a real estate appraiser). My college and law school education were funded nearly entirely via scholarships, grants, my own personal work efforts, and student loans.[2] I do not believe I have ever seen an actual silver spoon.

[2] There are two exceptions that I can recall, for which I am very grateful: (1) my grandparents gave me $3,000 upon my high school graduation; and (2) my father and stepmother paid for my law school parking pass.

My life experiences afford me a unique perspective. For instance, I am a wife and mother who was primarily raised by my father and stepmother. I was the subject of post-divorce litigation between my parents for multiple years, which gave me a unique understanding of how child custody cases affect some children. I learned about hearsay from my father's lawyer, Harvey Gipson, at eight (8) years old, and he was part of the reason I decided to become a lawyer.

As a sole practitioner, I have developed the skills of working independently and diligently. Domestic relations cases, the focus of my practice, make up a large portion of the cases handled by the Court of Appeals. I enjoy legal writing and excel at it. It would be an honor to serve on the Court.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Of course I will uphold the law even if I disagree with its substance. Judges are not legislators. Not only *should* they uphold the law as written — they *must* do so. The separation of powers between the branches of government, the system of checks and balances, is vital to the continuation of our republic.

As U.S. Chief Justice John Roberts once noted, judges are servants of the law, and not the other way around. When a judge stretches the meaning of words to impose his or her own beliefs, he or she is in fact doing a disservice to the law and the Constitution, which all lawyers have solemnly promised to support.

When people take their disputes before the courts, they are seeking "fairness." It can be a challenge to explain to clients that while judges do strive to be fair and impartial, they must apply the law to the facts of the case. Cases frequently require me to encourage a client to settle on terms he or she does not like in order to avoid the near-certainty of a worse result in court, which I do by explaining that judges must follow the law as written. Similarly, I have sometimes had to explain to clients that there may not be a legal remedy for a wrong they are expressing. These conversations with clients are sometimes difficult and upsetting to the client, but they are a necessary part of practicing law.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Chancellor Kasey A. Culbreath
Twenty-Fifth Judicial District (Fayette, Hardeman, Lauderdale, McNairy, and Tipton)
[redacted]

B. Terry G. Bailey, Tennessee District Superintendent (Non-Lawyer)
Tennessee Assemblies of God Ministry Network
[redacted]

C. Stephen L. Hale, Attorney and Mediator
Pinnacle Dispute Resolution Associates
[redacted]

D. Betsy G. Stibler, Senior Counsel
Gordon Rees Scully Mansukhani
[redacted]

E. Christie L. Jarvis, School Social Worker (Non-Lawyer)
Tipton County Schools
[redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the **Court of Appeals, Western Section** of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: November 4, 2025.

Signature

When completed, return this application to Laura Blount at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

IN THE COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN SECTION AT JACKSON

HEATHER DANIELLE RADAR BLOUNT
v.
JAMES EDWARD BLOUNT

No. W2022-01722-COA-R3-CV

Rule 3 Appeal from the Final Judgment of the
Shelby County Circuit Court, No. CT-005694-18

BRIEF OF APPELLEE, HEATHER DANIELLE RADER BLOUNT

ORAL ARGUMENT REQUESTED

/s/ Lori R. Holyfield
LORI R. HOLYFIELD
Board of Prof. Resp. No. 031369
Counsel for Appellee
P.O. Box 725
Munford, Tennessee 38058
(901) 492-1830
Lori@LoriHolyfield.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED FOR REVIEW

1. The Trial Court did not abuse its discretion in its findings related to marital fault, income, earning capacity, alimony, or distribution of the marital estate.

2. This Court should award to Wife her attorney fees incurred in defending this appeal, either as a frivolous appeal or pursuant to Tenn. Code Ann. § 36-5-103(c).

STATEMENT OF THE CASE

This appeal concerns the divorce of Heather Danielle Rader Blount (variously referred to herein as "Wife," "Mother," "Ms. Blount," or "Appellee") and James Edward Blount, IV (often referred to in the transcripts as Jimmy Blount, and variously referred to herein as "Husband," "Father," "Mr. Blount," or "Appellant"). Wife incorporates, in a general fashion, the "Statement of the Case" found in Husband's *Appellant Brief*. However, to present a more complete picture, Wife wishes to provide limited supplemental information.

1. On November 18, 2021, Wife filed a *Petition for Scire Facias and Citation for Civil Contempt*, alleging that Husband was failing to comply with the orders of the Trial Court related to payment of expenses. [Vol. 3, at 309.][1] Without holding an evidentiary hearing, the Trial Court dismissed this petition along with "all remaining pleadings and motions, including those filings following the trial in this matter…without

---

1. Wife's counsel will cite to the Appellate Record by indicating the volume of the record, followed by the page in the volume where the information is found. Rather than beginning citations with "R.," Wife's counsel has chosen to set off citations to the record with square brackets to assist with visual organization for the reader, a somewhat unconventional choice which was not intended to offend this Court.

Volumes 1–4 of the Appellate Record comprise what would traditionally have been known as the "Technical Record." Volumes 5–8 are "Transcripts of the Evidence," and Volume 9 contains all of the trial exhibits.

prejudice to either party with the right to re-file as a new cause of action." [Vol. 3, at 402.]

2. On June 2, 2022, after the Trial Court had entered *Conclusions of Law and Findings of Fact*, Husband filed a *Complaint Against a Judge Under the Code of Judicial Conduct* with the State of Tennessee Board of Judicial Conduct ("BJC"), alleging delay on the part of the Trial Court to enter a final order. [Vol. 3, at 415.]

3. The Trial Court entered its *Final Decree of Divorce* on June 17, 2022. [Vol. 3, at 364, 377–403.]

4. The *Final Decree of Divorce* substantially conformed to the *Conclusions of Law and Findings of Fact* previously filed by the Trial Court on March 2, 2022. [Compare *id.* with Vol. 3, at 325–51.]

5. After entry of the *Final Decree of Divorce*, *Husband's Motion to Recuse* was filed on July 6, 2022.

6. The judicial complaint was dismissed by the BJC on July 7, 2022. An *Order Denying Husband's Motion to Recuse* was entered on August 3, 2022. [Vol. 4, at 548.]

7. Husband filed a petition for recusal appeal in the Tennessee Court of Appeals on August 24, 2022. [Vol. 4, at 566.] This was the last date on which Husband could file an interlocutory appeal of the denial of his recusal motion. See Tennessee Supreme Court Rule 10B, *Section 2.02*. Although this appeal was dismissed, the Trial Court did not act on the pending motions until after the *Mandate* issued on November 2, 2022.

8. On November 15, 2022, the Trial Court entered an *Order Resolving Former Husband's Motion to Alter or Amend the Judgment, and Motion to Withdraw of Leslie Gattas & Associates, PLLC*, which provided that "[a]ll other matters before the Court are hereby dismissed…" [Vol. 4, at 574.]

9. Because the Trial Court did not enumerate in its order that this dismissal was without prejudice, it arguably "operates as an adjudication on the merits" despite the fact that no evidentiary hearing was ever held on Wife's November 18, 2021 *Petition for Scire Facias and Citation for Civil Contempt*. See Tennessee Rule of Civil Procedure 41.02(3).

STATEMENT OF THE FACTS

Factual Background

The Marriage and Children

The parties were married on July 31, 1999. [Vol. 7, at 308.] The marriage produced three sons, namely Alec, born in 2001; Ethan, born in 2002; and Noah, born in 2004. Wife filed for divorce on December 20, 2018. [Vol. 6, at 259.] At the time of trial in the summer of 2021, only Noah was still a minor. [Vol. 6, at 144.]

Husband's Education, Employment History, and Income

Husband is a practicing attorney, having been admitted to the Tennessee bar in 1998 and the Arkansas bar in 1999. [Vol. 7, at 336.] Husband's father and grandfather, who are now deceased, were also attorneys. [Vol. 7, at 338.] Husband's undergraduate degree in English was earned at Rhodes College in 1994, and he obtained a law degree from the University of Memphis in 1998. [Vol. 7, at 336.]

Husband began working at the Blount Law Firm, his grandfather's firm, immediately after passing the bar examination, and he worked there continuously until 2018. [Vol. 7, at 338, 342.] Husband was employed at the John Michael Bailey law firm from 2018 until he "voluntarily left" in March 2021. [Vol. 7, at 492; Vol. 8, at 665.] At that time, he began practicing law as the Blount Law Firm "out of [his] house" until he leased an office space the month before trial. [Vol. 7, at 345.]

Husband's earnings over the years and his earning capacity were such points of disagreement between the parties that each of them retained an accounting expert.

Wife's expert, Mr. Michael Pascal, testified that for someone with variable income, it was appropriate to average earnings over a two- to three-year time period because "it is more indicative of his current income and his prospective income." [Vol. 5, at 54.] Wife's expert's report indicated a two-year average income of $43,012 per month if the Court included the deduction for "cost of goods sold" in Husband's income, due to the fact that Husband sold no goods; or if the Court wanted to allow the deduction, then $39,439 monthly. [Vol. 9, Exh. 2, at 4.] Further, Wife's expert gave a three-year average income for Husband of $31,350 per month after backing out "cost of goods sold," or $28,968 if the Court allowed the deduction for "cost of goods sold." [Vol. 9, Exh. 2, at 4.]

Husband's expert, Ms. Cynthia MacAulay, testified that taking a five-year average would be more appropriate. In that five-year average, and in a three-year average she also calculated, she excluded two big settlements Husband received and averaged out those settlements over the time period that the case was pending in court, a period of one hundred sixty-four (164) months (*i.e.*, over 13 years). [Vol. 8, at 641.] The three-year average produced by Ms. MacAulay was $17,888 per month; her five-year average was $16,672. [Vol. 8, at 666–67.]

Although Husband wanted the Court to average fees for the two large-recovery cases over a longer span of time, he testified that such a

fee was not earned until it was actually in his hands, "[n]ot until the Chancellor entered the final order." [Vol. 7, at 531.]

The Trial Court, in its order, found that

> Averaging the fees earned over the life of the case until the fees are paid is not appropriate as they were not yet earned and dilutes the income and especially in light of the fact that no proof was provided as to what time Husband spent on the case for each year since each case was filed.
>
> [Vol. 3, at 336.]

However, the Trial Court also found that Wife's expert "has no factual basis for his opinion that Husband will make the same in 2021 or 2022 and Husband's income has varied from 2015–2019." [Vol. 3, at 336.] The Court also found Husband to be "voluntarily underemployed" because his previous employment with John Michael Bailey was terminated voluntarily by him. [Vol. 3, at 338.]

As a result of this analysis, the Trial Court calculated Husband's income to be $21,270.33 per month. [Vol. 3, at 338.]

Wife's Education, Employment History, and Income

At some point prior to the parties' marriage on July 31, 1999, Wife obtained a bachelor's degree and a master's degree in education at the University of Tennessee at Knoxville. [Vol. 6, at 145.] When the parties met, Wife was employed as a teacher at a public school in Memphis called Treadwell. [Vol. 6, at 146.]

After the wedding, Wife worked at Hutchison School, a private school in Memphis, during the 1999–2000 academic year. [Vol. 6, at 146.] Wife's employment at Hutchison ended in 2000, when she became pregnant with the parties' oldest son, Alec. [Vol. 6, at 147.] The parties had two (2) additional children, both sons, in 2002 (Ethan) and 2004 (Noah). Wife spent several years out of the workforce raising children, and she served as a full-time homemaker until August 2006. [Vol. 6, at 147.]

In the fall of 2006, Wife began teaching at Briarcrest Christian School, where the parties' oldest child was already attending. [Vol. 6, at 147–48.] Wife was employed at Briarcrest Christian School during each successive academic year until May 2019. [Vol. 6, at 152.] Wife earned $30,000 per year at Briarcrest "on average." [Vol. 6, at 149.] This $30,000 salary was a gross amount before deductions for taxes, tuition, health insurance, and retirement. [Vol. 6, at 149.]

Wife freely admitted that teaching at Briarcrest was a "sacrifice" she made for the sake of the parties' children. Although she could have earned a higher salary in a public school, "[my] primary concern was [the children]." [Vol. 6, at 159–60.] She testified that her employment at Briarcrest was a decision the parties made "jointly." [Vol. 6, at 148.] Wife also testified that "every single time" she mentioned to Husband the possibility of leaving Briarcrest to teach elsewhere, he would "threaten to pull the boys out of that school," which was "the last thing [Wife] wanted." [Vol. 6, at 169.]

Wife resigned her employment at Briarcrest after the school threatened to discipline or terminate her for filing for divorce. The divorce filing violated the *Professional Code of Conduct* that was incorporated into her employment contract, which read in pertinent part that BCS personnel shall "not initiate a divorce proceeding against his/her spouse except for reasons of adultery or abandonment, or remarry unless consistent with Scriptural principles [Matthew 5:32, 1 Corinthians 7:10–15]" [Vol. 9, Exh. 12; Vol. 6, at 151.] Wife then taught at the Bowie Center Day School for the 2019–2020 academic year, where she earned $19.00 per hour. [Vol. 6, at 152–53.]

When the COVID-19 pandemic began, Wife decided to leave teaching and learn how to sell insurance. She became a State Farm agent in the summer of 2020, where she had a base salary of $20,000 per year, plus commission. [Vol. 6, at 153.] Later, Wife began working with a different State Farm office, where her base salary was $24,000. She estimated that she could make more than $30,000 relatively quickly, although she was still in the training phase at the time of trial. [Vol. 6, at 154–55.]

The Office Building

Upon his father's death in 2011, Mr. Blount's mother inherited the office building owned by the Blount Law Firm. Then, according to Husband

> Basically I purchased the building from my mother by taking over the note on it, and basically purchased it for the cost of the note at that time and then got it -- was able to get it refinanced then. So it kind of all happened at one time. I got it transferred over into my name or the Blount Law Firm's name and refinanced it…around 2015.
>
> [Vol. 7, at 348.]

Wife testified that she was a co-signer on the loan for the Blount Law Firm's office building. [Vol. 6, at 186.] In 2018, during the pendency of the divorce, Husband sold the building and received $279,291.81 at closing. [Vol. 7, at 350.] Husband did not tell Wife the amount of the proceeds. In fact, Wife testified that she did not learn of the amount Husband received at closing until "today" (*i.e.*, the day of her testimony during the trial). [Vol. 6, at 186.] Husband testified that he took the money from closing in December 2018, deposited it into a bank account, and as of June 30, 2021, none of these proceeds remained. [Vol. 7, at 352.]

The Parties' Marital Problems and the Court's Determination of Fault

From Wife's perspective, the entirety of the marriage was "troubling" rather than "happy." [Vol. 6, at 155.] She stated that both parties had wrongdoing in the marriage, and that in her opinion, neither party's wrongdoing was significantly greater than the other's. [Vol. 6, at 181.]

From Husband's perspective, the parties' marriage was difficult, but the difficulty was all Wife's fault. Prior to Wife's affair, Husband admitted that the parties were "not happily married." [Vol. 7, at 536.] When asked to name the biggest problem in their marriage prior to Wife's adultery, Husband responded, "[s]he was the biggest problem." [Vol. 7, at 472.] He clearly testified to his belief that "this divorce is not my fault." [Vol. 7, at 484.]

With respect to grounds, the Final Decree reads as follows:

> 9. The parties both admitted to adulterous relationships.
>
> 10. Wife's relationship began shortly prior to Wife filing for divorce and Husband's began during the pendency of the divorce.
>
> 11. They also both admitted that the problems in the marriage existed before either began the relationships with other persons and the Court finds as such.
>
> 12. Though other issues were testified to by Husband which are that Wife was mean and cruel, did not help him with the money situation,[1] drove a wedge between him and family, and suffered depression and anxiety issues that overwhelmed her and the tension in the marriage arising from the relationship between Wife and Husband's mother and the mother's involvement in their marriage, and Husband's behavior towards Wife when he was mad, the Court finds that the parties marital issues prior to the adulterous relations primarily resulted from the financial issues the parties had due to communication issues that included the finances and Wife's ultimate frustration with the parties' financial issues.

13. Wife's frustration with the parties' financial problems evolved because Wife perceived Husband as being financially controlling due to the finances not being discussed with her which resulted in Wife not knowing whether the parties had money or not, what Husband earned, their debts, and Husband not spending money wisely which has resulted in Wife's payments for items being declined on multiple occasions and the utilities being turned off on several occasions even though Husband had the money and would transfer money for the payments to go through and pay to have utilities turned back on when she notified him.

14 The 1950 West Poplar building was a source of financial problems for them and lack of income from his private practice and Wife asked Husband for years to give up the office on West Poplar and get a job where he would have a reliable dependable check.

15. Once Wife expressed her desire to get a divorce due to the parties' financial issues, Husband attempted to cure those issues by taking a job with John Michael Bailey Law Firm ("JMB") in the fall of 2018; however, Wife felt like the marriage was irretrievably broken at this time and filed for divorce six months later.

16. Pursuant to Tenn. Code Ann. § 36–4–129, the court may, upon stipulation to or proof of any ground for divorce pursuant to § 36–4–101, grant a divorce to the party who was less at fault, or if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone

17. The Court finds that both parties are entitled to a divorce and declare the parties to be divorced.

[Vol. 3, at 378–80.]

Financial and Lifestyle Issues

Like many marriages, the Blount marriage was plagued by conflict related to money. Wife complained that throughout the marriage, information about marital finances "was kept from" her. [Vol. 6, at 156.] Husband, she testified, was "controlling about the money." [Vol. 6, at 158.] This was a particular source of frustration for Wife when Husband, who was completely in control of the majority of the marital income, would fail to make necessary payments. On several occasions, Wife testified, this caused the utilities at the marital residence to be shut off:

> While I was staying home for those six years, seven years, there would be so many times that I would call Jimmy at work, and tell him that our power had been turned off, our utilities had been turned off, our water had been turned off, so I was under the assumption that we never had any money. And so I begged Jimmy for years…to give up that office on West Poplar…and please go get a job with another law firm where we could have a reliable, dependable paycheck.

[Vol. 6, at 218.]

Wife noted that the utilities were not cut off "every month by any means, but it was consecutively years this went on." [Vol. 6, at 257–58.] Further, after undergoing the discovery process, Wife testified that she no longer believed that the issue was not having any money: "I was told that we did not have money. Our utilities would get turned off. I would call Jimmy. He had the money. He would pay for them to get turned back on." [Vol. 6, at 159.]

A similar issue would happen when Wife would go shopping for clothing or groceries:

> Way too many times the card was declined. I would call Jimmy. For instance, one time we went Christmas shopping. I was down in Texas. And we got up there to pay, the card was declined. I called Jimmy to tell him what happened and then he said, give me a few minutes. He was going to transfer some money over.

[Vol. 6, at 157–58.]

For his part, Husband agreed that he did not always disclose financial information to Wife. For instance, Husband routinely filed joint tax returns during the marriage without giving Wife the opportunity to review and sign the return because "my accountant didn't really think – didn't say that I needed to have her permission." [Vol. 7, at 359.] Wife testified that she did not know that the parties owed six figures to the IRS "until I was served a summons in the mail…after I filed [for divorce]." [Vol. 6, at 160.] Husband also did not tell Wife about several "big settlements" he received, because "[s]he thought I was a poor loser. Why would I tell her anything about that?" [Vol. 7, at 536.] These settlements included, but were not limited to, a fee from the "Methodist case" of "about $408,000" and a fee from the "Galilee Cemetery case" of "about $268,000." [Vol. 7, at 378, 395.]

Although the marital standard of living was "middle class," Wife felt that Husband did not always accord the same respect to her

contributions as a homemaker as he did to his contributions as a breadwinner. For instance, she testified, "Jimmy would always get himself brand new vehicles. I was always given used vehicles." [Vol. 6, at 230.] Further, Wife took issue with the fact that Husband spared no expense in relation to his work attire: "I was always for Mr. Blount to dress nice and to look nice, but I did not understand why he needed to pay thousands of dollars to a specific person to tailor make his suits when we allegedly didn't have any money." [Vol. 6, at 228.] By contrast, when she went shopping for new clothes for herself, "I was often given a guilt trip or told we just didn't have that kind of money in our account to pay for that kind of stuff." [Vol. 6, at 158.]

Wife was also perturbed that during times when she was told the family did not have money, Husband spent significant money on his hobbies. [Vol. 6., at 177.] "He got into sailing, so he bought a sailboat…he put a lot of work into repairing that. I know he added an air conditioner…[and] a bathroom." [Vol. 6, at 176.] He also, at some point, acquired "two working boats" and a "nonworking catamaran." [Vol. 6, at 176.] Husband would "take sailing classes in Nashville…[and] be gone for a week." [Vol. 6, at 177.] In addition, Husband went on sailing trips to the Virgin Islands twice. [Vol. 6, at 178.]

Sailing was not Husband's only hobby. Husband also

> took up bike riding. For instance, he bought several bikes from Bikes Plus that were worth several thousands of dollars, but not just the bikes came with it. He had to buy the shoes and the clothing that came along with the whole bike attire.

> Then he bought a Peloton bike. And once again, he had to buy the shoes, and the membership and the clothing that came with the Peloton bike.

[Vol. 6, at 177.]

Relationship Issues

The parties did not have a strong interpersonal relationship during much of their marriage. Wife testified that Husband had a "temper" and "liked everything to go his way." [Vol. 6, at 169.] This would sometimes lead to physical outbursts toward objects (but not people), or expressions of anger in front of the children. [Vol. 6, at 170.] Wife testified that "[w]hen Jimmy does drink, he tends to get angry. The more he drinks, the angrier he gets." [Vol. 6, at 173.] Wife also described an incident where Husband put a hole in a door by kicking it. [Vol. 6, at 170.] Husband contended that he did not kick the door, but that the parties' son slammed the door into his foot "and it hit me, my foot, as I was walking in and put a hole in the door." [Vol. 7, at 474.]

Wife testified Husband would call her names in front of the children. [Vol. 6, at 171.] After Wife began an extramarital affair, Wife testified, Husband called her "a wh-re…a cheater…a b---h…a f-ing b---h all the time." [Vol. 6, at 170.] Husband admitted to "calling [Wife] names" after he learned about her affair, but denied doing so in front of the children. [Vol. 7, at 475.]

Husband testified that Wife was the biggest problem in the marriage. She was "mean. She was i[m]patient. She could be cruel. She would not help me when it came to the money situation." [Vol. 7, at 472.]

Wife also felt that Husband's mother was a "source of contention" between her and Mr. Blount. [Vol. 6, at 168.] Mr. Blount's mother, Wife testified, "was always a third party. It was not a marriage between Jimmy and I. It was a marriage between the three of us." [Vol. 6, at 167.] Wife "always, always" tried to discuss this with Husband, but the issue did not get better. [Vol. 6, at 167.] Husband had a different take on this issue, finding fault with Wife for "attempt[ing] to drive a wedge between me and the rest of my family…and she just…had a lot of depression and anxiety issues that were overwhelming to her." [Vol. 7, at 472.]

Another issue for Wife was Husband bringing marijuana and paraphernalia into the marital home, including rolling papers and a grinder that she found in the playroom. [Vol. 6, at 173.] When she tried to confront him and discuss this, he responded that "[b]asically, he could do whatever he wanted to do." [Vol. 6, at 174.]

Adultery

Wife began an "inappropriate relationship" with Mr. Kurt Weigel in August 2018. [Vol. 6, at 166.] Husband testified that he learned about this relationship before Wife filed for divorce in December 2018. [Vol. 7, at 464.] Wife testified that there were significant problems in the

marriage before she began her relationship with Mr. Weigel, stating that "[o]ur marriage was beyond repair at that point." [Vol. 6, at 166–67.]

Husband also testified that his decision to go work for John Michael Bailey in the fall of 2018 was an effort to "save [his] marriage…I was desperately trying to stay married." [Vol. 7, at 342.] Even after learning of Wife's affair, Husband testified that he was still willing to work on the marriage. [Vol. 7, at 465.] However, Husband also testified that Wife became "evil" when she started seeing Mr. Weigel.

Husband was clearly very angry about Wife's extramarital affair at trial, almost three years after learning about it:

> I'm sorry if I do not want to spend my Christmas holiday with a woman who has forsaken me for some stranger that she met after a few months and then ruined a 20-year marriage. I'm sorry if [s]he chose him…over me and my children…Do I have, do I hold ill-will against her for doing all of that? Absolutely, I do.
>
> I think there's nothing wrong with me doing that. I don't think that I have any anger problems or anything like that because I think my anger towards her is perfectly well placed. I think it is perfectly reasonable. I think it is well deserved.

[Vol. 7, at 539.]

Husband began an extramarital affair in May 2020. [Vol. 7, at 471.] However, he testified that his adultery did not make him "evil" because

> I didn't start seeing my girlfriend until almost two years into this process, living alone by myself in a playroom while taking care of three boys while my wife went off and cuckolded me

> with some guy from Knoxville, so, no, I don't think I'm evil. In fact, I think I deserve what I – in my relationship that I have with Ms. Carbajal – and I think anybody in my position would do the same thing…While my wife is stepping out on me, I don't see why not…

[Vol. 7, at 537.]

Further, Husband admitted that he had purchased $2,500 in jewelry for his paramour, had spent money taking her on trips, had provided hotel accommodations for her, had employed her at his law office, was providing her with health insurance coverage, and wrote her a check in the amount of $2,400 during the pendency of the divorce. [Vol. 7, at 498.]

The Trial Court found that "both Husband and Wife dissipated and/or failed to preserve assets. Husband spent marital funds on girlfriend in an approximate amount of $5,000 for bar exam, jewelry, hotel, gifts, moving expenses." [Vol. 3, at 390.] The Trial Court found that Husband's adultery constituted recrimination, which operated as a perpetual bar to his claim regarding Wife's adultery. [Vol. 3, at 378.]

Additional Facts Relevant to Alimony

Need, Ability to Pay, and Earning Capacity

Wife testified that after accounting for her income, her expenses caused her to have a monthly financial deficit of $5,747.41. [Vol. 6, at 180.] When asked whether her earning capacity would ever approach

Husband's, Wife responded, "Oh, heavens no." [Vol. 6, at 301.] Wife also testified that she had relied on Husband's income for financial support throughout the entire marriage. [Vol. 6, at 301.] The Trial Court found that "there is a relative economic disadvantage and rehabilitation is not feasible."

The Parties' Contributions to the Marriage

Husband contributed to the marriage as the primary breadwinner. Wife testified that she had contributed to the marriage both in the form of homemaking and doing chores and in the form of employment outside the home: "I've always worked and helped to support our family. I've never not worked except for the time that I was at home raising my babies, and I continue to work." [Vol. 6, at 243.]

The Trial Court found that "Husband was the primary breadwinner and paid most of the household expenses…and also participated in making sure home improvements were done and preparing lunch for the children." [Vol. 3, at 394.] In addition to Wife's contributions as a homemaker and mother, the Trial Court found that she had contributed to Husband's earning capacity by co-signing on his office building note. Further, Wife's employment "enabl[ed] the parties to receive health insurance and 50% discount on [the children's] education for many years and the tuition, fees and insurance were deducted from her check leaving her with no money at the end sometimes."

STANDARD OF REVIEW

This Court reviews alimony and equitable distribution decisions of lower courts for abuse of discretion. "An abuse of discretion occurs when the trial court…appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011).

Findings of fact are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). The trial court's conclusions of law are reviewed *de novo* and "are accorded no presumption of correctness." *Franklin v. Franklin*, 2021 Tenn. App. LEXIS 466, at*3 (Tenn. Ct. App. 2021) (citing *Brunswick Acceptance Co., LLC v. MEJ, LLC*, 292 S.W.3d 638, 642 (Tenn. 2008)).

SUMMARY OF ARGUMENT

Appellant Husband identifies nine (9) alleged errors in the determinations made by the Trial Court. However, Appellant's Brief does not break down its Argument section with respect to the assigned errors. This presents difficulty in responding to Appellant's Argument. Appellee will do her best to respond thoroughly.

This Court must review the Trial Court's determinations for an abuse of discretion. A review of the record demonstrates that the Trial Court did not abuse its discretion. The Trial Court carefully assessed the parties' relative fault for the breakdown of the marriage, carefully and thoroughly considered the statutory factors relevant to equitable distribution and alimony, listened diligently to each party's expert on the issue of Husband's income, and made very thorough findings of fact and conclusions of law.

It is true that the Trial Court made decisions with which neither party fully agreed. However, that is the very nature of a trial. It is rare that any litigant is wholly satisfied with the outcome of divorce litigation. Of course, the standard is not whether a party disagrees with a particular ruling, or even whether this Court might have decided the issues differently if its individual members had been sitting as trial court judges. The Court of Appeals is a court of review, and in general, treats lower court decisions with some deference and presumption of correctness.

Wife, the economically disadvantaged spouse, has incurred substantial attorney fees defending this appeal. Meanwhile, Husband is a lawyer and his paramour is a paralegal who has completed law school, so it is likely that his attorney fees were substantially less than those of Wife. This Court should affirm the Trial Court's ruling, assess the costs of the appeal to Husband, award to Wife her attorney fees incurred on appeal, and remand for a determination of Wife's fees.

ARGUMENT

1. The Trial Court did not abuse its discretion in its findings related to marital fault, income, earning capacity, alimony, or equitable distribution of the marital estate.

Marital Fault

Husband alleges that the Trial Court erred when it made its determination regarding marital fault. He wants this Court to determine that the divorce was entirely Wife's fault, or that the Trial Court should have allowed him to testify more fully about Wife's fault. Husband does not cite any legal authority for the proposition that a trial court *must* consider the relative fault of the parties or that a trial court *must* allow endless testimony about one party's assertions of marital fault against the other. Precedent on this issue is relatively sparse, presumably because it is rarely litigated.

In *Norris v. Norris*, 2015 Tenn. App. LEXIS 673, E2014-02353-COA-R3-CV (Tenn. Ct. App. 2015), the Tennessee Court of Appeals examined a trial court's determination with respect to marital fault. In that case, the husband complained that the wife had not had sexual relations with him in 7–8 years, did not clean the house appropriately, and argued with him over money. The wife, on the other hand, complained about money matters and the fact that the husband was living with and committing adultery with another woman. *Id.*, at *3–4. The trial court awarded a divorce to the husband on the ground of irreconcilable differences, and the wife appealed. *Id.*, at *8.

The Court of Appeals held that a divorce could not be granted on the ground of irreconcilable differences without a written agreement resolving all of the issues before the trial court. However, rather than granting a divorce to either spouse alone, the Court of Appeals found that "neither party was faultless in the breakdown of their marriage," and ruled as follows:

> We find a preponderance of the evidence in the record shows that both parties engaged in inappropriate marital conduct. In situations where both parties are at fault and there exists proof of any ground for divorce, Tennessee law provides the following option:
>
> …(b) The court may, upon stipulation to or proof of any ground of divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce or if a divorce is to be granted on the grounds of irreconcilable differences, declare the parties to be divorced, rather than awarding a divorce to either party alone. [internal citation omitted]
>
> In light of our finding regarding both parties' inappropriate marital conduct, we amend the Trial Court's judgment to declare the parties to be divorced, rather than grant a divorce to either party alone.
>
> *Id.*, at *9–10.

In the *Norris* case, even though one party had committed adultery and the other had not, the Court of Appeals did not find Husband to be

exclusively at fault in the divorce, apparently crediting Husband's testimony about Wife's fault in the divorce.

As in the *Norris* case, both Mr. Blount and Ms. Blount had their faults and failings in this marriage that led to its eventual breakdown. Although Husband disputes Wife's testimony that "[o]ur marriage was beyond repair" prior to her adultery, it is unclear on what grounds he can make such a statement. Although Husband remained willing to work on the marriage even after learning of Wife's adultery, Wife was not willing to do the same and felt that the marriage was beyond repair. Therefore, the marriage *was* beyond repair because working on a marriage takes two. Wife's opinion on the state of the marriage mattered as much as Husband's did. Husband appears unable to accept this fact.

Husband did not make an offer of proof at trial regarding what other facts he would have testified to, if permitted. Rather, his counsel apparently acquiesced to the Court's ruling on this issue, responding: "I understand. Your Honor, I'll just move on. That's fine, I'll move on." [Vol. 7, at 468.] It is unclear what Husband believes he could have said that could have been relevant to the issues the Court had to determine, rather than superfluous, duplicative, or a waste of judicial resources. Appellant's Brief contains a clue:

> Husband was not permitted to testify on the particularly painful and distressing way that he discovered Wife's adultery and inappropriate martial [sic] conduct. Husband was not permitted to testify how Wife's misconduct emotionally impacted the children, or how her subsequent,

> numerous, repeated acts of inappropriate martial [sic] conduct affected him throughout the later part of 2018, all of 2019 and 2020, up until the trial in June of 2021…

[App't Brief, at 2–3.]

Tennessee Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wife admitted to adultery, so further testimony about her adultery would not have made the adultery itself more or less probable; and the Trial Court was not really called upon to assess the impact of Wife's adultery on Husband's feelings. However, even if that had fairly been at issue, Husband was still permitted to testify that Wife was "evil" and to the anger and hurt he felt as a result of Wife's adultery:

> I'm sorry if [s]he chose him…over me and my children…Do I have, do I hold ill-will against her for doing all of that? Absolutely, I do.
>
> I think there's nothing wrong with me doing that. I don't think that I have any anger problems or anything like that because I think my anger towards her is perfectly well placed. I think it is perfectly reasonable. I think it is well deserved.

[Vol. 7, at 539.]

Also, it is not true that Husband was not permitted to testify about "how Wife's misconduct emotionally impacted the children." Husband simply did not offer such testimony. The Trial Court, in fact, invited such

testimony in the ruling to which Husband assigns error, stating: "unless the priority [about which Husband wished to testify] has something to do with the children,…I don't want us to spend time on something that is unnecessary." [Vol. 7, at 463.] Furthermore, Husband does not raise any issue on appeal with the Permanent Parenting Plan ordered by the Court, which implies that Husband does not take the position that any further testimony about the impact of Wife's affair on the children would have changed the final parenting plan.

It is also unclear why Husband feels that Wife's adultery caused the demise of the marriage, since Husband testified that the adultery did not dissuade him from wanting to continue the marriage. [Vol. 7, at 465.] Further, Husband admitted that even before Wife's affair, the parties were "not happily married." [Vol. 7, at 536.] When asked to name the biggest problem in their marriage prior to Wife's adultery, Husband responded, "[s]he was the biggest problem." [Vol. 7, at 472.] Husband characterized Wife, before the affair, as "mean…i[m]patient…cruel," and he complained that "[s]he would not help me when it came to the money situation." [Vol. 7, at 472.] Husband clearly testified to his belief that "this divorce is not my fault." [Vol. 7, at 484.] Husband also admitted to adultery, but he believes the Trial Court should have paid more attention to Wife's adultery than his own.

Wife testified to problems throughout the marriage, characterizing it as "troubling" rather than "happy." [Vol. 6, at 155.] She testified that Husband was controlling about the marital finances and that there were

various issues related to anger and family relationships that made the marriage unsustainable.

The Trial Court apparently credited both Wife's testimony that the marriage was "beyond repair" before her extramarital relationship began *and* Husband's testimony that from Husband's perspective, Wife was mean, impatient, cruel, and unhelpful before she began seeing Mr. Weigel. [Vol. 6, at 166–67; Vol. 7, at 472.] Husband did not contradict Wife's testimony about the financial issues during the marriage, did not disagree that the utilities were turned off as Wife testified, and did not disagree that the parties had verbal disagreements about his family, all before Wife started seeing Mr. Weigel.

Husband complains that "[t]he trial court's conclusion that the parties' marriage was already over before Wife committed adultery, relegating her acts of infidelity and her accompanying acts of cruelty suffered by Husband as irrelevant non-events, is a manifest injustice that must be rectified." [App't Br., at 2.] However, the truth is that there is more than enough evidence in the record to support the conclusion reached by the Trial Court.

In most marriages of such a long duration, there is more than enough fault to go around. The Blount marriage was no exception. Raising the Trial Court's determination of fault as an issue on appeal does nothing more than lend credibility to Wife's testimony that Husband "like[s] everything to go his way" and that disagreeing with Husband in

even the slightest of ways causes his "temper" to "manifest" itself. [Vol. 6, at 169.]

A party alleging abuse of discretion has a high burden:

> The abuse of discretion standard recognizes that the trial court is in a better position than the appellate court to make certain judgments. The abuse of discretion standard does not require a trial court to render an ideal order…to withstand reversal. Reversal should not result simply because the appellate court found a "better" resolution.

Eldridge v. Eldridge, 42 S.W.3d 82, 88 (Tenn. 2001)

In this case, the Trial Court heard all the evidence and determined that "the parties' marital issues prior to the adulterous relations primarily resulted from the financial issues the parties had due to communication issues that included the finances and Wife's ultimate frustration with the parties' financial issues." [Vol. 3, at 378–79.] Husband nonsensically argues that the Trial Court could not fairly make a determination about the state of the marital relationship prior to the adultery without hearing the details of the subsequent adultery. [App't Br., at 1–2.]

Mr. Blount cannot accept that the Trial Court disagreed with him on this issue. However, the Trial Court certainly did not abuse its discretion in doing so.

Alimony

Husband challenges the award to Wife of alimony *in futuro*, transitional alimony, and alimony *in solido* in the form of attorney fees. He challenges both the type and amount of the alimony, alleging that the Trial Court abused its discretion when it "failed to consider" the factors found in Tenn. Code Ann. § 36-5-121(i), "particularly in regards to the the relative fault of the parties, the ability of Husband to pay, and the needs of Wife." [App't Br., at 6.]

To the contrary, according to the Trial Court, it considered "all relevant factors pursuant to T.C.A. § 36-5-121(i) in determining whether spousal support is proper and in determining the proper form and amount of support," identifying "the two most important factors, the need of Wife the economically disadvantaged spouse and the Husband's ability to pay." [Vol. 3, at 342.] In doing so, the Trial Court incorporated parts of its analysis of Tenn. Code Ann. § 36-4-121(c), which contains several of the same factors, and then added additional analysis, including a finding that "[b]oth parties are at fault for the divorce." [Vol. 3, at 343.] While it is certainly true that Husband disagrees with these findings, that does not mean the Trial Court *failed to consider* these factors.

Gonsewski

In making his argument against alimony, Husband cites *Gonsewski v. Gonsewski*, 350 S.W.3d 99 (Tenn. 2011), in which the Tennessee

Supreme Court upheld a trial court's determination that the wife was not entitled to alimony.

The *Gonsewski* Court was clear that "an appellate court should not reverse a trial court's alimony decision unless the trial court has abused its discretion. This standard does not permit the appellate court to substitute its judgment for that of the trial court." *Gonsewski*, 350 S.W.3d at 112. In determining whether a trial court has abused its discretion, the Tennessee Supreme Court explained that appellate courts must consider the evidence "in a light most favorable to the trial court's decision." *Id.* (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011).

The Blount case is quite different from the *Gonsewski* case. The wife in *Gonsewski* never served as a stay-at-home spouse or parent, but worked throughout the marriage. *Gonsewski*, 350 S.W.3d at 103. At the time of the divorce, Ms. Gonsewski had been employed with the State of Tennessee for 16 years. *Id.* Ms. Gonsewski was 43 years old and earned $72,000 per year. *Id.* Mr. Gonsewski only earned between $20,000 and $60,000 per year more than Ms. Gonsewski did. *Id.* There were no remaining minor children at the time of trial. *Id.*

By contrast, Ms. Blount, who was six years older than Ms. Gonsewski, spent "six years, seven years" out of the workforce as a stay-at-home mother. [Vol. 6, at 218.] Further, she "sacrifice[d]" a possibility of higher earnings in public school to ensure that the parties' children got

a private education like their father did. [Vol. 6, at 159–60, 169.] She testified that "every single time" she mentioned to Husband the possibility of leaving the private school to teach elsewhere and make more money, he would "threaten to pull the boys out of [the private] school." [Vol. 6, at 169.] Also, Ms. Blount *did* contribute to Husband's earning capacity by assisting him in refinancing his office building. [Vol. 6, at 186; Vol. 3, at 394.]

Mr. Gonsewski earned less than double what Ms. Gonsewski earned. In this case, Mr. Blount's earning capacity outstripped Ms. Blount's by a factor of 8 or 9. The Trial Court found Ms. Blount's actual monthly income to be $2,000, but imputed her income at $33,378 per year ($2,781.50 per month), which was commensurate with her earnings at the private school from 2006–2019. Although Ms. Blount testified that she had been told she might eventually earn up to $60,000 per year selling insurance, the Trial Court found that her earning history at the private school was more predictive of her future earning potential than this "speculative amount of what she could possibly earn at some point in the future." [Vol. 3, at 384.]

Notably, Ms. Blount had only been in her present employment for less than one year at the time of the divorce trial, so she did not have the same level of stability in her employment as Ms. Gonsewski. [Vol. 6, at 153.] Further, Ms. Gonsewski's earned income of $72,000 per year in 2008 is obviously not comparable to Ms. Blount's $33,378 per year in 2021. Ms. Gonsewski's "stable work history in a relatively high paying

job" was central to the Supreme Court's examination of the issue of need. *Gonsewski*, 350 S.W.3d at 103.

The Trial Court, after hearing from competing experts, assessed Husband's yearly income to be $255,244 ($21,370.33 monthly), a number quite similar to the one Husband's expert came to using what the expert called a "conservative approach." [Vol. 3, at 337.] This finding was based on a detailed analysis of the testimony presented by both accounting experts, which was legally and factually sound. [*See* Trial Court's analysis at Vol. 3, at 333–38.] In addition, the Blounts still had a minor child at home when the divorce was granted. [Vol. 3, at 302.]

The myriad of factual distinctions that can be drawn between the *Gonsewski* case and this case illustrates the point that alimony determinations are, by their very nature, highly fact-specific. As such, the Trial Court was uniquely positioned to observe the parties, the experts, the advocates, the documents, and the demeanor and credibility of all participants. The "cold record" of this case cannot show this Court what the Trial Court saw when it made its determinations. *See Eldridge*, 42 S.W.3d at 88. This is one of the primary reasons that factual decisions of lower courts are generally accorded such deference by appellate courts.

Types of Alimony

Husband assigns error to the Trial Court's decision to award both alimony *in futuro* and transitional alimony, arguing that it should have awarded only one and not the other, if at all. [App't Br, at 23.] Husband

cites no decisional law supporting his contention. In fact, several Tennessee cases have upheld simultaneous awards of transitional alimony and alimony *in futuro*. These include, but probably are not limited to, *Watson v. Watson*, 309 S.W.3d 483 (Tenn. Ct. App. 2009); *Henry v. Henry*, 2020 WL 919248, 7 (Tenn. Ct. App. Feb. 26, 2020); and *Edwards v. Edwards*, 2012 WL 6197079, 2012 Tenn. App. LEXIS 854 (Tenn. Ct. App. 2012).

In this case, transitional alimony was awarded to allow the Wife some additional support so that she and the parties' minor child would not have to move before the child graduated from high school, which was a reasonable accommodation for the child's comfort. [Vol. 3, at 344.]

Alimony *in futuro* was awarded because the Trial Court found that

> [b]ased on the relevant factors, Wife is economically disadvantaged and was financially dependent on Husband throughout the marriage and Wife's earning capacity will never be close to her Husband's even with the anticipated amount she hopes to make as an insurance agent. As such, there is relative economic disadvantage and rehabilitation is not feasible. Wife will be unable to achieve an earning capacity that will permit the standard of living after to divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the…Husband.

[Vol. 3, at 343.]

Husband does not appear to dispute Wife's relative economic disadvantage. Wife, when asked if she could ever approach Husband's earning capacity, replied laughingly, "Oh, heavens no." [Vol. 6, at 301.]

Indeed, it is patently obvious that a 49-year-old woman with a history of earning less than $40,000 per year throughout the last 15–20 years is quite unlikely — with efforts either reasonable or unreasonable — to reach an earning capacity of $250,000 per year, or even Husband's claimed $201,000 per year.

Attorney fees were awarded as alimony *in solido* in the amount of $25,000, at least in part because Husband had spent $60,000 in marital funds on his own fees and because of Husband's conduct in the litigation. [Vol. 3, at 344.]

Husband challenges the Trial Court's finding that "there was no objection to the reasonableness of the fees but only as to who should be made to pay those fees," claiming that he does object to the reasonableness of the fees. [App't Br., at 27.] However, no one objected to the reasonableness of the fees *at trial*. Wife was not cross-examined about the reasonableness of the fees. The affidavit of attorney fees presented by Wife's counsel, alleging that the fees were reasonable, was admitted into evidence without objection. [Vol. 9, at Exh. 12.] When asked why he did not think he should be required to pay any more of Ms. Blount's attorney fees, Mr. Blount did not respond that they were not reasonable. Instead, he said he should not be required to pay "[b]ecause this divorce is not my fault." [Vol.7, at 484.] Husband also did not demand an evidentiary hearing on the reasonableness of the fees.

With very few exceptions, issues not raised at trial cannot be appealed and are considered waived. "It is axiomatic that parties will

not be permitted to raise issues on appeal that they did not first raise in the trial court." *Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 511 (Tenn. 2010). "One cardinal principle of appellate practice is that a party who fails to raise an issue in the trial court waives its right to raise the issue on appeal." *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009). Therefore, Husband cannot now argue that Wife's attorney fees were not reasonable. Even if it were possible, it would be difficult for him to take that position in light of the fact that he expended a larger amount than Wife from marital funds on his own attorney fees.

The Parties' Earning Capacity and the Amount of Alimony

The Trial Court, finding that the parties' employment choices were not reasonable in light of their obligations to the minor child and to each other, determined that *both* parties were voluntarily underemployed and assessed their incomes using averages from recent years. [Vol. 3, at 384, 389.] With respect to Husband, the Trial Court found that "Husband's first obligation is to provide support to his child and to Wife and his own needs must be balanced with the need for support and maintenance." [Vol. 3, at 389.] Husband responds that this is incorrect because "[a]s an attorney, Husband's first duty is to his clients." [App't Br., at 13.] Wife's counsel respectfully disagrees. Although service to one's clients is important, as is dedication to the administration of justice, our responsibilities to our spouses and our children are at least equally important. We were not born lawyers, and most of our lives will extend

beyond our licenses. It is a poverty to prioritize even this wonderful profession in which we are privileged to participate over our duties to our loved ones.

Husband suggests to this Court that the Trial Court should have assessed Wife's earning capacity at $60,000, a higher level than she had ever earned during the marriage, rather than $33,378, which was similar to the income she earned for the duration of the marriage. However, even if the Trial Court had done this, an additional $2,200 per month in income would not have made a significant dent in the $8,767 per month deficit that the Trial Court found Wife to have after receiving child support. Husband does not challenge Wife's stated expenses in his brief, nor did he at trial. Given Wife's need even under Husband's theory of her income, an award of $3,300 of alimony would still have been appropriate. Therefore, Husband's own brief confirms Wife's need for the alimony.

In his brief, Husband also argues that the Trial Court should have averaged his income from two large class action cases over a 13-year period, which appears to exceed any time period approved for averaging in a Tennessee appeal to date. The Trial Court considered, then rejected, this approach because "Husband testified that he did not earn the fees until the Chancellor entered the order"; it would "dilute[] the income"; and "no proof was provided as to what time Husband spent on the case for each year since each case was filed.

Similarly, Husband suggests that the Trial Court should have found his income to be $16,672 per month rather than $21,270. Husband did not enumerate his monthly expenses as required by Shelby County Circuit Court Local Rule of Practice 14(C); rather, he presented a series of bank statements, from which the Trial Court had to determine his monthly expenses piecemeal. Even if the Trial Court had agreed with Husband that his monthly income was $16,672, this finding would still have left Husband with a monthly surplus of $4,140 after paying child support, which would have been sufficient to pay the ordered alimony obligation. Therefore, rather than exposing an abuse of discretion, Husband's own brief affirms his ability to pay the full amount of alimony awarded.

Husband contends in his brief that while this appeal has been pending, he has paid "much of what should be considered alimony," and "the income from Husband's self-employment at the Blount Law Firm has been sufficient to provide necessary support to his minor child and Wife up to this point, just as it has always been throughout the course of the marriage." [App't Br., at 15.] Although Husband does not seem to recognize it, these statements are another admission of Husband's ability to pay.

Husband is correct that according to Tenn. Code Ann. § 36-5-121(i)(11), in making an alimony determination, a trial court may consider "[t]he relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so." However, Husband is simply

wrong to contend that the Trial Court erred when it limited the proof in this regard. The statute says *may*, not *must* or *shall*. The Trial Court heard as much of the testimony about fault as it deemed necessary, and then, in its discretion, curtailed the remainder of that line of proof. Decisions like this are in the sound discretion of trial courts.

Furthermore, Husband appears to believe that if the Trial Court had "correctly determined" that Wife was totally at fault for the divorce, this would have been a reason to deny alimony to her. He appears to want this Court to reverse the Trial Court and eliminate his alimony obligation to punish Wife for her inappropriate marital conduct.

However, this contradicts Tennessee precedent. While courts may consider the relative fault of the parties in fashioning an alimony award to the extent they deem it appropriate, "fault must not be applied punitively against a guilty party." *Nicholson v. Nicholson*, No. M2010-00042-COA-R3-CV, 2010 Tenn. App. LEXIS 651, at *27 (Tenn. Ct. App. 2010) (citing *Tait v. Tait*, 207 S.W.3d 270, 278 (Tenn. Ct. App. 2006).

In *Nicholson*, the trial court denied a wife alimony because she had

> lived way beyond her means by obtaining large chunks of money from other men as well as using another man's credit card. [Wife], rather than finding employment lived as a party girl and the Court uses that term charitably because it believes it is must worse than just party girl. Therefore, the Court is hereby dismissing [Wife's] claim for alimony.
>
> *Nicholson*, 2010 Tenn. App. LEXIS 651, at *26.

Because the Court of Appeals felt that the *Nicholson* trial court had denied alimony to Wife in order to punish her for marital misconduct, the case was remanded with instructions to the trial court to focus more strongly on the "paramount considerations" of Wife's need and Husband's ability to pay, rather than on the relative fault of the parties. *Id.*, at *28–29.

In the *Tait* case, the trial court denied a wife alimony because it found that wife did not demonstrate a need for the alimony. Wife appealed, contending that her former husband had the ability to pay alimony, and the trial court should have awarded her alimony because of the husband's fault for the breakup of the marriage. The Court of Appeals found this argument by Wife to be without merit, because alimony is not intended to be punitive. *Tait*, 207 S.W.3d at 278; see also *Wilder v. Wilder*, 66 S.W.3d 892, 895 (Tenn. Ct. App. 2001).

Distribution of Marital Debts and Assets

Husband alleges that the Trial Court erred in its division of a single bank account due to a change in value in the account between the final day of trial and entry of the final decree. He argues, for reasons unknown, that Wife should not have been awarded $10,000 from this account that contained $88,020.59 as of the date of trial.

Indeed, many things have occurred since the date of trial. For instance, Husband has failed to pay a significant part of his alimony obligation and refused to pay the then-minor child's private school

tuition. The parties' last minor child has left for college, and Wife has relocated to East Tennessee. The value of the marital real property has likely increased substantially, and the balance of the mortgage has probably decreased substantially. Further, $117,635.18 of the IRS liens on the marital real property have been released, $51,501.78 of it on December 21, 2021 and another $66,133.40 on May 15, 2023:

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/2010	XXX-XX-5013	11/21/2011	12/21/2021	51501.78
1040	12/31/2011	XXX-XX-5013	04/15/2013	05/15/2023	66133.40
Place of Filing	Register of Deeds Shelby County Memphis, TN 38104-5406			Total	$ 117635.18

Vol. 9, at Exh. 31.

Most of this is not in the record, of course, because it occurred after trial. At some point, however, changed circumstances after the date of trial have to form the basis of a petition to modify, rather than an

allegation of error by the trial court. Otherwise, the passage of time as a trial court crafts a carefully-worded order would mean that cases could never come to finality. Values of realty and personalty fluctuate constantly, and rulings made would be immediately stale. At some point, trial courts must draw a line in the sand and make a final ruling. Here, that is what the Trial Court did, and Wife submits that it did not err in doing so.

To the extent that this Court deems it appropriate to reopen the issue of the division of this account, in fairness, the entire distribution of the marital estate should be subject to reexamination for changes in value due to the passage of time, in order to ensure equitable division. Frankly, Wife does not believe that this particular "can of worms" deserves opening, but of course, this Court has the right to make whatever decision it deems appropriate under the circumstances.

2. This Court should award to Wife her attorney fees incurred in defending this appeal pursuant to Tenn. Code Ann. § 36-5-103(c).

Tenn. Code Ann. § 36-5-103(c) provides as follows:

> A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the nonprevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of

> custody of any children, both upon the original divorce hearing and at any subsequent hearing.

This statute has been applied to cases where an alimony recipient is forced to defend an appeal in which the obligor seeks to reduce or terminate the alimony obligation. *Parker v. Parker*, No. E2018-00643-COA-R3-CV, 2019 Tenn. App. LEXIS 173 (Tenn. Ct. App. 2009) (citing *Evans v. Evans*, No. M2002-02947-COA-R3-CV, 2004 Tenn. App. LEXIS 547, 2004 WL 1882586, at *13 (Tenn. Ct. App. Aug. 23, 2004); see also *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017); and *Richards v. Richards*, No. M2003-02449-COA-R3-CV, 2005 Tenn. App. LEXIS 106, 2005 WL 396373, at *13-14 (Tenn. Ct. App. Feb. 17, 2005)).

Here, the Trial Court determined that Ms. Blount was economically disadvantaged and that she did not have the independent ability to pay her attorney fees. This Court has the discretion to determine whether the facts of any particular case warrant an award of attorney fees. Wife submits that the facts of this case do.

In cases involving alimony, an award of appellate attorney fees occurs with some frequency because the same factors supporting an award of alimony often support an award of attorney fees as alimony *in solido*. As the Court of Appeals has repeatedly noted,

> Alimony is only awarded in the first instance to an economically disadvantaged spouse who has a demonstrated need for the support. Absent a showing in a modification proceeding that the need no longer exists, requiring the

> recipient to expend that support for legal fees incurred in defending it would defeat the purpose and public policy underlying the statute on spousal support. Additionally, the possibility of being burdened with a former spouse's attorney's fees helps deter unwarranted or unjustified attempts by an obligor to evade or reduce an existing support obligation.
>
> *Malkin v. Malkin*, 613 S.W.3d 122, 148 (Tenn. Ct. App. 2019) (quoting *Henderson v. Henderson*, No. M2013-01879-COA-R3-CV, 2014 Tenn. App. LEXIS 587, 2014 WL 4725155, at *12 (Tenn. Ct. App. 2014) (in turn quoting (quoting *Evans v. Evans*, 2004 Tenn. App. LEXIS 547, 2004 WL 1882586, at *13) (Tenn. Ct. App. 2004)).

Wife is not able to pay all of her attorney fees, and Husband has the ability to pay them. Ms. Blount "should not be required to use her limited resources to pay for the defense of the trial court's award to her." *Parker v. Parker*, No. E2018-00643-COA-R3-CV, 2019 Tenn. App. LEXIS 173 at *18 (Tenn. Ct. App. 2019). For the foregoing reasons, this Court should award to Wife her attorney fees incurred on appeal and remand for a determination of the amount of said fees.

CONCLUSION

Although Husband alleges that the Trial Court abused its discretion in at least nine (9) different ways, a fair review of the appellate record reveals that no such abuse of discretion occurred. The Trial Court's determinations were all supported by the evidence presented at trial and were made by applying the correct legal standards to those facts. For that reason, this Court should affirm the Trial Court, award Wife her attorney fees incurred on appeal, assess the costs of the appeal to Husband, and remand to the Trial Court for determination of the amount of Wife's appellate attorney fees.

CERTIFICATE OF COMPLIANCE

In submitting this Brief, I hereby certify that to the best of my knowledge, this Brief complies with the requirements set forth in Tennessee Supreme Court Rule 46, § 3.02. I further certify that to the extent that I have correctly utilized the Microsoft Word® Word Count feature, this Brief contains 10,187 words.

/s/ Lori R. Holyfield

IN THE CHANCERY COURT OF TIPTON COUNTY, TENNESSEE
FOR THE TWENTY-FIFTH JUDICIAL DISTRICT AT COVINGTON

IN RE:

CONSERVATORSHIP OF
B.S.H.,

Respondent, **DOCKET NO. 12,345**

S.T.R.,

Petitioner.

PRELIMINARY REPORT AND RECOMMENDATIONS
OF GUARDIAN *AD LITEM*

COMES NOW your Guardian *ad Litem*, Lori R. Holyfield (the "GAL"), and having conducted an investigation, files this her preliminary report and recommendations pursuant to Tenn. Code Ann. § 34-1-107.

FACTUAL BACKGROUND

1. The Respondent, B.S.H. ("Ms. H."), was born on January 1, 1933 and is ninety-two (92) years old.

2. Ms. H. is unmarried. She was divorced from her first husband, who was the father of her three (3) children and is now deceased. On January 1, 2025, she was widowed by her second husband, Mr. H.D.H., to whom she was married for forty-eight (48) years.

3. Ms. H. has three (3) living children: S.T.R. (the Petitioner), who lives in Germantown, TN; V.R., who lives in Bowling Green, KY; and C.W., who lives in Punta Gorda, FL. V.R. and C.W. both signed a joinder of S.T.R.'s petition for appointment of a conservator.

4. A review of Ms. H.'s medical records indicates that she suffers from dementia, anemia, hypertension, anorexia, cognitive communication deficit, arthritis, venous thrombosis, and embolism. These conditions, along with her age, have unfortunately disrupted her ability to perform the activities of daily living, and she requires skilled nursing care. She is currently a resident at the Covington Care Post-Acute skilled nursing facility in Tipton County, TN.

5. In addition to the conditions listed in the physician's statement, during the GAL's interview of Ms. H., the GAL observed that Ms. H. is hard of hearing.

6. The Petitioner, S.T.R., who goes by "Thomas," resides in Germantown with his wife Catherine. Thomas and Catherine own their home free and clear of any mortgage. The approximate value of the home is $565,000. Thomas is in his early seventies, and according to his sister C.W., he has early-stage Parkinson's Disease. According to C.W., S.T.R.'s Parkinson's Disease would not prevent him from carrying out any of the functions of a conservator.

7. It is clear that the Respondent trusts the Petitioner. She is not concerned that he would behave irresponsibly or nefariously. Years ago, she made the Petitioner a joint owner of an account that contains approximately $700,000, which remains intact. When the GAL interviewed Ms. H., she expressed love for all three of her children. When asked about Thomas becoming her conservator so that he could help take care of financial and medical matters for her, she stated, "I don't want to put all of that on him." When

asked whether she had any concern that Thomas would misuse his power as a conservator to misappropriate funds, she responded, "Oh, Lord, no. I just don't want to be a burden."

8. The Petitioner filed his petition because Ms. H.'s advancing dementia, nursing home residency, and diminished ability to communicate are affecting Ms. H.'s ability to handle her own affairs and make her own decisions.

INVESTIGATION

9. The GAL spoke with S.T.R., V.R., and C.W. by telephone as part of the investigation.

10. Both V.R. and C.W. joined in the petition and support S.T.R.'s appointment as conservator.

11. The GAL reviewed the pleadings and the sworn statement of Ms. H.'s physician, as required by Tenn. Code Ann. § 34-1-107(d)(3)(B). The sworn statement provided a detailed description of the disability and how the disability affects Ms. H.'s functioning.

12. The GAL visited with Ms. H. at Covington Care Post-Acute. Prior to entering Ms. H.'s room, the nursing staff informed the GAL that Ms. H. had a recent (Brief Interview for Mental Status ("BIMS") score of only 3 out of 15, and warned the GAL that the interview might not yield significant information. They stated that Ms. H. could be oppositional or cantankerous and might refuse to speak to the GAL, but they helpfully provided the GAL with fun-sized Hershey's chocolate bars because they believed it would put Ms. H. in a good mood. They also stated that they had been giving Ms. H. chocolate

regularly because it is one of the few things she will reliably eat despite her anorexia, a practice the GAL heartily endorses.

13. Ms. H. was generally very pleasant to visit with, perhaps due to the chocolate. During the interview with Ms. H., she freely remembered and discussed her family structure and who each of her children were. She expressed limited understanding of the conservatorship proceeding, which eventually had to be simplified for her as "her son Thomas asking the court to give him the ability to take care of her finances and her medical decisions." She did not express any concerns about Thomas except for fear of being a burden to him and the rest of her family.

14. Based on the investigation to date, there is little doubt that Ms. H. does in fact have a disability that affects her functioning. A conservator should be appointed.

15. Ms. H.'s property consists of the property disclosed in the petition:

- 5678 Hwy 51 South, Covington, TN 38019 and contents
  - Approximate Value: $125,000
- Orion Federal Credit Union Account, jointly owned with the Petitioner
  - Approximate Value: $700,000
- First Horizon Bank Account, with her as sole owner
  - Approximate Value: $224,000
- Fidelity Account inherited from deceased husband
  - Approximate Value: $30,000

16. Pursuant to statute, I met with Ms. H. privately and would report to the Court as follows:

(1) Ms. H. does not appear to understand exactly what a fiduciary or conservator is, but trusts the Petitioner with her finances and healthcare

decisions. She does not wish to contest any portion of the conservatorship proceeding, although she worries about burdening her son. In the GAL's opinion, there is no need to appoint an attorney *ad litem*.

(2) In this GAL's opinion, a fiduciary should be appointed, and S.T.R. should be appointed to serve in this role as conservator.

(3) The GAL has not seen a property management plan for Ms. H.'s estate. The Petitioner's counsel has indicated that a property management plan will be forthcoming in the next 60 days. At that time, the GAL will review the plan and update this report.

(4) In the GAL's opinion, it is not in Ms. H.'s best interests to attend the conservatorship hearing. She does not oppose the conservatorship, she reported no interest in going to court, she requires constant skilled nursing care, and any outing from her nursing home necessarily puts her health at risk.

If Ms. H. had any objection to the conservatorship or if the GAL had any concerns about the proposed conservator, her attendance in court might justify the risk of getting out, but in these circumstances, the GAL does not feel it is appropriate to require her to attend.

Respectfully Submitted,

/s/ Lori R. Holyfield
LORI R. HOLYFIELD, BPR #031369
Guardian *ad Litem* for Respondent
P.O. Box 725
Munford, TN 38058
901-492-1830 tel
lori@loriholyfield.com

CERTIFICATE OF SERVICE

I, Lori R. Holyfield, do hereby certify that I have forwarded a copy of the foregoing to Danielle Woods and Shantazia Nash, counsel for Petitioner, via electronic mail on September 24, 2025.

/s/ Lori R. Holyfield

IN THE CHANCERY COURT OF TIPTON COUNTY, TENNESSEE
FOR THE TWENTY-FIFTH JUDICIAL DISTRICT AT COVINGTON

JANE SMITH,

Plaintiff, **DOCKET NO. 56,789**

vs.

JOHN SMITH,

Defendant.

WIFE'S MEMORANDUM ON MARITAL AND SEPARATE PROPERTY

Comes now the Plaintiff, **Jane Smith** ("Wife"), by and through counsel, and pursuant to the Court's request for briefing on the classification of the parties' marital residence as marital property or separate property, would respectfully state and show to the Court as follows:

FACTUAL BACKGROUND

John Smith ("Husband") purchased the residence located at 123 Sunnyside Drive, Munford, Tipton County, Tennessee 38058 on March 31, 2015 for $149,000. The home was and is encumbered by a mortgage in Husband's sole name. The current estimated value of the residence is $320,000, and the current outstanding balance on the mortgage is approximately $105,000. The value at the time of the marriage, net of the mortgage, was *de minimis*. The house is the primary asset of the marriage.

The parties did not marry until January 1, 2016, about eight (8) months after the marital residence was purchased. However, the Wife was living with the Husband prior to the purchase of the home, the Wife assisted in shopping for the home, and the home was purchased with her and her children in mind. The parties lived together in the marital

residence up to and even after the *Complaint for Absolute Divorce* was filed in this matter on September 16, 2024.

The Husband paid the monthly mortgage payments, sometimes with the Wife's direct financial help, but most of the time from money he earned from working during the marriage. The parties had a joint bank account at FSNB, into which the Wife deposited her Social Security Disability Payments each month. From that account, to which Husband rarely or never contributed, Wife paid the monthly Terminix bill, the Southwest Tennessee Electric Membership Cooperative (STEMC) bill, and the ADT Security contract associated with the home.

During the marriage, the Wife was approved for Social Security Disability Insurance (SSDI) payments due to her chronic kidney disease. At the time of her approval, the Wife received a back payment of approximately $57,000, which she contends is her separate property. With the money from the settlement, the Wife purchased a car; paid off some marital debts; paid to replace the windows in the house, which cost between $10,000 and $12,000; purchased a lawn mower for the marital residence; and made significant improvements to the upstairs of the marital residence. The Wife was involved in the process of deciding which improvements to make to the house, as well as selecting and sometimes physically purchasing materials herself. In addition, the Wife made contributions to the home as a homemaker and helped to maintain the condition of the home before and throughout the marriage.

TENNESSEE LAW ON MARITAL AND SEPARATE PROPERTY, COMMINGLING, AND TRANSMUTATION

The classification of property as either separate or marital property is a question of fact for the trial court. *Bowers v. Bowers*, No. E2011-00978-COA-3-CV, 2012 Tenn. App. LEXIS 313, 2012 WL 1752401, at *7 (citing *Mitts v. Mitts*, 39 SW.3d 142, 144-45 (Tenn. Ct. App. 2000)).

Tenn. Code Ann. § 36-4-121 provides, in relevant part, as follows:

- (b)(2)(A) "Marital property" means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce;

- (b)(2)(B)(i) "Marital property" includes income from, and any increase in the value during the marriage of, property determined to be separate property in accordance with subdivision (b)(4) if each party substantially contributed to its preservation and appreciation;

- (b)(2)(B)(ii) "Marital property" includes the value of vested and unvested pension benefits, vested and unvested stock option rights, retirement, and other fringe benefit rights accrued as a result of employment during the marriage;

- (b)(2)(D) As used in this subsection (b), "substantial contribution" may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine;

- (b)(4) "Separate property" means: (A) All real and personal property owned by a spouse before marriage, including, but not limited to, assets held in individual retirement accounts (IRAs) as that term is defined in the Internal Revenue Code of 1986 (26 U.S.C.), as amended; (B) Property acquired in exchange for property acquired before the marriage; (C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1)...

However, these definitions do not end the inquiry. "[S]eparate property can become marital property either through the doctrine of commingling or through the doctrine of transmutation." *Duffer v. Duffer*, No. M2021-00923-COA-R3-CV, 2024 Tenn. App. LEXIS 106, at *10 (Tenn. Ct. App. Mar. 8, 2024) (citing *Hayes v. Hayes*, No. W2010-02015-COA-R3-CV, 2012 Tenn. App. LEXIS 727, 2012 WL 4936282, at *11 (Tenn. Ct. App. Oct. 18, 2012) (citing *Eldridge v. Eldridge*, 137 S.W.3d 1, 13 (Tenn. Ct. App. 2002)).

As the Tennessee Supreme Court explained in *Langschmidt v. Langschmidt*,

> In addition to the provisions of Tenn. Code Ann. § 36-4-121(b)(1)(B), courts in Tennessee have recognized two methods by which separate property may be converted into marital property—commingling and transmutation. Although this Court previously has not addressed commingling and transmutation, several opinions of the Court of Appeals have explained the concepts as follows:
>
> Separate property becomes marital property [by commingling] if inextricably mingled with marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur .... [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property .... The rationale underlying these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also upon the provision in many marital property statutes that property acquired during the marriage is presumed to be marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Langschmidt v. Langschmidt, 81 S.W.3d 741, 747 (Tenn. 2002) (citing 2 Homer H. Clark, *The Law of Domestic Relations in the United States* § 16.2 at 185 (2d ed. 1987)); *Lewis v. Frances*, No. M1998-00946-COA-R3-CV, 2001 Tenn. App. LEXIS 140, at *24-25 (Tenn. Ct. App. March 7,2001), *perm. app. denied* (Tenn. Oct. 8, 2001); *Sartain v. Sartain*, 03 A01-9707-CH-00297, 1998 Tenn. App. LEXIS 722,

at *9 (Tenn. Ct. App. Oct. 29, 1998); *Hofer v. Hofer*, No. 02 A01-9510-CH-00210, 1997 Tenn. App. LEXIS 74, at *8 (Tenn. Ct. App. February 3, 1997); *Pope v. Pope,* No. 88-58- II, 1988 Tenn. App. LEXIS 449, at *7-8 (Tenn. Ct. App. July 20, 1988)).

> Four of the most common factors courts use to determine whether real property has been transmuted from separate property to marital property are: (1) **the use of the property as a marital residence**; (2) **the ongoing maintenance and management of the property by both parties**; (3) placing the title to the property in joint ownership; and (4) using the credit of the non-owner spouse to improve the property. Accordingly, our court has classified separately owned real property as marital property when the parties agreed that it should be owned jointly even though the title was never changed, or when the spouse owning the separate property conceded that he or she intended that the separate property would be converted to marital property."

Duffer at *11 (citing *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 Tenn. App. LEXIS 591, 2006 WL 2535407, at *5 (Tenn. Ct. App. Sept. 1, 2006) (citations omitted)) (emphasis added).

The *Duffer* Court continued,

> These four factors are the most common, but they are not exclusive. "Tennessee courts have also found persuasive **the use of marital funds for improving the property or paying off an encumbrance**." *Lewis v. Lewis*, No. W2019-00542-COA-R3-CV, 2020 Tenn. App. LEXIS 360, 2020 WL 4668091, at *4 (Tenn. Ct. App. Aug. 11, 2020) (citing *Owens v. Owens*, 241 S.W.3d 478, 486 (Tenn. Ct. App. 2007)).
>
> Notably, "**a spouse's earnings are marital property**, regardless of whether they are deposited into a joint or separate bank account." *Id.* (citing *Wade v. Wade*, 897 S.W.2d 702, 716 (Tenn. Ct. App. 1994)). "Whether or not transmutation has occurred is a fact question." *Luplow v. Luplow*, 450 S.W.3d 105, 114 (Tenn. Ct. App. 2014) (citing *Fox*, 2006 Tenn. App. LEXIS 591, 2006 WL 2535407, at *3).

Duffer at *11-12 (Ct. App. Mar. 8, 2024) (paragraphing changed, emphasis added).

APPLICATION OF TENNESSEE LAW TO THE FACTS IN THIS CASE

There is little doubt that at the moment of the marriage, the real property was the Husband's separate property. However, the property was subsequently used as a marital residence. The Wife participated in the selection of the house. The Wife lived there, as did of her children from a prior marriage, even after the *Complaint for Absolute Divorce* was filed. The Wife kept house, cooked, cleaned, and performed family duties in the house. She also paid for improvements to the house and equipment, such as a lawnmower, to maintain the property.

Further, and perhaps most importantly, the lion's share of payments made toward the mortgage on this real property were paid from the Husband's earnings during the marriage. "[A] spouse's earnings are marital property…" *Lewis*, 2020 Tenn. App. LEXIS 360, at *12. The Husband's use of marital property to maintain and pay down the mortgage encumbering the property constitutes a commingling of marital property with separate property. This commingling is inextricable; it cannot be untangled from the value of the separate property put into the real property prior to the marriage.

One analogous case is *Hunt-Carden v. Carden*, No. E2018-00175-COA-R3-CV, 2020 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 3, 2020). In that case, an engaged couple shopped for a home together just months prior to their wedding. The Wife's name was not listed on the deed or the mortgage note. The Husband asserted he had paid for all of the maintenance and upkeep on the marital residence, as well as all of the mortgage

payments, and that the Wife had only contributed about $300 per month toward the household expenses.

However, the Cardens had used the home as their marital residence throughout the marriage. The Wife and the Husband both contributed funds to a joint account, from which the mortgage was paid. Further, the joint account paid for the alarm system at the marital residence. The Court of Appeals found that "[a]lthough Husband may consider Wife's contributions to be minor, the evidence in the record is sufficient to support the trial court's finding of transmutation of the Royal Mountain house." *Hunt-Carden*, at *18.

Similarly, the Smiths shopped together for a residence, which was purchased a mere 8 months prior to their marriage with an eye toward having room for the Wife's children. Because of her chronic kidney disease, the Wife was unable to work outside the home very much, but she maintained the house and performed the duties of a stay-at-home spouse. Further, she contributed a large portion of her SSDI settlement to improving the home, and she paid the electricity bill, the Terminix bill, and the STEMC bill each month from her ongoing SSDI earnings. Further, the Husband paid the monthly mortgage note with earnings from the marriage, which themselves are marital property. These analogous facts support the contention that the Smiths' marital residence has been transmuted into marital property.

In *Hagler v. Hagler*, No. E2007-02609-COA-R3-CV, 2009 Tenn. App. LEXIS 119, at *7 (Tenn. Ct. App. Mar. 31, 2009), the Husband's parents had transferred a residence to the Husband solely, as a gift. This would ordinarily mean that the residence would

have been the Husband's sole and separate property. However, the trial court found, and the Court of Appeals affirmed, that the residence was transmuted into marital property because "[t]he evidence demonstrated that the parties used this property as the marital residence, and the wife contributed both her time and her earnings to the maintenance and improvement of the property." *Hagler*, at *8.

In *Owens v. Owens*, 241 S.W.3d 478, 486 (Tenn. Ct. App. 2007), the Court of Appeals upheld the classification of the Husband's interest in a house in Boca Raton, Florida, as marital property. The Husband argued that his interest was a separate interest because it was received as a gift from his parents. However, the Court of Appeals held to the contrary because although the Wife had spent the last 25 years of the marriage as a homemaker and parent, rather than working, [*Owens*, at 494.],

> It is essentially undisputed that Mr. Owens is an **owner of record** of the property and that, for twenty years, **he used marital funds to pay the mortgage** on the property. This evidence is sufficient to support the trial court's decision to classify Mr. Owens's interest in the Boca Raton house as marital property.

Owens, at 486 (emphasis added).

In this case, it is undisputed that Mr. Smith is an owner of record of 123 Sunnyside Drive. It is also undisputed that he used his earnings during the marriage, which were marital property, to pay the monthly mortgage on the property; and that the Wife served as a homemaker during the marriage.

In another analogous case, *Hudson v. Hudson*, No. M2023-00879-COA-R3-CV, 2024 Tenn. App. LEXIS 537, at *11 (Tenn. Ct. App. Dec. 13, 2024), the parties shopped for a home together prior to their marriage and the Husband purchased it in his sole name 4 months before the wedding. The parties moved into the residence at the time of the purchase, and they used the home as a marital residence for the next 12–13 years. Over the years, the parties made many improvements to the marital residence. Interestingly, Mrs. Hudson did not financially contribute to these improvements, but "she was responsible for picking everything out and was involved in the process." *Hudson*, at *12. Mr. Hudson asserted that "because he alone bought the property a few months before the marriage and because Wife was never on a deed or made any payments to indebtedness or taxes, she is not entitled to any bit of this property." *Id.* However, the trial court found, and the Court of Appeals affirmed, that this property was transmuted into marital property because of the Wife's intangible contributions to the real property, the fact that the Wife signed the deed of trust as a grantor during a refinancing, and the fact that "all the mortgage payments were made during the marriage using income earned by Husband during the marriage, while Wife ran the household and raised the children." *Id.*, at *18.

In the case now before this Court, the Wife intangibly contributed to the home by serving as a homemaker and tangibly contributed by paying for improvements to the home. Further, the Husband made the mortgage payments during the marriage using income that he earned during the marriage. Therefore, as in *Hudson*, the Smith residence is marital property.

CONCLUSION

For the foregoing reasons, this Honorable Court should find that the real property located at 123 Sunnyside Drive, Munford, Tipton County, Tennessee 38058 has been transmuted into marital property during the court of these parties' 10-year marriage and grant to the Wife any other relief to which it finds her entitled.

Respectfully Submitted,

/s/ Lori R. Holyfield
LORI R. HOLYFIELD, BPR #31369
Attorney for Wife
P.O. Box 725
Munford, TN 38058
901-492-1830 tel
Lori@LoriHolyfield.com

CERTIFICATE OF SERVICE

I, Lori R. Holyfield, hereby certify that I have forwarded a true and correct copy of the foregoing to Rachel Lambert, counsel for Husband, via electronic mail on September 4, 2025.

/s/ Lori R. Holyfield

42 U. Mem. L. Rev. 221

University of Memphis Law Review
Fall, 2011

Note

ONE FELL THROUGH THE CRACKS: WHY TENNESSEE NEEDS AN INITIAL OUTPATIENT COMMITMENT STATUTE

Lori R. Holyfield [a1]

*222 I. Introduction

Driven by a delusion that a surgeon had implanted a tracking device in his body during an appendectomy nine years earlier, a man named Abdo Ibssa entered the Parkwest Medical Center in Knoxville, Tennessee in April 2010, carrying a gun and bent on exacting what he perceived to be justice. [1] When he asked to see the surgeon, Ibssa was told the doctor was not in the hospital that day. [2] He proceeded to open fire on the next people he saw. Firing five shots in rapid succession, the gunman wounded two hospital employees, killed a third, and then took his own life. [3]

Of course, there was no tracking device in Ibssa's body; rather, he had schizophrenia, for which he had been hospitalized a mere two months earlier. [4] Although medication to treat this illness was found in his home after the incident, police reported that he probably had not been taking it. [5] Like the other three people he shot, Ibssa was a victim of a preventable tragedy stemming from his untreated mental illness.

In September 2007, the Memphis police arrested Adam Sutton, a Cordova man diagnosed with paranoid schizophrenia. [6] Sutton, who was not medicated for his condition, had broken several windows out of his home and stabbed his father and stepmother. [7] The police searched for the man—a martial arts expert armed with a knife—for several hours before finally locating him with the help of a helicopter and search dogs. [8] Although Sutton did not ***223** permanently harm himself or anyone else, the situation

could have turned out much differently. A court could likely have prevented this potential tragedy if it had ordered treatment of Sutton's schizophrenia.

Untreated mental illness often has tragic results. One treatment option is involuntary civil commitment, the process whereby a court compels psychiatric treatment—in the form of medication, counseling, or both—for a person suffering from a severe mental illness who would not willingly enter treatment of his own volition. [9] Although it is a substantial intrusion on a person's liberty, it is often a necessary one if the person is a danger to himself or to others, especially if the mentally ill individual cannot appreciate this danger. [10] Untreated mental illness, especially if it is serious, is a risk factor for violent acts. [11]

Historically, inpatient commitment, by which the individual is ordered into treatment in an institutional setting, has been the most frequently used form of civil commitment. [12] However, because inpatient commitment intrudes so significantly on a person's freedom, another option called outpatient commitment has risen in popularity. [13] The defining feature of outpatient commitment is that the patient is not confined to the hospital. Rather, he is free to ***224** conduct his day-to-day business normally while under a court order to be treated for his mental illness. Outpatient commitment provides a much-needed middle ground between releasing a mentally ill person without treatment and institutionalizing him when court-ordered, community-based treatment would have been appropriate. [14]

Although limitations are imposed by the United States Constitution, involuntary commitment is otherwise a matter of state law. [15] Each state has its own statutory guidelines for when and how a person may be compelled to receive treatment for mental illness. Some states authorize only inpatient commitment, [16] while others allow outpatient commitment only for those who have been involuntarily institutionalized prior to being committed to outpatient care. [17] The overwhelming majority of United States jurisdictions—forty-four states and the District of Columbia—allow outpatient commitment as an initial matter. [18] Tennessee is not among them. [19]

***225** Currently in Tennessee, outpatient commitment is authorized by state law, but not as an initial option. [20] Instead, it is permitted only after an individual is discharged from inpatient commitment. This approach is sometimes called “conditional discharge” outpatient commitment. [21] In order to be eligible for outpatient commitment under the current statutory scheme, a person must first be hospitalized. [22] Then, and only then, may a court release him to mandatory outpatient care. [23] This judicial hand-tying leads to absurd results. In practice, many judges, forced to choose between releasing a person without treatment and coercing him into treatment in a hospital setting, will order the patient to hospitalization with explicit instructions to the medical team to return to the next hearing with a recommendation of outpatient commitment. [24] Thus, patients who do not need hospitalization end up in the hospital simply because of the language of the statute, and patients who might have benefited from outpatient commitment may fall through the cracks. [25]

***226** As previously noted, commitment is a drastic step that curtails an individual's freedom, at the very least forcing him to receive medical treatment against his will. [26] However, treatment of severe mental illness is frequently necessary to prevent harm and save lives. [27] The state has a substantial interest in the protection of its citizens, both those who struggle with mental illness and the public at large. [28] However, if the state must limit a person's freedom to serve the greater public good, it should do so by using the least restrictive means possible, in a way that respects the individual's autonomy and dignity to the greatest extent that the circumstances will allow. [29] Initial outpatient commitment is a much less restrictive, but still highly effective, way to serve the state's interests in situations where a mentally ill person poses a serious risk of harm. This Note argues that the Tennessee legislature should amend title 33, chapter 6, section 502 of the Tennessee Code Annotated to allow outpatient civil commitment as an initial treatment option, where appropriate, for Tennessee residents with mental illness who pose a risk

of harm to themselves or others. This change would allow judges to help those who are dangerously mentally ill by providing necessary treatment for them and reducing their risk for involuntary hospitalization, imprisonment, and serious self-harm. It would also benefit the state by bringing about increased public safety, lower prison costs, and provide the dignity that comes with appropriate and humane treatment of people who are struggling with mental illness.

Part II provides an outline of the history of civil commitment in the United States, including an overview of the current state of the law. Part III explains why Tennessee and its citizens would benefit from an initial outpatient commitment option. Part ***227** IV demonstrates that in order to comply with the United States Constitution and minimize financial impact to the state budget, Tennessee should retain the risk of harm requirement for outpatient commitment. Part V offers brief concluding remarks.

II. Mental Health Law in the United States: A Brief Historical Overview

When proposing a change in an area of the law, it is useful to understand where the law has been and the path on which it has progressed.[30] Only by observing the mistakes, successes, and patterns of the past can the legal community develop a viable way forward.[31] In the past few centuries, treatment of mental illness has progressed extraordinarily in some ways, yet in others, it has merely returned to the place where it started.

What began with the rise of mental hospitals in response to widespread mistreatment, homelessness, and imprisonment of the mentally ill has now regrettably come full circle. The phenomenon of deinstitutionalization has resulted in the renewed unavailability of mental health treatment, high rates of homelessness, and the shamefully common incarceration of the mentally ill.[32] In the wake of deinstitutionalization, states have begun to move slowly in the direction of appropriate treatment for those with mental disorders. Chief among the recent reforms has been the advent of involuntary outpatient commitment.[33] States which have enacted such statutes ***228** still have a long way to go, but states which have not, such as Tennessee, have even further to travel for the sake of their residents.

A. The Rise of Mental Hospitals

In the early nineteenth century, mental health care was in a deplorable state, both in the United States and in Europe.[34] Although community-based "care" for the mentally ill had never been ideal—often consisting of confinement or seclusion by relatives—the Industrial Revolution weakened even this inferior safety net.[35] The first public mental hospital opened in 1773, but by the 1840s, there was still nowhere near the number of public hospital beds necessary to provide appropriate care for people with mental disorders.[36] This hospital bed shortage had unfortunate consequences. The mentally ill subsisted in prisons, poorhouses, almshouses, and cellars.[37] These accommodations were often poorly run and overcrowded.[38] Other destitute individuals with mental illnesses found themselves homeless.[39]

Enter: Dorothea Dix. Dix, a former teacher and nurse, visited a prison in 1841 to teach a class for the inmates.[40] To her great dismay, she discovered that besides the hardened criminals one might expect to find in a prison, many inmates were psychiatric patients for whom the state mental hospital did not have space.[41] Further, the conditions inside the prison were deplorable; shockingly, those living inside were subjected to extreme temperatures and often did not have adequate clothing.[42]

***229** Appalled by this situation, Dix devoted the remainder of her life to mental health advocacy. Her unrelenting efforts paved the way for at least thirty-two state mental institutions to be established and for the improvement of conditions in existing asylums.[43] Indirectly, her work produced a sea change in the national discourse surrounding mental illness.[44] For many years, these reforms continued, and care of people with mental illness advanced.

B. The Deinstitutionalization Movement

In the mid-twentieth century, the discovery of psychotropic medications such as lithium and haloperidol further improved treatment prognoses for mental illnesses.[45] However, by this time, mental hospitals were overcrowded, understaffed, and dilapidated.[46] Following the introduction of psychiatric medications and an attendant shift in public perceptions of the mentally ill, the number of mentally ill people in institutions started to drop precipitously as they found themselves able to live productive lives in the community with the help of medicine.[47] Deinstitutionalization created an opportunity for many states to close many of their government-funded ***230** mental hospitals.[48] However, these states were penny wise and pound foolish. They have paid, and continue to pay, a steep price for abdicating their responsibility to the safety of the public, and to people struggling with mental illness.[49]

While helping the mentally ill to live in the community was a worthy goal, the deinstitutionalization movement did not produce all it promised. It merely ended the widespread practice of hospitalization for the vast majority of mental patients without providing an appropriate alternative.[50] The result was that discharged patients, without guidance and not required to seek treatment, struggled to function normally in society, just as those who need psychiatric care do now.[51] Today, as then, people with severe mental illnesses may roam the streets aimlessly, behave inappropriately, and create public safety concerns.[52] Those who are not homeless often live in conditions that are less than ideal.[53]

Deinstitutionalization, while well intentioned, did not create a new world where people with psychiatric conditions can live safely in their communities.[54] In fact, in many ways, the legacy of deinstitutionalization is a return to the sad conditions of the 1800s. In the present day, there are more mentally ill Americans in jails than in hospitals.[55] Currently, approximately 50% of those discharged from state mental hospitals as a result of the push for deinstitutionalization are either homeless or incarcerated.[56] There is a nationwide shortage of appropriate treatment facilities.[57] Only ***231** 5% of the hospital beds available for treating mental illness in 1955 were still available in 2005.[58] People with untreated mental illness are still more likely than the general population to be victimized by crime, physically and sexually abused, living in poverty, incarcerated, violent, suicidal, and addicted to drugs and alcohol.[59]

The deinstitutionalization movement has not achieved its goal of safe community-based treatment for the formerly institutionalized, but initial outpatient civil commitment may provide part of the solution. If used judiciously, it could remedy at least some of the problems that remain. For instance, studies have shown that outpatient commitment reduces the number and length of inpatient hospitalizations, lowers the homelessness rate, decreases violent acts and threats, and results in fewer instances of arrest and incarceration.[60] By authorizing commitment of the less seriously ill to outpatient treatment, Tennessee could ease the shortage of available inpatient treatment accommodations, increase patient autonomy, and reduce costs to the state.[61] At the very least, outpatient commitment could be the first step toward finding a way forward that helps people with severe untreated mental illness, their communities, and the state government.

C. The Current State of Civil Commitment Law Nationwide

Support for initial outpatient commitment has grown significantly over the years and continues to rise. There is a national ***232** trend toward statutory authorization of outpatient commitment.[62] Among the states that allow outpatient commitment, some of the states require a showing of dangerousness or risk of harm.[63] Although it has not yet addressed standards for outpatient commitment, the Supreme Court of the United States has made clear that a finding of dangerousness is necessary for the purposes of inpatient commitment.[64] Other states allow “preventive outpatient commitment,” which authorizes commitment

when the person is gravely disabled or when it is necessary to prevent the further deterioration of the individual that would result in inpatient commitment.[65]

Every state in the United States authorizes inpatient commitment.[66] However, six states do not have an initial outpatient commitment statute: Connecticut, Maryland, Massachusetts, Nevada, New Mexico, and Tennessee.[67] States that pass, implement, ***233** and fund these laws have usually seen positive results both for themselves and for those committed under the laws, as documented in several studies.[68] Nevertheless, there are many reasons why a state would not have such a statute. The possibilities include lack of awareness of the problem, uneasiness with the subject of mental illness, concerns about discriminatory application of such a law, and the law's initial fiscal feasibility.[69]

D. The Tennessee Statutory Scheme and the Failed 2009 Amendment

Commitment law in Tennessee is primarily governed by two statutes. The first is a basic inpatient commitment law, which allows a court to compel inpatient treatment for a mentally ill person who poses a danger to himself or others.[70] The second is a conditional release outpatient commitment law, which allows outpatient commitment, but only for those who are being released from an institution.[71] No Tennessee statute authorizes initial outpatient commitment.

In early 2009, Tennessee State Senator Beverly Marrero and State Representative Jeanne Richardson introduced a bill in the General Assembly that would have authorized initial outpatient ***234** commitment by amending title 33, chapter 6, section 502 of the Tennessee Code Annotated.[72] This bill would have retained the requirement that the person must pose a risk of harm in order to be committed, whether on an inpatient or outpatient basis.[73] The General Assembly's Fiscal Review Committee estimated that implementation of the bill would cost the state approximately $800,000.[74] To put this amount in proper perspective, according to the State of Tennessee Fiscal Year 2011-2012 Budget, TennCare's reserve fund will have a balance of $254.6 million as of June 30, 2012.[75] Other estimates of cost have varied widely, with one official projecting a yearly cost of at least $15 million.[76] With two amendments, the bill passed by a unanimous vote in the Tennessee Senate.[77] In the House, the bill was lost in the limbo of the Budget Subcommittee of the Finance, Ways, and Means Committee and never came to a vote.[78] No further action has been taken to pass this bill or any similar one.

The primary reason for the bill's failure in the House was financial.[79] Initial cost estimates have varied widely, but any costs ***235** would in all likelihood be more than offset by the cost savings associated with initial outpatient commitment.[80] The disparate cost estimates understandably made some legislators uncomfortable with the bill.[81] Others, knowing the bill would be useless without the appropriate funding, did not press for a vote.[82] Tennessee sorely needs this law, but no one knows with certainty what its initial budgetary impact might be.[83] However, any costs to the state are likely to be recovered over time through the decreased costs of incarceration and inpatient care of people with severe mental illness.[84]

III. Tennessee Should Adopt an Initial Outpatient Commitment Statute

The current Tennessee statute does not allow for initial outpatient commitment. However, Tennessee's residents would reap substantial benefits if the statute were amended to add such an option. It would place highly fact-specific decisions about the appropriateness of treatment in the hands of the finder of fact, who sees the individual in person and can best assess his or her needs. Initial outpatient commitment is a viable least restrictive means to accomplish state objectives such as preventing harm to mentally ill individuals and those around them. Further, outpatient commitment causes the least disruption to an individual's freedom and day-to-day life, lessening interruption, reducing turmoil, and providing the stability needed for a person to be treated for his mental illness.

***236** Providing an initial outpatient commitment option would increase the likelihood that those who needed treatment would obtain it, which would in turn increase overall public safety. In addition, initial outpatient commitment shows promise in addressing the Tennessee bed shortage problem. The current shortage of public hospital beds dedicated to mental health treatment means that individuals who have inpatient commitment orders frequently spend time in jail rather than in mental hospitals where they can get the help they need. Last, although such a law could initially cost Tennessee money, the financial and other benefits would outweigh this cost.[85]

A. Initial Outpatient Commitment Gives Judges Much-Needed Discretion

Judges need wide latitude and a multitude of options in order to do what is best for each person, especially in this area of the law. Decisions about whether to subject an individual to commitment, as well as what type of psychiatric intervention is necessary, are dependent on the facts of a given situation. The fact-specific nature of the inquiry means that a "one size fits all" approach is inappropriate and unproductive; it fails to acknowledge that different approaches have varying effectiveness for individual patients in different situations.[86] Interestingly, the Tennessee legislature has ***237** expressly acknowledged that different treatment settings are appropriate for different individuals.[87] Mental illness varies widely in intensity and character. Commitment—especially inpatient commitment—is a drastic step.[88] Those who come into contact with a mentally ill person, such as the judge, the person's family, and the medical team, are in the best position to determine what type of intervention is appropriate in a given situation.[89] Tennessee, with its blanket prohibition on initial outpatient commitment, removes a possibility that might very well be the best option for certain people.[90] The legislature should amend the state's civil commitment statute to provide its judges with another alternative for handling people with severe mental illness.

Of course, giving this level of discretion to judges is not without its potential pitfalls. For instance, those who have discretion are occasionally at risk of abusing it.[91] In particular, some have expressed concern that such laws may be employed in a racially or socioeconomically discriminatory manner.[92] However, ***238** hypothetical abuse of discretion is not an argument against passing any particular law, even if it may be a reason to establish procedural safeguards designed to ensure that people are not committed to involuntary outpatient care wrongfully. This concept underlies the procedural protections afforded in inpatient commitment proceedings.[93] Also, notably, the forty-five American jurisdictions in which outpatient commitment is authorized have not been so overwhelmed with these concerns as to prevent them from passing and implementing their outpatient commitment statutes.

B. Initial Outpatient Commitment Provides Treatment in the Least Restrictive Setting

Another reason Tennessee should pass an initial outpatient commitment statute is that it would authorize treatment in the least restrictive setting possible. Inpatient commitment brings havoc to an already inherently disordered situation. Those who undergo inpatient commitment encounter problems with taking care of their responsibilities to the outside world. Those who spend extended periods of time involuntarily hospitalized could lose everything, including their jobs, their homes, and their children. Outpatient commitment, in contrast, causes substantially less upheaval in a person's life.[94] Although a person who undergoes outpatient commitment ***239** is forced to have psychiatric treatment, he is still basically free to conduct his life in the way that he chooses. Stability often aids in recovery of mental health, while chaos and volatility tend to exacerbate the problem.[95] By allowing initial outpatient commitment, Tennessee would create the best possible environment for some patients to achieve optimal recovery in the most expeditious, most effective, and least restrictive manner.

Furthermore, initial outpatient commitment is in accord with constitutional principles. A basic tenet of American constitutional law is that when a state seeks to impinge on a fundamental constitutional right, it may do so only if there is a compelling governmental interest and only if the means used are the least restrictive alternative available to serve this interest.[96] The

Supreme Court of the United States has recognized that "avoiding the unwanted administration of antipsychotic drugs" is undoubtedly one such right.[97] Refusing unwanted medical care generally is another. ***240** [98] If the government seeks to intrude on the territory of these rights, it must do so only to satisfy a compelling interest, and it must do so by using the least restrictive means possible to accomplish its purpose.

Protecting the safety of mentally ill people and the public at large is a legitimate, even compelling, state interest; however, it is an objective served quite well in some situations by outpatient commitment, which is far less restrictive than inpatient commitment. Patients prefer outpatient commitment over inpatient commitment because it is less confining.[99] Most of them also perceive it as the least restrictive alternative available.[100] Because there is a less restrictive means to achieve the government's objectives of protecting society and mentally ill individuals, outpatient commitment should be authorized when it would be equally effective.[101]

In addition to constitutional concerns, public policy compels Tennessee to allow initial outpatient commitment. Notably, it is the Tennessee legislature's stated policy to provide treatment in the least restrictive setting.[102] Tennessee's policy, as laid out by statute, is to allow recipients of its mental health services "to have the greatest possible control of their lives in the least restrictive ***241** environment that is appropriate for each person."[103] By foreclosing the possibility of outpatient commitment, at least as an initial matter, Tennessee's statutory scheme seems misaligned with the state's policy on treatment of people struggling with mental illness. Statutory authorization of outpatient commitment would be more consistent with Tennessee's core values and goals for treatment of the mentally ill. Notwithstanding constitutional concerns, Tennessee should enact an initial outpatient commitment statute for public policy reasons alone.

C. Outpatient Commitment Benefits Both the State and People with Mental Illness

Scientific evidence demonstrates that outpatient commitment for the dangerously mentally ill benefits individuals with mental illness, the government, and residents without mental illness. First, outpatient commitment benefits those with mental disorders by improving everyday functioning in society. This includes management of psychiatric illness and reductions in harmful behaviors towards one's self or others. Relatedly, treatment in an outpatient program reduces an individual's likelihood of being victimized. Finally, outpatient commitment benefits a state and its residents by reducing costs to the populace and providing a safer environment for residents of the state.

1. Outpatient Commitment Benefits Those Who Are Dangerously Mentally Ill

Initial outpatient commitment is authorized by statute in the vast majority of states,[104] and it has a positive impact on people to whom it is applied.[105] In the nearly fifty years it has been used, researchers have carefully studied its outcomes, which have largely been beneficial.[106] In one study of Kendra's Law, New York's outpatient commitment law, researchers found good behavioral out- ***242** comes.[107] After six months, individuals who were committed on an outpatient basis doubled their medication compliance and increased their engagement with available services by roughly 50%.[108]

Outpatient commitment also helps people struggling with mental illness to gain autonomy and function better in the world. The majority of the patients in the Kendra's Law study reported that the outpatient commitment process helped them to gain control over their lives and helped them to get well and stay well.[109] They also saw increases in their ability to care for themselves and live successfully in the community.[110] Additionally, various measures of social skills, such as conflict resolution and ability to communicate, showed significant improvement.[111] Most strikingly, there was a marked reduction in harmful behaviors: patients were 55% less likely to attempt suicide, 49% less likely to abuse alcohol, and 48% less likely to abuse drugs.[112]

Treatment for mental illness also reduces an individual's risk of being victimized. Individuals with mental illnesses are more likely to be incarcerated. Once incarcerated they are significantly more likely to be victimized physically than people without mental illnesses.[113] Further, even when living in freedom, those with untreated mental illness are more likely to experience violent criminal victimization than those without mental illness.[114] Interestingly, ***243** substance abuse and transient living conditions, both of which outpatient commitment reduces,[115] are correlated with increased victimization.[116] Outpatient commitment reduces a mentally ill person's risk of becoming the victim of a violent crime.[117] Rather than the commitment process itself, researchers postulate that this effect primarily results from the decrease in substance abuse and the increase in compliance with psychiatric medication therapy that accompanies outpatient commitment.[118] Still, if outpatient commitment brings about other changes in a person's life, and those changes in turn have positive effects, this is evidence in favor of outpatient commitment.

2. Outpatient Commitment Benefits Both the Government and the Citizenry

Evidence also confirms that outpatient commitment benefits the state and those within its borders. Along with the above-listed positive changes in behavior, the Kendra Law study's authors noted a reduced incidence of "significant events"; among these were negative social outcomes such as arrest, imprisonment, inpatient commitment, and homelessness.[119] Those undergoing outpatient commitment were 87% less likely to be incarcerated, 83% less likely to be arrested, 77% less likely to become a psychiatric inpatient, and 74% less likely to become homeless.[120] They were also 47% less likely to threaten suicide or harm others physically and 38% less likely to create public disturbances.[121] Other less detailed studies have found that outpatient commitment reduces hospitalizations, both in number and length of stay.[122]

***244** These effects are important to the state. The lower frequency of these "significant events," several of which involve substantial cost to the state, has the potential to save a state considerable money, release hospital beds, and help the mentally ill to break the incarceration cycle. It also creates a safer environment for all citizens, both by reducing violence committed by and upon those with severe mental illness, and by freeing the police to protect and serve rather than wasting valuable time on public disturbances created by individuals with untreated mental illnesses.

D. The Statute Could Ease Hospital Bed Shortages and Keep the Mentally Ill Out of Jail

An outpatient commitment statute has the potential to ease psychiatric hospital bed shortages and to help the mentally ill stay out of prison, which would benefit both mentally ill individuals and the state. In the wake of deinstitutionalization, there is a national shortage of hospital beds for psychiatric treatment.[123] About 95% of the hospital beds that existed for this purpose in 1955 were no longer available in 2005.[124]

According to experts in the area, the number of psychiatric beds in the United States is woefully inadequate for the size of our population.[125] The estimated minimum acceptable number of beds in psychiatric hospitals is 50 beds per 100,000 people.[126] Nationwide, the United States has about one-third of the number of beds that experts estimate would be required to reach a minimum acceptable standard of mental health care.[127] In Tennessee, the situation is not much better. Tennessee has only 18.1 beds per 100,000 Tennesseans.[128]

There is simply not enough room in mental hospitals to treat those who suffer from severe mental illness. As a result, many of the mentally ill end up in prisons.[129] Nationwide and in Tennessee, a mentally ill person is about three times more likely to ***245** be in prison than in a psychiatric hospital.[130] There are moral and ethical concerns about this phenomenon, which

critics have deemed "criminalizing mental illness." [131] At least some commentators consider community-based care, such as outpatient commitment, to be part of the solution to this problem. [132]

The state treats people for their disorders while they are incarcerated, and this, combined with the costs of housing inmates, is a very expensive endeavor. [133] Mentally ill inmates cost more to house because they need increased security and tend to have more behavioral problems. [134] In Texas, for instance, prisoners with mental illness cost the state almost twice as much as the typical prisoner. [135] Inmates with untreated mental illness are also "frequent flyers," repeatedly returning to prison upon their release. [136] This "revolving door" situation does not serve the state's interests well, and it certainly does not serve the interests of individuals with mental illness, who often cannot appreciate the seriousness of their illnesses or the inappropriateness of their behavior. [137]

Estimates indicate that between 15 and 20% of all inmates have at least one mental illness; the estimate in Tennessee is about 16%. [138] About 40% of mentally ill people spend at least some time in prison during their lifetimes, including some who have not committed a crime. [139] In a very real sense, jails and prisons have ***246** become the de facto psychiatric care facilities of the modern era, and they are not suitably equipped to fulfill the role. [140] The current system does not function optimally, but initial outpatient commitment holds the promise of allowing treatment for those who do not require hospitalization, thus freeing up hospital beds for those who truly need them.

IV. Tennessee Should Retain the Risk of Harm Requirement for Outpatient Commitment

Some states with initial outpatient commitment statutes require a showing that the individual poses a risk of harm or danger to himself or to others. Tennessee requires such a showing under its inpatient commitment statute, [141] and this requirement should be retained if Tennessee adopts an initial outpatient commitment statute. First, constitutional concerns arise without a risk of harm requirement that are analogous to those surrounding inpatient civil commitment. Second, removing the risk of harm requirement would result in the involuntary treatment of people who are not dangerous, incurring potential financial costs to the state without serving a significant state interest.

It is a settled matter of constitutional law that states may not commit a person to inpatient psychiatric treatment unless he poses a danger to himself or to others. [142] What remains to be seen is whether such a finding may be required for outpatient commitment, although there is evidence to suggest that it may. While the Supreme Court of the United States has not squarely addressed this ***247** issue, the few state and federal courts which have considered the matter have generally held that a person who is neither dangerous nor incompetent may not be forced to take psychiatric medications against his will. [143]

Outpatient commitment, which allows patients to be treated in the community rather than in an institution, places fewer physical restrictions on the individual in question than inpatient commitment does. [144] However, forcing any kind of medical treatment on an individual against his will is a "significant deprivation of liberty," and there is a fundamental right to refuse such treatment. [145] Treatment with psychotropic drugs is not without risks or side effects. [146] Psychiatric medications can have severe side effects, [147] and these, along with the intended effects of psychotropic ***248** drugs, confine patients both mentally and physically. [148] Because of the attendant effects, an individual should be able to refuse treatment with psychiatric medications unless there is some state interest in preventing danger. [149]

Proponents of preventive outpatient commitment have written derisively of mentally ill people who refuse treatment as "dying with their rights on." [150] However, these critics would be wise to remember that in the absence of a compelling state interest, the Constitution guarantees a person's right to refuse medical treatment, even if that refusal results in death. [151] It is also noteworthy

that every state permits inpatient commitment of those who pose a direct threat of harm to their own lives or to the lives of others, which provides a way to compel appropriate care for those who are at risk of death by reason of mental illness. [152]

In response, preventive outpatient commitment supporters have argued that without preventive outpatient commitment, people who do not meet the dangerousness standard will deteriorate ***249** until they do pose a risk of harm. [153] However, the risk of a future occurrence is not a sufficient reason to abridge a person's constitutional rights in the absence of a current compelling state interest. [154] For instance, states do not incarcerate people simply because they are statistically likely, at some indeterminate point in the future, to commit a crime. [155] Rather, people are allowed to go free until they harm someone, and then they are afforded their constitutionally protected due process rights. In addition, if preventive outpatient commitment is permitted, commitment could last indefinitely. [156] If a state procedure is constitutional, it has little to fear from due process, and if it is not in accord with the Constitution, then it is not worthy of preservation in a system of justice with the Constitution at its core.

Further, those who advocate preventive outpatient commitment argue that people with severe mental illness are often incompetent to make their own medical decisions due to a lack of insight about their conditions (known as anosognosia), [157] and that according to the Supreme Court, only competent individuals have ***250** the right to refuse unwanted medical treatment. [158] However, it is far from clear that a majority of the Court feels the right is limited only to competent persons. [159] Further, competency is a very low legal hurdle. Mentally ill people may legally enter binding contracts and devise their estates. [160] It would be incongruous to deny them the right to make decisions about whether to be treated for their illnesses.

Even if the Court did intend to restrict the right to refuse medical treatment to competent persons, options are still available to the state other than preventive outpatient commitment. If a person is truly incompetent due to his or her mental illness, the state could initiate an action for adjudication of incompetency. [161] After the person was adjudicated incompetent, the state could then proceed to seek medical care on his or her behalf. This is entirely different from preventive outpatient commitment, which compels a non-dangerous patient into treatment without an adjudication of his or her competency. [162]

***251** States already have procedures in place to handle exceptional situations without running roughshod over constitutional guarantees. Paternalistic concerns about avoiding suffering, in the absence of dangerousness or incompetency, cannot justify forcing treatment on a person who does not want it and has a constitutional right to refuse it. [163] The legal implications of accepting such a proposition have no logical endpoint. For instance, one could just as easily argue that the state could force an adult Jehovah's Witness to receive a life-saving blood transfusion in order to "alleviate suffering," [164] but this is certainly not legally permissible. [165] A world in which the government acts for an individual's perceived good without any regard for his rights is adverse to a Constitution deeply concerned with individual rights. Inherent in the Constitution is the right to choose "wrongly," as long as one's choice does not pose risk or danger to oneself or others.

When the individual is dangerous or incompetent, however, the situation is much different, and in such cases, compelling treatment is constitutional and may well be appropriate, even required. [166] Although the seriously mentally ill may be relatively likely to be dangerous, this probability does not justify creating a bypass procedure like preventive outpatient commitment, in which the state no longer has to prove that a risk of harm exists. [167]

Further, if the state allows preventive outpatient commitment, costs will rise disproportionately to benefits as non-dangerous people are forced into outpatient care for which the state will bear some of the expenses. Preventive outpatient commitment ***252** of non-dangerous, non-violent mentally ill people is of little benefit to the state. It does not result in substantial financial savings and does not affect the violent crime rate. Although perhaps the state derives some sort of intangible benefit from a medicated citizenry, this sort of benefit is not significant enough to justify infringing on an individual's right to refuse psychiatric

medication.[168] In other words, while it may achieve some kind of governmental goal, such a goal does not appear to be compelling or substantial. Thus, such a statute might not survive strict scrutiny. The costs of treating the non-dangerous mentally ill, while not devastatingly high, are not offset by the kinds of financial savings inherent in treating those who are dangerous. Due to both constitutional and financial concerns, Tennessee should adopt an initial outpatient commitment statute with a risk of harm requirement.

V. Conclusion

Initial outpatient commitment promises to improve the lives of severely mentally ill Tennesseans significantly, while also benefiting the state. Today, without it, the state's mentally ill people languish in inappropriate settings: in mental hospitals, in prisons, and on the streets. If it were available, at least some individuals with mental illness could live safely in the community as functional members of society. Judges need the discretion to do what is best in each situation, not a statute with a built-in false dichotomy. Patients deserve to receive the necessary care in the least restrictive treatment setting, not to experience immense upheaval when they are most vulnerable. Studies have demonstrated the effectiveness of outpatient commitment and shown how it saves and improves lives by helping those struggling with mental illness to avoid institutionalization, both via prison and inpatient hospitalization.[169] This is a change whose time is overdue.

Because compelling any kind of medical treatment is a serious endeavor,[170] Tennessee's law should continue to require that, ***253** prior to any kind of involuntary commitment, the person to be committed must pose a risk of harm to himself or others. Statutory authorization of initial outpatient commitment for those who pose a risk of harm to themselves or others would benefit the state and its citizens, both those with and those without mental illnesses. Although it would not be a panacea for all of the difficulties those with mental illness experience, the amended statute would likely save money,[171] increase the quality of life of the dangerously mental ill,[172] improve public safety,[173] and reduce the shamefully inappropriate number of mentally ill people in prisons.[174] It would be the best solution for all the major stakeholders. Tennessee has a responsibility to adopt such a law for the good of its people and that of future generations, and it should do so without delay.

Footnotes

a1 J.D. Candidate, The University of Memphis Cecil C. Humphreys School of Law, May 2012; Senior Notes Editor, The University of Memphis Law Review, Volume 42; B.A., Rhodes College, 2006. I would like to express my sincere gratitude to the Editorial Board and staff of The University of Memphis Law Review; to Matthew J. Crigger and Eric J. Montierth for their invaluable editorial contributions; to Professor Lars G. Gustafsson for his input, creativity, and guidance throughout the process of writing this piece; to my friends and family, for their support; to my husband, Farris M. Holyfield, III, whose abiding love and strength have given wings to my dreams; and to God, who makes all things beautiful in His time and with whom nothing is impossible.

1 Police: Hospital Shooter Mentally Ill, COM. APPEAL, Apr. 21, 2010, at B6.

2 Id.

3 Id.

4 Id.

5 Id.

6 Pamela Perkins, Police Find Man Who Cut Parents—25-Year-Old Has History of Mental Illness, COM. APPEAL, Sept. 27, 2007, at B2.

7 Id.

8 Id.

9 See O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). In some jurisdictions, courts do not actually compel forcible medication. Bruce J. Winick et al., Involuntary Outpatient Commitment, 9 PSYCHOL. PUB. POL'Y & L. 94, 101 (2003). However, for those patients whose outpatient treatment plan includes medication, the costs of noncompliance may be high indeed, up to and including involuntary hospitalization. Id. While medication is not strictly compulsory in such situations, the potential consequences for noncompliance lend such a level of coercion to the outpatient commitment order that it is almost compulsory in practice. Id. Thus, the word "compel" and variants thereof are used throughout this Note to denote both actual compulsion and this de facto compulsion that arises from the coercive nature of commitment orders.

10 Addington v. Texas, 441 U.S. 418, 426 (1979).

11 "[U]ntreated severe mental illness is among the most reliable predictors of future violence." Karen Easter, Parkwest Shooting Points to Need for a New Law, KNOXVILLE NEWS-SENTINEL (May 23, 2010, 12:00 AM), http:// www.knoxnews.com/news/2010/may/23/parkwest-shooting-points-to-need-for-a-new-law/.

12 Edward P. Mulvey, Jeffrey L. Geller & Loren H. Roth, The Promise and Peril of Involuntary Outpatient Commitment, 42 AM. PSYCHOLOGIST 571, 571 (1987).

13 Id.

14 Id.

15 See infra Parts III.B, IV.

16 See, e.g., MD. CODE ANN., HEALTH-GEN. § 10-632(a) (LexisNexis 2009) (stating the individual must either "be admitted to a facility as an involuntary patient" or be "released without being admitted").

17 See, e.g., TENN. CODE ANN. § 33-6-602 (2007) (providing that if a person has been involuntarily hospitalized, then "the person shall be eligible for discharge subject to the obligation to participate in any medically appropriate outpatient treatment").

18 ALA. CODE § 22-52-10.2 (LexisNexis 2006); ALASKA STAT. § 47.30.795 (2010); ARIZ. REV. STAT. ANN. § 36-540 (2009 & Supp. 2010); ARK. CODE ANN. § 20-47-202 (2001 & Supp. 2011); CAL. WELF. & INST. CODE § 5346 (West 2010) (only implemented in some counties); COLO. REV. STAT. § 27-65-107(6) (2010); DEL. CODE ANN. tit. 16, § 5010 (2003); D.C. CODE § 21-545 (2001); FLA. STAT. ANN. § 394.4655 (West 2006 & Supp. 2011); GA. CODE ANN. § 37-3-1(9.3) (1995); HAW. REV. STAT. § 334-121 (LexisNexis 2008); IDAHO CODE ANN. § 66-329(11)(b) (2007 & Supp. 2011); 405 ILL. COMP. STAT. ANN. 5/1-119.1 (West 2011); IND. CODE ANN. § 12-26-14-1 (LexisNexis 2006); IOWA CODE ANN. § 229.14 (West 2006); KAN. STAT. ANN. § 59-2946(n) (2005); KY. REV. STAT. ANN. § 202A.081 (LexisNexis 2007); LA. REV. STAT. ANN. § 28:2(28) (2001 & Supp. 2009); ME. REV. STAT. ANN. tit. 34-B, § 3873-A (West 2010); MICH. COMP. LAWS ANN. § 330.1401(c) (West 1999 & Supp. 2011); MINN. STAT. ANN. § 253B.09(b) (West 2007); MISS. CODE ANN. § 41-21-73(4) (2009 & Supp. 2010); MO. ANN. STAT. § 632.335 (West 2006); MONT. CODE ANN. § 53-21-127(3)(b) (2009); NEB. REV. STAT. § 71-925(4)(a) (2009); N.H. REV. STAT. ANN. § 135-C:34 (LexisNexis 2006); N.J. STAT. ANN. §30:4-27.2(hh) (West Supp. 2011); N.Y. MENTAL HYG. LAW § 9.60 (McKinney 2011); N.C. GEN. STAT. § 122C-263 (2009); N.D. CENT. CODE § 25-03.1-02 (2002 & Supp. 2011); OHIO REV. CODE ANN. § 5122.15 (LexisNexis 2008); OKLA. STAT. ANN. tit. 43A, § 5-415(E)(2) (West 2001 & Supp. 2011); OR. REV. STAT. § 426.127 (2009); 50 PA. STAT. ANN. § 7304(f) (West 2001); R.I. GEN. LAWS § 40.1-5-2 (2006); S.C. CODE ANN. § 44-17-580(A) (2002 & Supp. 2010); S.D. CODIFIED LAWS § 27A-10-9 (2004); TEX. HEALTH & SAFETY CODE ANN. § 574.034(i)(1) (West 2010); UTAH CODE ANN. § 62A-15-631 (LexisNexis 2006 & Supp. 2011); VT. STAT. ANN. tit. 18, § 7617(b)(3) (2000); VA. CODE ANN. § 37.2-100 (2005); WASH. REV. CODE ANN. § 71.05.240 (West 2008 & Supp. 2011); W. VA. CODE ANN. § 27-1-9 (LexisNexis 2008 & Supp. 2011); WIS. STAT. ANN. § 51.20 (WEST 2010); WYO. STAT. ANN. § 25-10-110(j)(ii) (2011).

19 See TENN. CODE ANN. § 33-6-502 (2007) (listing criteria for involuntary inpatient commitment); TENN. CODE ANN. § 33-6-602 (2007) (providing for outpatient commitment only upon discharge from involuntary inpatient hospitalization).

20 TENN. CODE ANN. § 33-6-602 (2007).

21 See, e.g., Dora W. Klein, Autonomy and Acute Psychosis: When Choices Collide, 15 VA. J. SOC. POL'Y & L. 355, 381 (2008).

22 Id.

23 Id.

24 Telephone Interview with Jeanne Richardson, Tenn. State Representative, Tenn. House of Representatives (Dec. 15, 2010).

25 Id.

26 Addington v. Texas, 441 U.S. 418, 426 (1979).

27 See Judge Reese McKinney, Jr., Involuntary Commitment, A Delicate Balance, 20 QUINNIPIAC PROB. L.J. 36, 36 (2006).

28 Id. at 42.

29 See Olmstead v. L.C., 527 U.S. 581, 600 (1999) (declaring, as only one argument in favor of this proposition, that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"); see also Lessard v. Schmidt, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972) (noting that "[i]t seems clear that persons suffering from the condition of being mentally ill cannot be totally deprived of their liberty if there are less drastic means for achieving the same basic goal").

30 Although this section provides a brief summary of mental health care in the United States for the purpose of illustrating the events that have returned it to its prior state, a comprehensive analysis of the topic is well outside the scope of this Note.

31 Put another way, in the immortal words of George Santayana, "Progress, far from consisting in change, depends on retentiveness. When change is absolute there remains no being to improve and no direction is set for possible improvement Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, THE LIFE OF REASON, OR, THE PHASES OF HUMAN PROGRESS 82 (Charles Scribner's Sons 1955).

32 For more information about deinstitutionalization, see discussion infra Part II.B.

33 See generally Kathryn A. Worthington, Note, Kendra's Law and the Rights of the Mentally Ill: An Empirical Peek Behind the Courts' Legal Analysis and a Suggested Template for the New York State Legislature's Reconsideration for Renewal in 2010, 19 CORNELL J.L. & PUB. POL'Y 213, 215-20 (2009).

34 CIORSTAN J. SMARK, WOMEN IN RESEARCH CONFERENCE, DOROTHEA DIX: A SOCIAL RESEARCHER AND REFORMER 5 (Nov. 24-25, 2005), http:// ro.uow.edu.au/cgi/viewcontent.cgi?article=1469&context=commpapers.

35 Id.

36 Id. at 5-6. Then, as now, many psychiatric patients were indigent due to the disabling nature of their illnesses and therefore unable to afford private mental health care.

37 Id. at 6-7.

38 Id. at 9.

39 Id.

40 Id. at 6.

41 Id.

42 Id. When Dix confronted the jailer about these deplorable conditions, he replied insensitively that "'lunatics could not feel the cold."' Id. (quoting Dorothea Dix and Her Hospital: Mental Health Care Reformer, ESSORTMENT, http://www.essortment.com/all/dorotheadixhos_rzue.htm (last visited Oct. 26, 2011)).

43 SMARK, supra note 34, at 6. A woman in the mid-nineteenth century accomplished all of this largely singlehandedly, despite significant obstacles. For instance, her gender barred her from addressing most legislative bodies directly. In response, she prepared written presentations and convinced sympathetic men to present her ideas before some legislatures. Id. at 6-8.

44 Id. at 7.

45 Jeffrey A. Lieberman, Robert Golden, Scott Stroup & Joseph McEvoy, Drugs of the Psychopharmacological Revolution in Clinical Psychiatry, 51 PSYCHIATRIC SERVICES 1254, 1255 (2000). Psychotropic medications, also called biological treatment techniques or psychiatric drugs, are medications prescribed for the treatment of mental disorders. CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISNER, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 23 (5th ed. 2009). These medications produce their results by stabilizing or normalizing brain chemistry. Id. at 25. However beneficial these medications might be, though, they are not without their side effects. See id. at 25-31; see also discussion infra notes 135-37 and accompanying text.

46 See generally, E. FULLER TORREY ET AL., , TREATMENT ADVOCACY CENTER, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES (May 2010) [hereinafter PRISON STUDY], http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_ study.pdf.

47 Id. at 3.

48 Id.

49 For a discussion of these costs, see infra Part III.C.2.

50 John A. Talbott, Deinstitutionalization: Avoiding the Disasters of the Past, 55 PSYCHIATRIC SERVICES 1112, 1113 (2004); see also PRISON STUDY, supra note 46, at 11 (calling the failure to ensure community treatment for those discharged an "egregious mistake," "one of the greatest social disasters of the 20th century," "a personal tragedy," and "an ongoing disaster").

51 PRISON STUDY, supra note 46, at 9-11.

52 Talbott, supra note 50, at 1112-13.

53 Id.

54 PRISON STUDY, supra note 46, at 11.

55 Id at 9.

56 Id at 11.

57 E. FULLER TORREY ET AL., TREATMENT ADVOCACY CENTER, THE SHORTAGE OF PUBLIC HOSPITAL BEDS FOR MENTALLY ILL PERSONS 2 (Mar. 2008) [hereinafter BED SHORTAGE STUDY], http://www.treatmentadvocacycenter.org/storage/documents/the_ shortage_of_publichospital_beds.pdf.

58 Id.

59 Victimization: One of the Consequences of Failing to Treat Individuals with Severe Mental Illness—Backgrounder, TREATMENT ADVOCACY CENTER, http://www.treatmentadvocacycenter.org/resources/consequences-of-lack-of-treatment/violence/1373 (last updated Mar. 2011).

60 See, e.g., N.Y. STATE OFFICE OF MENTAL HEALTH, KENDRA'S LAW: FINAL REPORT ON THE STATUS OF ASSISTED OUTPATIENT TREATMENT 16-18 (2005) [hereinafter KENDRA'S LAW STUDY], http://www.omh.state.ny.us/omhweb/kendra_

web/finalreport/AOTFinal2005.pdf. Kendra's Law is New York's initial outpatient commitment law, and results of its implementation have been quite positive. Id. at 1.

61 See discussion infra Part III.C.2. Failure to treat the mentally ill costs states money. The costs of inpatient treatment, higher police expenditures, expenses associated with maintaining the mentally ill as prison inmates, and lost productivity from those disabled by their conditions represent only some of these costs.

62 Since the first outpatient commitment order occurred in the District of Columbia in 1964, a growing number of states have passed initial outpatient commitment laws. By 1995, thirty-five states and the District of Columbia had adopted such a law. E. Fuller Torrey & Robert J. Kaplan, A National Survey of the Use of Outpatient Commitment, 46 PSYCHIATRIC SERVICES 778, 778 (1995). By 2005, the number had increased to forty states. Currently, forty-four states and the District of Columbia have laws permitting initial outpatient commitment. See sources cited supra note 18. The most recent of these was passed in New Jersey in 2010, although its implementation has not yet been funded. N.J. STAT. ANN. § 30:4-27.2(hh) (West Supp. 2011).

63 See, e.g., DEL. CODE ANN. tit. 16, § 5010 (2003) (directing that only a "mentally ill person" may be committed) and DEL. CODE ANN. tit. 16, § 5001(6) (2003) (defining a "mentally ill person" as a person who "poses a real and present threat" of committing or suffering "serious harm" if not treated).

64 O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

65 See HAW. REV. STAT § 334-60.2 (LexisNexis 2008) (authorizing outpatient commitment for a non-dangerous, mentally ill individual who is "gravely disabled"); MINN. STAT. ANN. § 253B.065(b)(3)(ii) (West 2007 & Supp. 2011) (allowing outpatient commitment when, if left untreated, "the patient is reasonably expected to physically or mentally deteriorate" until he or she meets the criteria for inpatient commitment).

66 GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 337 (3d ed. 2007).

67 See CONN. GEN. STAT. ANN. § 17a-498 (West 2006 & Supp. 2011); MD. CODE ANN., HEALTH-GEN. § 10-632(e)(2) (LexisNexis 2009); MASS. GEN. LAWS ANN. ch. 123, § 8(a) (West 2003); NEV. REV. STAT. ANN. § 433A.115 (2009); N.M. STAT. ANN. § 43-1-11 (2010); TENN. CODE ANN. § 33-6-602 (2007).

68 See generally Jeffrey Geller et al., The Efficacy of Involuntary Outpatient Treatment in Massachusetts, 25 ADMIN. & POL'Y IN MENTAL HEALTH 271 (1998); KENDRA'S LAW STUDY, supra note 60; Marvin S. Swartz et al., A Randomized Controlled Trial of Outpatient Commitment in North Carolina, 52 PSYCHIATRIC SERVICES 325 (2001).

69 Although many experts postulate that statutory authorization of outpatient commitment results in substantial savings to states, there have not been any detailed studies of financial impact. Further, implementing such a statute requires an initial financial outlay that often concerns legislators, who have an obligation to their constituents to keep costs down. It is not inconceivable that this concern is at least partly to blame for keeping the remaining legislatures from passing outpatient commitment statutes.

70 TENN. CODE ANN. § 33-6-502 (2007) (permitting "involuntary care and treatment in a hospital or treatment resource" if and only if, among other criteria, "the person poses a substantial likelihood of serious harm").

71 Id. § 33-6-602 (providing that upon discharge from involuntary hospitalization, if certain criteria are met, "the person shall be eligible for discharge subject to the obligation to participate in any medically appropriate outpatient treatment").

72 S. 0034, 106th Gen. Assemb., Reg. Sess. (Tenn. 2009), http:// www.capitol.tn.gov/Bills/106/Bill/SB0034.pdf; H.R. 0297, 106th Gen. Assemb., Reg. Sess. (Tenn. 2009), http://www.capitol.tn.gov/Bills/106/Bill/HB0297.pdf.

73 Id.

74 JAMES W. WHITE, FISCAL NOTE: SB 34-HB 297, TENN. GEN. ASSEMB. FISCAL REV. COMM. (Apr. 3, 2009), http://www.capitol.tn.gov/Bills/106/Fiscal/SB0034.pdf (estimating that the necessary therapy, medications, salaries of case managers, and operational costs of the bill will total $796,200 per year).

75 BILL HASLAM, GOVERNOR, STATE OF TENNESSEE, THE BUDGET: FISCAL YEAR 2011-2012 xxii. (2011), www.tn.gov/finance/bud/documents/11-12BudgetVol1.pdf.

76 Editorial, Preventing Another Parkwest Shooting, KNOXVILLE NEWS-SENTINEL, Apr. 28, 2010, available at http://www.knoxnews.com/news/2010/apr/28/preventing-another-parkwest-shooting/. The source of this number is unknown, but it seems an unlikely figure.

77 Bill Information for SB0034, TENN. GEN. ASSEMB., available at http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB0034&ga=106.

78 Id.

79 Telephone Interview with Jeanne Richardson, Tenn. State Representative, Tenn. House of Representatives (Dec. 15, 2010). The primary issue, at least in the Tennessee General Assembly, appears to be uncertainty about costs. Id. It is difficult to weigh financial costs and benefits of an action not yet taken, especially when no studies of cost savings to other states with outpatient commitment statutes exist. Id.
This fiscal uncertainty contributed heavily to the failure of the 2009 proposed amendment. Id. Legislators were uncomfortable with passing a bill for which financial impact could not be readily ascertained. Id. Common sense suggests that enforcement of outpatient commitment orders and provision of outpatient services would be less expensive than inpatient hospitalization, but as the old saying goes, “if sense were really common, everyone would have it.”

80 Id.

81 Id.

82 Id.

83 Id.

84 Id.

85 Such a law would, according to one Knoxville physician, “save countless dollars in the long run.” J.J. Stambaugh, The Mental Health Perspective: ‘Sins of Our Fathers'—Policy of ‘60s Sends Ill to Jails, Foregoing Proper Treatment, KNOXVILLE NEWS-SENTINEL, Mar. 3, 2009, available at http://www.knoxnews.com/news/2009/mar/03/030309homeless/. For a detailed list of initial costs to the state, see JAMES W. WHITE, FISCAL NOTE: SB 34 - HB 297, TENN. GEN. ASSEMB. FISCAL REV. COMM. (Apr. 3, 2009), http:// www.capitol.tn.gov/Bills/106/Fiscal/SB0034.pdf.

86 McKinney, Jr., supra note 27, at 46. (“The courts must continue to make the hard decisions based on each individual patient's needs, not based on any blanket legal philosophy A patient's history and diagnosis, along with current behavior and professional recommendations[,] should all be taken into consideration.”). The role of health care professionals here cannot be understated. Although the judge decides whether the individual should be subject to judicial commitment, he or she does so based largely on the facts presented by the person's medical team. See TENN. CODE ANN. § 33-6-503 (2007). Further, the judge only determines whether to commit the person; it is the medical team that decides what form of care is appropriate after that determination is made. However, without that judicial determination, the patient may refuse care and the medical team would be unable to treat the patient at all.

87 TENN. CODE ANN. § 33-1-201 (2007) (declaring that “[i]t is the policy of the state to achieve outcomes and accomplishments that create opportunities for service recipients to have the greatest possible control of their lives in the least restrictive environment that is appropriate for each person” (emphasis added)).

88 See Riese v. St. Mary's Hosp. & Med. Ctr., 271 Cal. Rptr. 199, 208 (Cal. Ct. App. 1987).

89 McKinney, Jr., supra note 27, at 46. But see generally Virginia Aldigé Hiday, Court Discretion: Application of the Dangerousness Standard in Civil Commitment, 5 L. & HUM. BEHAV. 275 (1981).

90 In this respect, Tennessee's refusal to allow initial outpatient commitment is somewhat puzzling. It is not as though there are concerns with outpatient commitment generally; after all, the state already authorizes conditional discharge outpatient commitment.

91 For example, Miller and Fiddleman express concern that even when dangerousness is required by statute, outpatient commitment is often used, and perhaps overused, "when the judge is convinced that further treatment is advisable but feels that the legal evidence is insufficient to justify inpatient commitment." Robert D. Miller & Paul B. Fiddleman, Outpatient Commitment: Treatment in the Least Restrictive Environment?, 35 HOSP. & COMMUNITY PSYCHIATRY 147, 149 (1984).

92 Outpatient commitment does, indeed, disproportionately impact members of racial minority groups and those living in poverty. See Henry A. Dlugacz, Involuntary Outpatient Commitment: Some Thoughts on Promoting a Meaningful Dialogue Between Mental Health Advocates and Lawmakers, 53 N.Y.L. SCH. L. REV. 79, 82 (2008-2009). While statistically this is the case, this phenomenon is at least partially explained by the fact that those living in poverty are less likely to be able to afford private mental health care, including psychiatric medication, and thus are more likely to be dependent on the public mental health care system. See Jeffrey Swanson et al., Racial Disparities in Involuntary Outpatient Commitment: Are They Real?, 28 HEALTH AFF. 816, 822-23 (2009). Although racial prejudice is, without question, still a problem in the United States, it is doubtful that there is a nationwide conspiracy to institutionalize members of minority groups. Rather, the higher rate of involuntary outpatient commitment among minority groups, especially among African Americans, appears to be related to a history of poverty and marginalization of these groups. Id. at 825. An inability to afford continuous treatment results in a higher rate of use of outpatient commitment as a stopgap against the "revolving door" of periodic involuntary hospitalization. Id.

93 McKinney, Jr., supra note 27, at 38 (describing safeguards provided in Alabama, such as the involvement of mental health professionals, the appointment of a guardian ad litem, and follow-up of those committed on an outpatient basis).

94 Winick et al., supra note 9, at 102-03.

95 As one physician has put it, "'If you take somebody who's already psychotic and lock them in a cage, guess what's going to happen? They're going to get sicker That's not what you're supposed to do. But that's what we do."' Stambaugh, supra note 85.

96 See, e.g., Shelton v. Tucker, 364 U.S. 479, 488 (1960) (making clear that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved").

97 Washington v. Harper, 494 U.S. 210, 221-222 (1990). Harper was a prison inmate whom the state of Washington had involuntarily treated for schizophrenia. Id. at 217. Although the Court recognized a fundamental right to refuse psychiatric medications, thus invoking due process, it decided against Harper because the law affords fewer protections to an individual who is already in the custody of the state due to his own wrongdoing. Id. at 223. Also integral to the decision was the state's interest in operating safe and secure prisons. Id. These interests are obviously absent in the case of a person who has done nothing wrong and is not in the custody of the state. Further, the Court limited its decision to allow forcible medication of inmates to situations where "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." Id. at 227.
But see Ilissa L. Watnik, Comment, A Constitutional Analysis of Kendra's Law: New York's Solution for Treatment of the Chronically Mentally Ill, 149 U. PA. L. REV. 1181, 1210-11 (2001). Watnik argues that Kendra's Law, which authorizes outpatient commitment without a showing of dangerousness, survives an equal protection challenge because the proper standard is rational basis review, rather than strict scrutiny. Id. However, the author does not fully address whether the right to refuse treatment is fundamental, but bases her analysis on whether the mentally ill form a suspect class. Id. She concludes that they do not. Id. For a more thorough discussion of the law's development in this area, see generally Ellen Wright Clayton, From Rogers to Rivers: The Rights of the Mentally Ill to Refuse Medication, 13 AM. J.L. & MED. 7 (1987).

98 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

99 Teresa L. Scheid-Cook, Outpatient Commitment as Both Social Control and Least Restrictive Alternative, 32 SOC. Q. 43, 55 (1991).

100 Id. Outpatient commitment is the least restrictive alternative, but not simply because the individual is not confined to a hospital. Winick et al., supra note 9, at 102-03. Rather, giving an individual a choice between involuntary medication and involuntary hospitalization enables the patient to choose the alternative that seems least restrictive to him. Id.

101 See Lessard v. Schmidt, 349 F. Supp. 1078, 1097 (E.D. Wis. 1972). Interestingly, the Tennessee civil commitment statute authorizes inpatient commitment if and only if "all available less drastic alternatives are unsuitable to meet the needs of the person." TENN. CODE ANN. § 33-6-502(4) (2007). While this seems to imply, and even to require, that less restrictive alternative means should be used where appropriate before resorting to inpatient commitment, outpatient commitment remains statutorily unavailable prior to hospitalization.

102 TENN. CODE ANN. § 33-1-201 (2007).

103 Id.; see also TENN. CODE ANN. § 33-2-104(3) (2007) (holding up "service in the least restrictive, most appropriate setting" as a core value governing the state's system of voluntary community-based mental health care).

104 See sources cited supra note 18.

105 See sources cited supra note 68.

106 See sources cited supra note 68.

107 KENDRA'S LAW STUDY, supra note 60, at 12. Improvements listed were in comparison with the same individuals' experience before outpatient commitment, at a time when they were not in court-ordered treatment of any kind.

108 Id.

109 Id.

110 Id. at 13. Improvements included better hygiene, higher-quality meal planning and preparation, greater medication compliance, and increased ability to follow daily routines. Id.

111 Id. at 14. Those participating showed a reduction in difficulties in several other areas of interpersonal interaction as well. Id.

112 Id. at 16. This is particularly important because individuals with mental illnesses are at much higher risk of suicide and substance abuse than the population in general.

113 See Cynthia L. Blitz et al., Physical Victimization in Prison: The Role of Mental Illness, 31 INT'L J.L. & PSYCHIATRY 385, 385 (2008).

114 Id.; Virginia Aldigé Hiday et al., Criminal Victimization of Persons with Severe Mental Illness, 50 PSYCHIATRIC SERVICES 62, 62 (1999) [hereinafter Criminal Victimization].

115 KENDRA'S LAW STUDY, supra note 60, at 16-18.

116 Criminal Victimization, supra note 114, at 66.

117 Virginia Aldigé Hiday et al., Impact of Outpatient Commitment on Victimization of People with Severe Mental Illness, 159 AM. J. PSYCHIATRY 1403, 1407 (2002).

118 See, e.g., id. at 1409. Those who are committed on an outpatient basis have lower rates of substance abuse and higher rates of medication compliance in comparison with mentally ill individuals who are not under commitment orders. Id.

119 KENDRA'S LAW STUDY, supra note 60, at 18.

120 Id.

121 Id. at 16.

122 See generally Geller et al., supra note 68; Swartz et al., supra note 68.

123 BED SHORTAGE STUDY, supra note 57.

124 Id. at 2. This figure is based on the number of psychiatric beds available per 100,000 population.

125 Id. at 11.

126 Id. at 2.

127 Id.

128 Id. at 9.

129 Id. at 2.

130 Id.

131 Bill Murphy, Finding Escape Behind Bars: When Jail Is the Only Place Mentally Ill Inmates Get Treatment, They Come Back, and It Costs $87 Million, HOUS. CHRON., July 21, 2008, http://www.chron.com/news/houston-texas/article/To-get-help-mentally-ill-go-in-and-out-of-Harris-1538856.php##page-1.

132 Id. Chief Deputy Mike Smith of Harris County, Texas, said, “We shouldn't be treating our mentally ill in the jails. We should be treating them in the free world.” Id.

133 PRISON STUDY, supra note 46, at 9-10.

134 Id.

135 Id. at 10.

136 Id. at 9. One particularly egregious example of this “frequent flyer” phenomenon is Gloria Rodgers, who was finally committed as an inpatient after an astounding 259 arrests in Memphis. Id.

137 Easter, supra note 11.

138 PRISON STUDY, supra 46, at tbl.1.

139 Id. The nationwide mental hospital bed shortage often pushes the mentally ill into prisons, rather than hospitals, during inpatient commitment. See BED SHORTAGE STUDY, supra note 57 at 12-13. This is true even of people who have committed no crime.

140 See Murphy, supra note 131.

141 TENN. CODE ANN. § 33-6-502(2) (2007) (allowing commitment only if “the person poses a substantial likelihood of serious harm”). The current conditional-release outpatient commitment statute, by contrast, allows outpatient commitment if the person's condition “is likely to deteriorate rapidly to the point that the person will pose a likelihood of serious harm.” TENN. CODE ANN. § 33-6-602(1)(B) (2007).

142 O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975). “A finding of ‘mental illness' alone cannot justify a State's locking a person up against his will [T]here is no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom [T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.” Id. at 575.

143 Courts have generally opined that people with mental illnesses who are neither dangerous nor incompetent have a right to refuse psychiatric medication. See Rennie v. Klein, 720 F.2d 266, 269 (3d Cir. 1983) (restricting the forcible administration of psychiatric medication to "only those mentally ill patients who constitute a danger to themselves or to others"); Rogers v. Comm'r of Dep't of Mental Health, 458 N.E.2d 308, 321-22 (Mass. 1983) (holding that compelling treatment with psychiatric medications is permissible only when an individual is incompetent to make his own medical decisions or poses a threat of harm to himself or others); Rivers v. Katz, 495 N.E.2d 337, 342-43 (N.Y. 1986) (upholding the right of a psychiatric inpatient to decline medication absent a showing of dangerousness or incompetence to make medical decisions); see also In re K.L., 806 N.E.2d 480, 484 & n.2 (N.Y. 2004) (upholding New York's preventive outpatient commitment law only because the law does not authorize involuntary treatment with psychotropic medications).

144 Winick et al., supra note 9, at 102 (stating that although forcible medication is burdensome, "hospitalization involves greater restrictions on one's liberty than medication").

145 Addington v. Texas, 441 U.S. 418, 425 (1979); see also Humphrey v. Cady, 405 U.S. 504, 509 (1972) (calling commitment a "massive curtailment of liberty"); Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) (declaring that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body"), abrogated on other grounds by Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957).

146 Riese v. St. Mary's Hosp. & Med. Ctr., 271 Cal. Rptr. 199, 208 (Cal. Ct. App. 1987) (noting that psychotropic medications have "profound effects—both intended and unintended—on mind and body"). Bruce J. Winick and colleagues spoke movingly of forcible medication as "a deep intrusion into the person's psychic integrity." Winick et al., supra note 9, at 102.

147 Possible side effects include--but are not limited to--weight gain, hypertension, diabetes, sexual dysfunction, increased risk of suicide, dry mouth, upset stomach, dehydration, kidney disease, and liver dysfunction. See JDS PHARMACEUTICALS LLC, LITHOBID PATIENT INSERT REV. 01/2006 (May 4, 2006, 12:43:10 PM), http://www.lithobid.net/pdfs/LIT62604_fullPI_R3.pdf; GLAXOSMITHKLINE, PAXIL PRESCRIBING INFORMATION (2011), http:// us.gsk.com/products/assets/us_paxil.pdf.

148 See O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) ("[A] State cannot constitutionally confine a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.").

149 Riese, 271 Cal. Rptr. at 208 (stating that the right to refuse treatment with these medications "clearly falls within the recognized right to refuse medical treatment").

150 See, e.g., Ken Kress, An Argument for Assisted Outpatient Treatment for Persons with Serious Mental Illness Illustrated with Reference to a Proposed Statute for Iowa, 85 IOWA L. REV. 1269, 1315 (2000) (citing Darryl A. Treffert, Dying with Their Rights On, 130 AM. J. PSYCHIATRY 1041 (1973) (letter)). Kress claims, disturbingly, that even if those meeting the criteria of a preventive outpatient commitment statute have a constitutionally protected right to refuse medical treatment, which he does not concede they do, such a right should not be "enforced" because of the risk of them "rotting or dying with their rights on." Id. The concept of non-enforcement of constitutional guarantees is, of course, not present anywhere in the Constitution.

151 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278-79 (1990).

152 MELTON ET AL., supra note 66, at 337.

153 Kress, supra note 150, at 1300.

154 Concern about future danger, in the absence of present danger, cannot sufficiently justify these kinds of preemptive measures. Winick et al., supra note 9, at 98. "Because of our commitment to liberty and dignity," she insists, "we tolerate a certain amount of insecurity." Id.

155 States can and do, however, civilly and criminally commit discharged sexual predators who pose a risk of reoffending. See generally Kansas v. Hendricks, 521 U.S. 346 (1997). Civil and criminal commitment are fundamentally different in nature, though, and there is no reason to believe that civil commitment would be available even to prevent sexual violence by individuals who have not already

been convicted of a sexual crime, much less to prevent the suffering of a person who has freely chosen not to receive treatment for a mental disorder.

156 MELTON ET AL., supra note 66, at 343. The authors argue that a patient who is not imminently dangerous may interminably pose some risk of becoming dangerous at a future point in time. Id. Thus, even a person whose mental state is well managed could be under continuous outpatient commitment for the remainder of his or her life under the theory that if commitment is discontinued, there is a risk of deterioration. Id. The authors recommend that, at the very least, outpatient commitment orders founded on risk of deterioration should terminate automatically. Id. There is, however, a risk of abuse even with this approach.

157 Easter, supra note 11.

158 See Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [the Supreme Court's] prior decisions.").

159 See id. at 287 (O'Connor, J., concurring); id. at 302 (Brennan, J., dissenting). Representing five Justices, these opinions do not explicitly limit this fundamental right to competent persons. Further, the use of the word "competent" in the opinion of the Court could have been related to the specific subject matter of the Cruzan case, which concerned Nancy Cruzan—a woman in a persistent vegetative state who was obviously not competent to make decisions about medical care because of her condition—and her parents who sought to refuse the offered medical treatment on her behalf. Id. at 261. It is unclear what the Court intended here by using the word "competent." For a more detailed discussion of competency in the mental health treatment context, see generally Grant Morris, Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment, 32 SAN DIEGO L. REV. 343 (1995).

160 See In re Phyllis P., 695 N.E.2d 851, 853 (Ill. 1998) (declaring that "an adjudication of mental illness is not an adjudication of incompetence to direct one's legal affairs"). Deciding whether to receive medical care for one's mental illness certainly seems to be a legal matter.

161 Until adjudicated otherwise, there is a legal presumption in favor of competence for adults. Id. at 852.

162 See Emily S. Huggins, Note, Assisted Outpatient Treatment: An Unconstitutional Invasion of Protected Rights or a Necessary Government Safeguard?, 30 J. LEGIS. 305, 319-20 (2004) (addressing the "constitutional deficiencies" and "procedural failings" of a particular preventive outpatient commitment statute).

163 The Supreme Court, in the context of inpatient commitment, has explicitly condemned this kind of paternalism. See O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (indirectly asserting that the state cannot constitutionally confine the mentally ill "merely to ensure them a living standard superior to that they enjoy in the private community").

164 See Winick et al., supra note 9, at 96-97 (stating by implication that "alleviat[ing] suffering and disability" is not a sufficient reason to compel unwanted medical treatment).

165 Stamford Hosp. v. Vega, 674 A.2d 821, 831 (Conn. 1996).

166 Addington v. Texas, 441 U.S. 418, 426-27 (1979).

167 McKinney, Jr., supra note 27, at 36 (explaining that the restraint on fundamental liberties that is inherent in involuntary commitment proceedings of any kind "demands due process and the assurance that such action will only be taken when legally necessary and appropriate").

168 See Winick et al., supra note 9, at 98 (stating that the potential benefit to the government brought about by medicating non-dangerous individuals "is not a sufficient basis for [preventive outpatient commitment], at least as a general matter").

169 See sources cited supra note 68.

170 See O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); Riese v. St. Mary's Hosp. & Med. Ctr., 271 Cal. Rptr. 199, 208 (Cal. Ct. App. 1987); Rogers v. Comm'r of Dep't of Mental Health, 458 N.E.2d 308, 321-22 (Mass. 1983); Winick et al., supra note 9, at 102; Huggins, supra note 162, at 319.

171 Stambaugh, supra note 85.

172 See discussion supra Part III.C.1.

173 See BED SHORTAGE STUDY, supra note 57.

174 See PRISON STUDY, supra note 46.

End of Document