

**2009-2010 TENNESSEE FAMILY LAW UPDATE:  
DECISIONS THAT AFFECT YOUR PRACTICE  
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**Tennessee Attorneys Memo**

**Materials Prepared by**

**Gregory D. Smith  
Stites & Harbison, PLLC  
401 Commerce Street, Suite 800  
Nashville, TN 37219  
Phone: 615-782-2200  
Gregory.smith@Stites.com**

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# 2009-2010 Family Law Update: Decisions that Affect Your Practice

## CASE LAW UPDATE

2009 was a relatively quiet year on the new law front for domestic cases. The Tennessee Supreme Court, for example, only decided only one case dealing with the rights of parties in a divorce, although it also issued opinions on a termination of parental rights matter, a judicial recusal case that might have some applicability to difficult family cases, and a statutory exemption case that involves the value of a debtor's judgment exemption if that debtor lives with a minor child.

The cases below are divided into various categories, but it is worthwhile to note that several cases were instructive about a variety of issues. Some contain relatively unique fact patterns and decisions; some are useful in reminding us of common principles. Where appropriate, the cases use extensive language from the decisions themselves, and anyone who is interested in obtaining an emailed version of this entire section is welcome to simply send an email to [gregory.smith@stites.com](mailto:gregory.smith@stites.com) asking for the presentation, and one will be sent to you straightaway.

Please note: the starred cases (\*) are not necessarily the most exciting cases of the past year: they simply represent the cases decided since the first of October 2009. So, unlike the original editions of William Goldman's *The Princess Bride*, which had certain sections highlighted in red to help the reader understand the difference between his version ("the good parts version") and the original version of the book by S. Morgenstern, the starred cases (\*) are my effort to identify new cases since the previous version of this presentation was given.

## Alimony

### 1. **Insurance *In Futuro***

*Shooster v. Shooster* (Court of Appeals, March 9, 2009). This is an ordinary case that reminds us of something we often forget: “Pursuant to T.C.A. § 36-5-121(j), the trial court may direct a party to pay the premiums for insurance insuring the health care costs of the other party, in whole or in part, for such duration as the court deems appropriate.” In *Shooster*, the Court of Appeals affirmed a trial court ruling requiring the husband to provide health insurance to wife *in futuro*.

### 2. **When the Shoe is on the Other Foot**

*Deakins v. Deakins* (Court of Appeals, September 30, 2009). It happens once every blue moon: the husband asks for alimony, and then appeals when alimony is not awarded. Last year, we found one case in which a husband was awarded alimony. This year, the husband in *Deakins* tried to be that case. As the husband pointed out, “Wife now lives in a 4,000 square foot home with a value of \$500,000.00 while [he] resides in a one bedroom apartment over a strip mall paying \$410.00 a month, [and a] food bill of \$20.00 a day.” The evidence was clear that the wife had substantial funds, primarily from gifts and inheritances, and that the husband’s ship had not yet come in on that score. However, the testimony also made clear that the husband did not work during the last 10 years of the 24 year marriage, that he primarily drank (until an alcohol intervention a year before the divorce) and played golf, and sometimes took the parties’ son to school. The trial court denied alimony to the husband and the Court of Appeals affirmed:

In summary, the evidence does not preponderate against the trial court's finding that Husband failed to show a need for spousal support. Moreover, we have undertaken a review of the remaining factors and conclude that, overall, they do not support an award of alimony to Husband under the evidence in the record. More specifically, of the remaining factors, only two, in our view, – Wife's ability to pay and the duration of the marriage – lean at all in favor of an alimony award. Again, however, the proof supports the trial court's finding of a clear lack of need – the threshold factor. The evidence does not preponderate against the trial court's decision to deny Husband an award of alimony.

*Id.* I'm sure there is a case out there in which the husband worked and the wife stayed home, the parties stayed married for 24 years, the husband had substantial assets and the ability to pay alimony in some amount, and the court denied alimony to wife on the theory that she could find a job and, besides, she didn't really need alimony because she could get computer training—but I haven't seen that case.

### 3. “Affidavit of Support”

*Baines v. Baines* (Court of Appeals, November 13, 2009). Husband filed divorce complaint against Wife. Wife answered and counter-petitioned for support in accordance with an “affidavit of support” Husband filed with the Immigration and Naturalization Service as part of Wife's permanent residency application. That affidavit provided that Husband would financially support the wife at 125% of the poverty guidelines each year until either (1) Wife dies; (2) Husband dies; (3) Wife permanently departs the United States; (4) Wife is credited with 40 qualifying quarters of work; or (5) Wife becomes a United States citizen. None of these events had occurred at the time of the trial. The trial court held that Husband was bound to provide support in accordance with the affidavit, including back support and attorneys fees, and ordered the Husband to also provide Wife with health insurance for at least 18 months and as long as 36 months, or as long as his policy would allow.

The Court of Appeals noted that there were no Tennessee cases on point, but that other courts had considered and enforced “affidavits of support” in conjunction with divorce actions. As one court noted:

Certain classes of immigrants may be deemed inadmissible including but not limited to, those that may be likely to become a public charge. See 8 U.S.C. § 1182(a)(4). Family-sponsored immigrants seeking admission are admissible only if the person petitioning for the immigrants' admission signs an Affidavit of Support Form I-864. A Form I-864 is a legally enforceable contract between the sponsor and both the United States Government and the sponsored immigrant. See *Schwartz v. Schwartz*, 2005 WL 1242171 at \*1 . . . (W. D. Okla. May 10, 2005). The signing sponsor submits himself to the personal jurisdiction of any court of the United States or of any State, territory, or possession of the United States if the court has subject matter jurisdiction of a civil lawsuit to enforce the Form I-864. See 8 U.S.C. § 1182(a).

*Shumye v. Felleke*, 555 F. Supp.2d 1020, 1022 -1024 (N. D. Cal. 2008). The court also noted that the Form I-864 signed by the Husband stated that “I... acknowledge that a plaintiff may seek specific performance of my support obligation. . . . I may also be held liable for costs of collection, including attorney fees.” The Court of Appeals rejected Husband’s defenses of lack of consideration and unconscionability, as well as his argument that his insurance did not allow him to keep the Wife insured for any time after the divorce, as he did not raise this issue at trial.

#### **4. Modification of Alimony**

*Lane v. Lane* (Court of Appeals, November 17, 2009). Husband earned \$10,000 per month at time of divorce, and less than \$3,000 per month at time of hearing on his petition to modify his \$1,500 per month alimony *in futuro* obligation. The trial court determined that the Husband was willfully underemployed and refused to modify the award, and the Court of Appeals affirmed. Of interest was the Husband’s argument that the Wife’s receipt of a

windfall from the sale of the marital residence awarded to her in the divorce ought to be considered in determining her need for alimony. The trial court and the Court of Appeals rejected this argument, with the appellate court noting that

Wife was awarded the parties' marital home, valued at \$280,000, in the divorce. She sold the marital home for \$500,000, and with the proceeds she purchased her new home for \$295,000.00. We reject Husband's suggestion that the proceeds from the sale of her home decreased Wife's need for alimony. This Court has stated that "[a]ny income produced [from assets] awarded to a spouse in the division of marital property should not be a factor in determining whether or not a change of circumstances existed to warrant a modification of periodic alimony payments." *Richards v. Richards*, No. M2003-02449-COA-R3-CV, 2005 WL 396373, at \*11 (Tenn. Ct. App. Feb. 17, 2005) (quoting *Norvell v. Norvell*, 805 S.W.2d 772, 775 (Tenn. Ct. App. 1990)).

*Id.* at footnote 12.

## **Attorney's Fees**

### **1. Attorney's Fees Per Discretion of Court**

*Moses v. Moses* (Court of Appeals, March 31, 2009). This is a vanilla case, in which the husband appealed complaining that the trial court had improperly valued some assets, had erroneously divided the marital estate \$133,000 to wife and \$90,000 to husband, had mistakenly considered fault in the division of the marital property, had erred in its award of alimony, and had erred in not giving him equal time with the children. The Court of Appeals made short work of all of these issues (including approving the trial court's amendment of a transcript to eliminate the suggestion on the record that the trial court considered fault in the division of property) and awarded the wife her attorneys fees on appeal. In making this award, the court noted that

The decision whether to award attorney's fees on appeal is a matter within the sole discretion of this court. See *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). The appellate courts in this state have set forth the factors that should be applied when considering a request for attorney's fees incurred on appeal. These factors include the ability of the requesting party to pay fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered. See *Dulin v. Dulin*, W2001-02969-COA-R3-CV, 2003 Tenn. App. LEXIS 628, 2003 WL 22071454, at \*10 (Tenn. Ct. App. Sept. 3, 2003) (citing *Folk v. Folk*, 210 Tenn. 367, 357 S.W.2d 828, 829 (Tenn. 1962)). In weighing the above factors in light of the particular facts of this case, we exercise our discretion by awarding Wife her attorney's fees and expenses on appeal. On remand, the trial court will determine a reasonable attorney's fee and expense award for Wife.

*Id.*

## **2. Reasonableness of Fees is a Question for the Court**

*Hansen v. Hansen* (Court of Appeals, October 7, 2009). The Court of Appeals upheld the trial court in most aspects of this case, but remanded the case to determine whether certain fees related to the issue of child support. As the Court noted:

Tennessee abides by the American Rule regarding the payment of attorney's fees. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000). The rule requires litigants to pay their own attorney's fees unless a statute or an agreement provides otherwise. *Id.* One of Mother's theories for recovery of the attorney's fee relies on Tenn. Code Ann. § 36-5-103(c):

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

This statute has been interpreted as allowing for the award of attorney's fees to a party defending an action to change a prior order on the theory that the defending party is enforcing the prior order. See *Shofner v. Shofner*, 232 S.W.3d 36, 40 (Tenn. Ct. App. 2007); *Scofield v. Scofield*, No. M2006- 00350-COA-R3-CV, 2007 WL 624351, at \*7 (Tenn. Ct. App. Feb. 28, 2007). The Court of Appeals has observed that "requiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy." *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992).

Whether to award attorney's fees incurred by a party in enforcing a decree lies within the discretion of the trial court. *Eldridge v. Eldridge*, 137 S.W.3d 1, 25 (Tenn. Ct. App. 2002). A court abuses its discretion when it "either applie[s] an incorrect legal standard or reache[s] a clearly unreasonable decision, thereby causing an injustice to the aggrieved party." *Kline v. Eyrich*, 69 S.W.3d 197, 204 (Tenn. 2002). In light of the fact that Mother's counsel had to prepare for the hearing as if the issue of support would be litigated, we find no abuse of discretion in the trial court's decision to award attorney's fees for that preparation.

The reasonableness of the trial court's fee award is another matter. Some of the fees and expenses awarded do not appear to relate to the defense of Father's petition, and others are unclear. Therefore, we remand the issue of the amount of the fee award back to the trial court with instructions to examine the attorney's fee affidavit and any clarifying affidavit or testimony and to award attorney's fees only for time spent in preparation for defending against Father's petition to decrease child support.

*Id.*

### **3. Attorney's Fees at Trial**

\**Slocum v. Slocum* (Court of Appeals, December 15, 2009). Trial court awarded Wife attorney's fees. Husband appealed. Court of Appeals recognized that the award of attorney's fees is a form of alimony in solido within the discretion of the trial court, but reversed, holding that

Taking into account the factors listed in Tenn. Code Ann. § 36-5-121(i), Wife's need, and Husband's ability to pay, we find that the evidence does not support a finding that Husband has the ability to pay additional alimony *in solido*. After the marital property division, Husband's monthly income was \$3,334.40, including his social security payments and his Air Force retirement fund; Wife's monthly income was \$3,364.45, including her social security payments, rental income, and the BellSouth retirement fund. Weighing Wife's monthly income against Husband's as well as considering the factors at Tenn. Code Ann. § 36-5-121(i)(1), (4), and (5), Wife has not demonstrated that Husband has the ability to pay her counsel fees. Consequently, the award of counsel fees to Wife is vacated and each party is responsible for their own fees.

*Id.*

### **Child Support**

#### **1. Retroactive Child Support**

*Corbin v. Corbin* (Court of Appeals, February 24, 2009). The parties divorced in 1996. In 1999, they submitted to the trial court an agreed order providing that neither party would pay support to the other, but that the father would pay certain expenses on behalf of the children. The mother filed a petition in 2006 to set aside the consent order as void against public policy. The trial court refused to set aside the consent order, and the Court of Appeals affirmed, stating that

Applying all these principles to the case at bar, we conclude that the trial court did not err in awarding retroactive child support only from the date of Mother's counter-petition to modify the consent order. The second consent order entered by the parties in 1999 was not void for lack of jurisdiction or for ruling on an issue outside the pleadings. Furthermore, the consent order was not void based on the fact that it only required Father to pay health insurance, dental, orthodontic, and optical expenses. See *Woodard*, 2006 WL 1343209, at \*3. This is not a case where a parent was completely relieved of responsibility toward the child, as in *Witt* and *Wrzesniewski*. See *Cook*, 2007 WL 295238, at \*2, n.6 (explaining the Court's previous opinion in *Witt*).

*Id. Corbin* contains an excellent discussion of the earlier cases in which courts set aside consent decrees in child support cases, and is recommended reading.

\**K.A.G. v. B.L.I.* (Court of Appeals, November 25, 2009). Father, married to wife, had an affair with mother. The affair produced a child, who the father knew about, took on a couple outings, was photographed with, and was otherwise told about. Fourteen years after the child's birth, the mother filed a petition seeking retroactive support to the date of the child's birth. The trial court held that mother should have retroactive support limited to three years prior to the filing of her petition. The Court of Appeals reversed, noting that

In the present case, the factors set forth in Tenn. Code Ann. § 36-2-311(a)(1)(A)(i) - (iii) are clearly inapplicable. Succinctly stated, that section "only contemplates excusing retroactive child support to the date of birth in circumstances where the father was not aware of the existence of the child." *In re T.K.Y.*, 205 S.W.3d at 355. There is no question in the case before us that Father knew about the Child and his possible, even probable, parentage.

*Id.* This case also contains an excellent discussion of the equitable factors the trial court should consider when child support is sought by the mother years after the birth of the child, when the father was aware that the child was probably his: there are none.

## **2. Everything but the Kitchen Sink**

*Hommerding v. Hommerding* (Court of Appeals, June 15, 2009). Every once in a while you find a case that teaches you a great deal about any number of domestic issues, and *Hommerding* is that kind of case. It addresses:

-- what constitutes a final order for purposes of appeal, whether inherited funds are considered for child support purposes (they are, at an interest or dividend rate determined by the trial court);

-- whether capital gains can be “imputed” from the increase in value of stock held by a parent (no, not until the stock is sold or otherwise disposed of);

-- whether the court can deviate from the guidelines for lack of visitation without making specific findings (no); whether a party who once made \$75,000 as an unlicensed technician should be imputed with that income when she is only making \$29,000 while attempting to get her license (not necessarily);

-- whether the husband could purge himself of civil contempt for having an overnight visitor of the opposite sex by marrying that visitor three weeks before the trial (yes); and

-- whether wife is entitled to post judgment interest on a property division judgment notwithstanding the trial court’s determination that she was responsible for part of the delay in the receipt of that judgment (yes, because post judgment interest is statutory and not subject to equitable defenses).

\**Small v. Small* (Court of Appeals, January 28, 2010). This is another kitchen sink case. In this case, the trial court determined that the Husband was underemployed and had an earning capacity of \$500,000 per year; the Court of Appeals agreed that the Husband was underemployed, but held that his earning capacity was only \$250,000 per year. The trial court found an earning capacity for the Wife of \$36,000 beginning one year after the divorce; the Court of Appeal held that the Wife was capable of earning \$65,000 per year. Accordingly, the trial court’s assessments of alimony and child support against the Husband were reversed and remanded, with instructions to consider the awards in light of the revised earning capacities of each party. The trial court found that several assets which had been spent or used during the course of the divorce proceedings should be assessed to the Husband; the Court of Appeals reversed, finding that the trial court should not divide non-existent assets. The Court of

Appeals upheld certain credibility findings against the Husband, upheld the *nunc pro tunc* entry of certain orders, and upheld the decision of the trial court to require the Husband to maintain insurance for the children until age 22. The Court of Appeals reversed the restrictions on Husband's visitation with his minor daughter. The Court of Appeals also found that the trial court had mistreated certain witnesses of the Husband, and ignored expert and fact testimony, and remanded the case to the trial court with instructions that the issues on remand be heard by a different judge. As the Court of Appeals stated

We are particularly concerned with the court's seemingly cavalier treatment of Ms. Edge and Mr. Riccardi, witnesses called on behalf of Husband, whose testimony the court disregarded without substantial explanation, and we posit whether the court's finding that Husband was not credible colored its duty to dispassionately consider evidence from those as to whom the court made no adverse credibility determination. We are also troubled by the court's combative attitude when Husband's counsel made an oral motion for recusal. Every litigant is entitled to walk into court with the confidence of knowing that their case will be heard by a neutral and detached judge and, more importantly, leave the court with the same confidence.

*Id.*

Stay tuned for Round 2.

### **3. Runaway Child Support**

***In the Matter of T.M. II*** (June 11, 2009). In case anyone gets the idea that the silly season for child support cases has ended, *T.M. II* gives ample evidence that the season is alive and well in Tennessee court. The facts are pretty simple: mom lost custody of a child, who was placed in state custody in February. A petition was filed to set mom's child support. By the time of the hearing on the support issue in April, the child had run away and the state apparently had no idea where to find the child. Mom asserted that she should not have to pay the state to support a child when the state did not actually have care of the child and didn't

know where the child was. As the Court of Appeals stated, “The resolution of the issue presented, as we perceive it, is whether, under Tennessee Code Annotated §37-1-151, a parent is liable for support of a child in the State’s legal custody despite the State’s lack of physical care and control of the runaway child.”

Surprise: the answer is “yes:”

Tennessee Code Annotated § 37-1-151 requires the setting of child support when a child is placed in State custody, and it mandates that child support “shall be retroactive to the date that custody was placed with the State by any order of the court.” Tenn. Code Ann. § 37-1- 151(b)(4)(A)(2005)(emphasis added). The statute allows no exception to the requirement of retroactive support. *State v. Wilson*, 132 S.W.3d 340, 342-43 (Tenn. 2004). Further, it states that the parent’s obligation to pay support begins on the date the child is placed in State custody by “any order of the court.” Thus, it is the court’s order which determines the State’s custody of the child and the parent’s obligation to pay child support. As in *Kirkpatrick*, custody in this case must be construed as the “legal authority” over the child. Nowhere does the statute create an exception when a child has run away. Under Tennessee Code Annotated § 37-1-151, a parent’s obligation to pay child support while their child is in State custody does not end with, and is not interrupted by, the child’s decision to run away.

*Id.* So, you leave your raincoat with the hat check fellow at the Country Club, and come back and the raincoat has disappeared, you don’t have to pay for him to continue to take care of the coat. But, you leave your child with the state of Tennessee, and your child disappears, you keep paying until your child is 18 or the class of which he or she would have been a member at age 18 graduates from high school.

#### **4. Willful Underemployment.**

***Reed v. Steadman*** (Court of Appeals, October 14, 2009). The father was earning \$70,000 per year as a salaried employee of a construction firm. He left that firm, started his own business (which he capitalized with his retirement assets), and began earning about

\$36,000 per year. The trial court found that the father was not willfully underemployed, and the Court of Appeals affirmed. In affirming, the Court of Appeals cited a number of cases where a party took a lower paying job or left a lucrative job, but was not determined to be underemployed. Here, the Court stated that

The evidence does not establish that the father intended to reduce his income as he testified that he hoped to improve his income and standard of living with the growth of his new business. We hold that the mother failed to carry her burden of proof that the father was voluntarily unemployed, and the Trial Court's findings do not preponderate against the weight of the evidence. Tenn. R. App. P. 13(d). Further, we hold the Trial Court did not abuse its discretion in making the child support award.

*Id.*

**\**Stockman v. Stockman* (Court of Appeals, February 22, 2010). Trial court, in setting alimony and child support, found that husband was voluntarily underemployed and that mother was not. Court of Appeals reversed on both counts, finding that husband was not voluntarily underemployed and that wife was voluntarily underemployed. The opinion contains a good discussion of the murky factors that a court must wade through in determining voluntary underemployment.**

## **5. College Expenses**

*Jones v. Jones* (Court of Appeals, November 19, 2009). Mother and father agreed to divided equally the expense of their children's college tuition and books. Mother took a job which provided for a 100% tuition benefit. When father refused to pay half of the tuition on the theory that there was no tuition due and owing, mother sued—and won. The trial court and the Court of Appeals found that mother had taken her job and passed up others that paid more in order to have the tuition benefit, and that, even if no tuition was owed by father to the

school, he owed the money to the mother. The Court also awarded mother attorneys fees for the expenses of the litigation.

## 6. “Necessities” and Credit

*\*State of Tennessee ex rel Debusk v. Debusk* (Court of Appeals, February 14, 2010).

This is a case in which the State of Tennessee intervened because the children had been enrolled in TennCare and the trial court gave the father credit for the payment of certain expenses, including mortgages, against his child support obligation. The State appealed, and the Court of Appeals affirmed the trial court, citing *Paychek v. Rutherford*, No. W2003-01805-COA-R3-JV, 2004 WL 1269313 (Tenn. Ct. App. June 8, 2004) *Paychek* held as follows:

[I]t is well settled that non-custodial parents may be given credit against their child support obligation for payments made on behalf of their children if such payments are for necessities that the custodial parent either failed to provide or refused to provide. *Brownyard v. Brownyard*, 1999 WL 418352 (Tenn. Ct. App. June 22, 1999); *Hartley v. Thompson*, 1995 WL 296202 (Tenn. Ct. App. May 17, 1995); *Oliver v. Oczkowicz*, 1990 WL 64534 (Tenn. Ct. App. May 18, 1990). However, the credit for necessities cannot exceed the amount of support due for the period during which the necessities were furnished. W.Walton Garrett, *Divorce, Alimony and Child Custody* § 14-8(8) (2001). The obligation to provide necessities requires the provision of appropriate food, shelter, tuition, medical care, legal services, and funeral expenses as are needed. What items are appropriate and needed depends on the parent’s ability to provide and this issue is to be determined by the trier of fact. *Id.* at § 2-3(3).

\* \* \*

In order to maintain a successful claim for necessities, the plaintiff must prove: (1) that the child needed the particular goods or services that were provided, (2) that the defendant had a legal obligation to provide the goods or services, (3) that the defendant failed to provide the goods or services, and (4) the actual cost of these goods or services. *Hooper v. Moser*, 2003 WL 22401283, at \*3 (Tenn. Ct. App. Oct. 22, 2003).

*Id.*

In *Debusk*, the result turned partly on the failure of the State, as the appellant, to produce a record that showed the trial court had acted improperly. But the end result was that the father was able to obtain a credit against his child support obligation for

[O]ne-half (½) of the documented monthly mortgage payments paid by him on the parties' tracts of real property, documented payment of premiums for insurance upon said properties, documented payment of taxes upon said properties, and the documented reasonable cost of necessary repairs or maintenance upon said properties as of December 1, 2007....

*Id.*

## 7. UIFSA, Revisited

\**Goins v. Gay* (Court of Appeals, January 21, 2010). Upon petition of the Mother, the trial court entered an order modifying a Texas child support order and changing the support in accordance with the Tennessee Child Support Guidelines. The Father appealed, contending that the trial court improperly assumed jurisdiction and without authority, modified the Texas court child support order. The Court of Appeals reversed as to the child support modification but affirmed on the name change. As the Court of Appeals noted with regard to the modification of child support:

Applying the above section to the instant case, Tennessee did not have subject matter jurisdiction to modify the support order issued by the Texas court. As Father points out, he (the obligor) remains a resident of the issuing state, Texas, and Mother (the obligee), the petitioner, is a resident of Tennessee. Additionally, nothing in the record indicates that the parties filed written consents in Texas, the issuing state, to permit Tennessee to assume continuing, exclusive jurisdiction over the order. As a result, none of the provisions of Tenn. Code Ann. § 36-5-2611(a) are met, and Texas courts retain continuing, exclusive jurisdiction over this child support order.

Reaching a similar conclusion in *Shannon v. Shannon*, W2004-02258-COA-R3-JV, 2005 WL 1315829, at \*4 (Tenn. Ct. App. W.S., May 27, 2005), this court affirmed the trial court's determination that it did not have subject matter jurisdiction to modify a Mississippi child support order. A Tennessee court did not have subject matter jurisdiction to modify the Mississippi child support order under §36-5-2611 where the obligor was a "resident of Mississippi and the petitioner. . .is not a nonresident of Tennessee, and where the parties have not filed written consent in the Mississippi court. . . ." Here, the trial court did not have subject matter jurisdiction to modify the Texas child support order.

*Id.*

## Civil Procedure

### 1. Recusal

*Bean v. Bailey*, (Tenn. Sup. Ct. March 26, 2009). In *Bean*, the plaintiff requested recusal of the presiding judge based on a history of antagonism between plaintiff's counsel and the court. This history included charges by the judge of alleged ethical and criminal conduct against the plaintiff's counsel, the failure of the judge to rule on a recusal motion in one case for a number of years, and a host of other problems. The Supreme Court held that, in this case, recusal was the proper remedy, and that it was empowered to issue the recusal

order without the necessity of remanding the case back to the trial judge for a decision. The Supreme Court noted that

After a thorough review of the record, we believe that the past acrimonious relationship between Judge Wilson and members of Mr. Rogers' law firm provides a reasonable factual basis for doubting Judge Wilson's impartiality. Judge Wilson requested twice that the T.B.I. investigate Mr. Rogers for criminal conduct and accused Mr. Rogers and members of his firm of tampering with political polls and having knowledge of a wiretap on Judge Wilson's phone. Both Judge Wilson and Mr. Rogers filed claims for misconduct against one another. Numerous hostile meetings took place between Judge Wilson and members of Mr. Rogers' firm, and further, the public had knowledge of the parties' antagonistic relationship.

Reviewing the quantity and quality of these contacts between Judge Wilson and members of Mr. Rogers' law firm, we are unconvinced that the passage of time removes the appearance of bias and prejudice.

In this case, we conclude that a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the ability of Judge Wilson to be fair and impartial.

We therefore disqualify Judge Wilson from this case and remand this case to the presiding judge of the Third Judicial District for reassignment pursuant to Tennessee Supreme Court Rule 11, VII(c). We take no position regarding Judge Wilson's presiding over other present or future cases involving Mr. Rogers' law firm. Should motions for recusal be filed in other cases, Judge Wilson should exercise his discretion to either grant or deny them in a manner consistent with this opinion.

*Id.*

***Bishop v. Bishop*** (Court of Appeals, May 7, 2009). Gamesmanship only gets you so far in recusal motions. From the Court of Appeals' own summary:

In February 2004, Melissa Ann Bishop (“Wife”) filed a complaint for divorce from Richard W. Bishop (“Husband”) following a lengthy marriage. The lawsuit was filed in the Fourth Circuit Court for Knox County, Judge Bill Swann presiding. Wife was represented by the law firm of Lockridge and Valone, PLLC, from the outset, through trial, and for much of the post-trial litigation. This representation lasted for over three years. Much of the legal work on Wife’s behalf was performed by attorney Russell Egli (“Egli”), an associate at Lockridge & Valone, PLLC, who left that firm in August 2006 to start his own law firm.

Prior to a hearing scheduled for March 2007, Wife discharged the law firm of Lockridge & Valone, PLLC. Wife retained Johnny Dunaway as her new attorney and sought a continuance of the March 2007 hearing because of her change of attorneys. In support of her request for a continuance, Wife filed an affidavit stating that the reason for the discharge of her attorneys was the fact that Mr. Lockridge “sent younger, less experienced associates, who were unprepared to represent me at various stages of the proceedings.” One of these associates was Egli.

After leaving Lockridge & Valone, PLLC, and starting his own firm, Egli’s wife filed a separate lawsuit against Judge Swann. Egli represents his wife in this other lawsuit. After several adverse rulings in her divorce case, Wife rehired Egli and immediately filed a motion to recuse. Wife claimed that Judge Swann had a conflict of interest based on the fact that Egli was representing his (i.e., Egli’s) wife in a separate lawsuit filed against Judge Swann. Judge Swann denied the motion to recuse after finding that the only reason Wife rehired Egli was to create a conflict of interest and obtain a new judge to hear any remaining issues. We granted a Tenn. R. App. P. 10 interlocutory appeal to determine whether the Trial Court erred when it denied Wife’s motion to recuse. We affirm the judgment of the Trial Court.

*Id.*

## **2. Homestead Exemption**

*In re Hogue and Hogue* (Tenn. Sup. Ct. July 2, 2009). For years, the Tennessee homestead exemption has been a paltry sum of between \$4,000 and \$7,500. This is the amount that a debtor may claim as exempt from claims of creditors, whether in bankruptcy

courts or in other debtor/creditor matters. However, the exemption statute has recently been amended to allow debtors to claim exemptions in the equity in their homes of up to \$25,000, if they reside in the home with minor children. And, the Supreme Court held this year, that exemption amount doubles to \$50,000 if the debtors are joint debtors. “Tennessee Code Annotated section 26-2-301(f) allows each of two individuals who are married and have custody of a minor child to claim a \$25,000 homestead exemption on real property that each owns and uses as a principal place of residence.” *Id.*

### 3. Rule 60

*Mason v. Mason* (Court of Appeals, March 3, 2009). In this case, the Court of Appeals affirmed a trial court’s dismissal of Rule 60 action by the husband, holding that the dismissal was within the discretion of the trial judge. The court held that

No complaint is made by Mr. Mason that the final decree itself is void or the product of any action or activity that goes against the integrity of the judgment itself, e.g., fraud or misconduct; rather, the concern of Mr. Mason relates only to the interpretation and operation of a specific paragraph of the MDA. The “defect” asserted by Mr. Mason goes to the question of whether the terms in paragraph 13 accurately reflect the agreement reached between the parties; as such, the court is presented with a contract question rather than an issue of whether the judgment itself is valid or should be modified. The language of Rule 60.02 as well as the law is clear that the availability of relief under the rule does not preclude the filing of a separate action attacking the judgment or seeking relief therefrom. *See Trice v. Moyers*, 561 S.W.2d 153, 156 (Tenn. 1978) (“The filing of a separate or independent suit in equity for relief from a judgment is recognized as a permissible remedy under Rule 60.02”).

*Id.* Stay tuned next year for the outcome of the “separate or independent suit in equity...”

### 4. Appellate Rules

*Moore v. Moore* (Court of Appeals, February 12, 2009). The Court of Appeals called it “irony.” There might be a more descriptive word for it: the father appealed from a

contempt order, but failed to file a transcript or statement of evidence with the trial court in a timely manner. The Court of Appeals issued a show cause order requiring the father to show cause why he had not filed a transcript or statement of the evidence, and the father asked for and was given additional time to file a statement. The father then let that deadline pass, and the court dismissed the appeal. The father then filed a motion to set aside the order of dismissal, and the court of appeals granted the motion to allow a late filed statement of the evidence. When the mother did not timely respond to the late filed statement, the father sought to have her statement of evidence stricken. The trial court denied this motion, and the father appealed. The Court of Appeals dismissed father's appeal on this issue.

*Nieman v. Nieman* (Court of Appeals, August 27, 2009). The primary issue in *Nieman* concerned the husband's obligation to pay alimony, but the Court of Appeals also addressed the question of whether the trial court could hear a request by the husband to modify his child support and alimony obligation pending an appeal of an order that had already decided those issues. The Court of Appeals noted that

Lastly, Husband asserts that the trial court erred in denying his Motion for Decrease in Child and Spousal Support Upon a Material Change in Circumstances on the basis that the trial court lacked jurisdiction to modify a final order that was pending on appeal. In the motion, Husband contended that there was a "substantial and material variance in the defendant's income such that he requests modification of his child and spousal support obligations" and requested that the trial court "grant a reduction in child support based upon the child support guidelines and a reduction in rehabilitative alimony."

To support his argument that the trial court had jurisdiction while the Final Decree of Divorce was pending on appeal, Husband relies on Tenn. R. Civ. P. 62.03, titled "Relief Pending Appeal," which states that:

When an appeal is taken from an interlocutory or final judgment in actions specified in Rule 62.01 or in action for alimony or child support, the court in its discretion may suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal and upon such terms as to bond or otherwise as it deems proper to secure the other party.

Tenn. R. Civ. P. 62.03 (emphasis added); *Young*, 971 S.W.2d at 393 (holding that “[t]he express language of [Tenn. R. Civ. P. 62.03] gives the trial court the discretion to suspend or grant whatever relief is deemed appropriate during the pendency of an appeal in an action for alimony or child support”).

In his motion, Husband sought a permanent change in child and spousal support pursuant to Tenn. Code Ann. § 36-5-101(g)(1)3 and Tenn. Code Ann. § 36-5-121(a),<sup>4</sup> rather than a temporary change effective only during the pendency of this appeal. Thus, Tenn. R. Civ. P. 62.03 is not applicable to the present matter. “[O]nce a party perfects an appeal from a trial court’s final judgment, the trial court effectively loses its authority to act in the case without leave of the appellate court.” *First Am. Trust. Co. v. Franklin-Murray Dev. Co., L.P.*, 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001) (footnote in original).

We are of opinion, however, that the trial court had jurisdiction to consider the motion, since Husband specifically sought relief under Tenn. Code Ann. §§ 36-5-101(g)(1) and 36-5-121(a), based on the difference in the currency conversion rate between the date of trial and the date of the motion. Thus, Husband was not seeking to modify the order that was on appeal based on circumstances existing at the time of trial but, rather, sought to have the court set child and spousal support based on what was alleged to be a significance variance between the amount of child support he had been ordered to pay and the applicable guidelines and, with respect to spousal support, a material change in circumstance.

As noted by the court in *Hannahan v. Hannahan*, 247 S.W.3d 625 (Tenn. Ct. App. 2007): "After a divorce decree becomes final, a marital dissolution agreement becomes merged into the decree as to matters of child support and alimony, and the trial court has continuing statutory power to modify the decree as to those matters when justified by changed circumstances." 247 S.W.3d 625, 627.

*Id.*

**5. De Novo Means De Novo**

**Green v. Green** (Court of Appeals, February 11, 2009). The parties litigated a dependent and neglect petition before the Juvenile court. The father sought to have the children found dependent and neglected and custody transferred to him. The children were found dependent and neglected by the Juvenile court, and the mother appealed to Circuit Court. The Circuit Judge found that the conditions which led to the finding of dependency and neglect by the Juvenile Court had been remedied (the mother had married a convicted sex offender and then divorced him), and dismissed the dependency and neglect petition and returned the children to the mother's care. The father appealed.

The Court of Appeals first set out the statutory scheme that led to this question, that is:

Accordingly, once jurisdiction is acquired in a dependency and neglect proceeding, the jurisdiction continues over the child until one of the following four events: (1) the petition is dismissed, (2) the case is transferred, (3) an adoption petition is filed, or (4) the child reaches 18. *In re D.H.Y.*, 226 S.W.3d at 330. Neither adoption nor transfer is at issue in this case and the children remain minors. Therefore, only dismissal is relevant to the arguments herein. As discussed earlier herein, Tenn. Code Ann. § 37-1-129(a)(1), provides that “[i]f the court finds that the child is not a dependent or neglected child . . . , it shall dismiss the petition and order the child discharged from any detention or other restriction theretofore ordered in the proceeding.” (emphasis added). Once a court dismisses a dependency and neglect petition, then the court loses jurisdiction. *Toms v. Toms*, 98 S.W.3d 140, 143-44 (Tenn. 2003); *In re E.P.*, 2005 WL 3343807, at \*3 - 4.

*Id.* The Court of Appeals then found that the Circuit Court's review of a Juvenile Court decision is de novo, which, while requiring the record from the Juvenile Court, is not bound by the decision of the Juvenile Court. As the Court of Appeals stated,

While the record of the juvenile court proceedings is required to be provided to the circuit court on appeal, Tenn. Code Ann. § 37-1-159(c), the circuit court is not limited to that record. On Our courts have also analogized the de novo trial of Tenn. Code Ann. § 37-1-159(a) with the appeal of proceedings before a juvenile court referee to a juvenile court judge in Tenn. Code Ann. § 37-1-107(e) which merely references a “hearing.” *Kissick v. Kallaher*, 2006 WL 1350999, at \*2-3. In *Kelly v. Evans*, the court held that the “hearing” contemplated by Tenn. Code Ann. § 37-1-107(e) was a hearing like in a general sessions appeal to a circuit court and not an appeal merely upon the record. *Kelly v. Evans*, 43 S.W.3d 514, 515 (Tenn. Ct. App. 2001).

To the contrary, the circuit court in a dependency and neglect proceeding may not rely solely on the record made before the juvenile court, but under Tenn. Code Ann. § 37-1-159(c) must try the case de novo by hearing witnesses again and by rendering an independent decision based on the evidence received in the circuit court proceeding. *Tennessee Dept. of Children’s Services v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006); *In re M.J.B.*, 140 S.W.3d at 651; *In re M.E.*, M2003-00859- COA-R3-PT, 2004 WL 1838179, at \*5 (Tenn. Ct. App., August 16, 2004) (perm. app. denied Nov. 8, 2004).

Black’s Law Dictionary defines a de novo trial as “[a] new trial on the entire case – that is, on both questions of fact and issues of law - conducted as if there had been no trial in the first instance.” *Kissick v. Kallaher*, W2004-02983-COA-R3-CV, 2006 WL 1350999, at \*3 (Tenn. Ct. App. May 18, 2006) (no Tenn. R. App. P. 11 application filed). Consequently, the circuit court is not “reviewing” the juvenile court’s decision; instead, it is conducting a new proceeding as though the petition were originally filed in circuit court.

*Id.* As summarized by the Court of Appeals, “The matter is tried as though no other trial had occurred.” In this case, the trial court found that the children were not dependent and neglected at the time of its trial, and, as required by statute, immediately dismissed the dependency and neglect petition and returned the children to the mother, “there existed no legal basis for any custody order that differed from the one in effect before the petition was filed.” The Court of Appeals affirmed.

One final note: the Court of Appeals also addressed the issue of whether attorneys fees are available in dependent and neglect proceedings, and found that they are: “This court has found that Tenn. Code Ann. § 36-5-103(c)15 authorizes award of attorneys fees in a dependency and neglect action between two parents who had entered into a court decree governing custody. *Shofner v. Shofner*, 232 S.W.3d 36, 38-39 (Tenn. Ct. App. 2007).”

**6. Don’t Substitute Rule 60 for an Appeal (or “Slumberin’ on the Cumberland”)**

*Nagy v. Dubois* (June 26, 2009). In this case, the trial court, after a divorce in 2003, heard and decided a motion by the husband to impose a tax obligation on the wife for a share of the parties’ 2002 joint tax obligation owed to the IRS. The court ordered the wife to pay \$18,762 for her share of the tax obligation, which husband claimed at trial exceeded \$40,000. The wife did not appeal or request a new trial. However, seven months later she filed a Rule 60 motion asserting that the *unpaid* portion of the parties’ taxes totaled only \$21,000, and that ordering her to pay \$18,762 of this amount was in error.

The Court of Appeals noted that “Wife presents some arguments that appear sound regarding why she should not have been held liable to Husband for \$18,762,” but denied her relief. In doing so, the court held as follows:

Wife has made no showing of the type of mistake, inadvertence, surprise or excusable neglect that would rise to a level justifying relief under Tenn. R. Civ. P. 60.02(1). In addition, Wife has shown no reason why she was justified in failing to avoid the mistake she now alleges occurred. Wife could have attempted to correct the alleged mistake by filing a timely motion to alter or amend the judgment or by taking a timely appeal of the Trial Court's December 7, 2007 order, but she chose not to take these steps. Additionally, Wife also has made no showing of fraud, misrepresentation, or other misconduct by Husband as required by Tenn. R. Civ. P. 60.02(2). What Wife instead has presented is her argument that the Trial Court erred in its December 7, 2007 Order. The correction of such a claimed error by a trial court is what an appeal is designed to address but is not the purpose of a Rule 60.02 motion.

Rule 60.02 is not for use by a party merely because he or she is dissatisfied with the results of the case. *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991); *NCNB National Bank of North Carolina v. Thrailkill*, 856 S.W.2d 150, 153 (Tenn. Ct. App. 1993). Wife is attempting to file a late appeal utilizing Rule 60.02 without any showing that she is entitled to relief under Rule 60.02. The purpose of Rule 60.02 is not to allow a party who has slumbered on her rights to take a late appeal. As our Supreme Court has stated more than once: "a party remains under a duty to take legal steps to protect his own interests." *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 625 (Tenn. 2000) (quoting *Banks v. Dement Constr. Co.*, 817 S.W.2d 16, 19 (Tenn. 1991)). Wife did not take steps to correct the alleged error in the December 7, 2007 order in a timely manner and has made no showing of why she could not have done so. Any such alleged mistake was just as apparent to Wife on December 7, 2007 as it was on July 1, 2008.

*Id.* (By the way, this case came out of East Tennessee, so the Cumberland River had nothing to do with it. However, it sounded better than anything I could find to rhyme with "Watauga.")

## 6. Notice of Hearing

\**Tatum v. Tatum* (Court of Appeals, December 10, 2009). Husband filed divorce complaint. Complaint served on Wife. Husband filed motion for default and noticed default

hearing for October 24. Hearing actually heard on October 23. Wife did not appear for October 23 hearing. Default granted. Wife appealed. Husband argued that Wife's failure to appear on October 24 was evidence that Wife had no intention of appearing on October 23. Court of Appeals overturned default judgment and ordered case tried on the merits on all issues. Court held that

Rule 55.01 implicitly requires that the notice sent to the party against whom a default judgment is sought convey the *correct* hearing date. Thus, the notice afforded to Wife in this case did not meet the required procedural safeguards of Rule 55.01. Accordingly, based on the above cited cases, we find that the default judgment against Wife is void, rather than voidable, as it was issued with insufficient notice, which was evident from the face of the notice. Because of the facially insufficient notice, we need not address the issue of excusable neglect under Rule 60.02.

*Id.*

## 7. Marriage by Estoppel

**\*Farnham v. Farnham (Court of Appeals, December 29, 2009).** Get out your thinking caps for this one. It wasn't so long ago that the Tennessee Supreme Court overturned a Court of Appeals decision in *Guzman* to reject the idea of "marriage by estoppel." In *Farnham*, the Court of Appeals found, although not in so many words, a marriage by estoppel where the parties had been married in Florida prior to Wife's divorce in Massachusetts becoming final, and then stayed married for 17 years before Husband sued Wife for divorce. Husband sought to have the marriage declared *void ab initio* on the ground that the parties did not have a valid marriage, since the Wife was married to another husband at the time of her marriage to this Husband. The trial court found that, since the defects in the marriage would have been cured under Florida and Massachusetts law, the marriage was valid under Tennessee law, in part because "a marriage valid where celebrated is valid everywhere." (I

suspect we will have a Massachusetts case or two in the future that will really test the validity of those words.) The Court of Appeals noted that

In short, the *Guzman* Court held that “the applicable statutes, our prior case law, and the public policy of this state prohibit the application of the marriage by estoppel doctrine to void, bigamous marriages.” *Id.* Husband insists that *Guzman*’s holding applies to prevent the parties’ Florida marriage by estoppel from being recognized in this state. We disagree.

The overriding problem with the “marriage” at issue in *Guzman* was that there was no evidence that it was ever recognized as valid as a marriage by estoppel or under any other theory of Mexican law. Stated differently, the validity of the marriage in *Guzman* was entirely dependent on the application of Tennessee law and, as the Supreme Court observed, Tennessee does not permit a marriage by estoppel in the case of a void, bigamous marriage.

For these reasons, the Tennessee Supreme Court refused to apply principles of estoppel to validate a marriage that was void under the laws of the jurisdiction where it was entered into. To the contrary, the present case involves a marriage that is recognized as valid under Florida law, where it was celebrated, as well as Massachusetts law, where the parties also lived together as husband and wife.

In our view, the trial court properly gave full faith and credit to the laws of our sister states. In our view, there is no question that under the circumstances of this case, the trial court properly found that the parties’ 17-year union was a valid marriage recognizable as such in Tennessee.

*Id.*

## **8. Failure to Appear**

\**Moore v. Givler* (February 24, 2010). Mother sought 18 years of back support for child. Father answered, admitted paternity, but denied that mother was entitled to back support. Mother failed to appear at hearing. Trial court dismissed case. Mother appealed. Court of Appeals affirmed, finding that there was no showing of an abuse of discretion by the trial court.

## 9. **Juvenile Court Appeals-Dependent and Neglect Proceedings**

*\*In re Hannah* (Court of Appeals, February 12, 2010). Parties engaged in a contested dependent and neglect proceeding in Juvenile Court. Child was found dependent and neglected in an adjudicatory hearing. No appeal was filed from the decision in the adjudicatory hearing. Later, a dispositional hearing was held. One party filed a timely appeal from the decision after the dispositional hearing. Circuit Court dismissed appeal from the adjudicatory hearing on the ground that it was not filed within 10 days of the entry of the order on the adjudicatory hearing, but allowed the appeal from the dispositional hearing because it was filed within 10 days of the entry of the order on the dispositional hearing. Court of Appeals reversed: dependent and neglect proceedings have two phases: adjudicatory and dispositional. Both phases are part of the same action. Only one appeal need be filed. A timely appeal from the dispositional hearing decision is a timely appeal from the adjudicatory decision.

## **Contempt**

### 1. **Don't Say It—Don't Even Think of Saying It!**

*Simmons v. Simmons* (Court of Appeals, March 27, 2009). This is a criminal contempt case in which the husband was found guilty of two separate counts of criminal contempt and sentenced to two days in jail on each count. The husband appealed, and the court of appeals addressed each count separately. The trial court had previously expressed dissatisfaction with the actions and attitude of the husband toward court orders, so the first contempt finding, while disputed by the husband because he believed he was at worst guilty of a civil contempt rather than a criminal contempt, was relatively easy.

The second contempt finding was a little more difficult, but again was upheld by the Court of Appeals. The second contempt arose from the allegation that the husband had violated a court order which provided that “[Husband]. . . is heretofore [sic] enjoined and restrained from saying anything negative to the minor children regarding his living situation or financial situation. . . . He is further enjoined and restrained from saying anything negative about [Wife] . . . to the parties’ minor children.” The husband later told his wife in a tape recorded conversation “I can say anything I want to my kids.” Although there was no evidence introduced at the hearing that he had said anything to his children about his living situation or financial situation, or anything negative about the wife, the Court held that “[Husband] cannot say anything he wants to his kids and that is specifically provided for in the previous orders of this Court. . . .” The result: two additional days in the slammer, to run concurrently with the first two days. The Court of Appeals held that

His argument is that the cited words were not specifically prohibited by the court’s April 5 order and that he did not speak to his children of matters specifically prohibited in the order. The order holding Husband in contempt, however, found that the content of the statement showed contempt for the court, *i.e.*, that, in accordance with the plain language of the April 5 order, he was not able to say “anything I want” to his children, but that statements to them regarding certain matters were prohibited.

Courts in Tennessee are permitted to punish, as contempt of court, the “willful disobedience or resistance of any . . . party . . . to any lawful . . . order, . . . or command of such courts.” Tenn. Code Ann. § 29-9-102(3). As noted above, we do not substitute inferences we might draw from facts for those drawn by the trial court. *Johnston, supra*. Having found sufficient evidence to support the trial court’s finding that Husband made the statement which served as the basis of the finding of contempt, we cannot say that the trial court’s determination that the fact that Husband made the statement constituted sanctionable contemptuous conduct on his part was error. The trial court had a long history with Husband, observed him at the hearing, and heard the tape of the telephone conversations where the statement was made. The sentiment expressed in Husband’s remark, along with the history of Husband’s resistance to the orders of the court, supports an inference that the statement constituted resistance to the court’s order.

*Id.* The lesson for your clients: Not only can they not say things that are prohibited by court orders, they cannot obliquely threaten to say such things.

## 2. You Had to be There...

*Yates v. Yates* (Court of Appeals, May 25, 2009). The wife was charged with an conviction of criminal contempt, although she did not appear for the hearing on the contempt action. (She instead sent a letter to the court stating that she was under the care of a physician and could not attend.) The wife was convicted of criminal contempt and appealed. The Court of Appeals reversed, finding that

In *State v. Far*, 51 S.W.3d 222 (Tenn. Crim. App. 2001), the Court held that “Rule 43 only allows a trial in absentia when the defendant is first present at trial and then leaves, voluntarily or otherwise.” *Id.* at 227. In *Denton v. Phelps*, No. E2005-00101-COA-R3-CV, 2005 WL 2546921 (Tenn. Ct. App. Oct. 12, 2005), a motion for criminal contempt was filed alleging that the defendant had violated an Order of Protection. *Id.* at \*1. The defendant did not appear at the hearing and was convicted in absentia. *Id.* at \*2. Because the defendant was “not first present at trial,” the court followed the ruling in *Far* and reversed the trial court’s judgment. *Id.*

In the present case, Wife was not first present at the criminal contempt hearing but was nonetheless convicted of several counts of criminal contempt. Following *Far* and *Denton*, we find that the trial court violated Tenn. R. Crim. P. 43. Accordingly, the trial court's judgment finding Wife in criminal contempt is reversed.

*Id.*

### **3. Criminal versus Civil Contempts**

*Cansler v. Cansler* (Court of Appeals, February 1, 2010). This is a case, says the Court of Appeals, in which the original trial judge recused himself, most likely because of “understandable frustration over the inability of the parties to even remotely get along and the filing of a continuous stream of petitions for contempt...” The case contains a thorough discussion of the difference between civil and criminal contempt, and the ability of a trial judge to modify a sentence of criminal contempt (it can do so, as can the Court of Appeals itself.)

## **Division of the Marital Estate**

### **1. Guns and Roses and Transmutation**

*Hagler v. Hagler* (Court of Appeals, March 31, 2009). *Hagler* is of interest for two reasons. First, the Court of Appeals reversed the award by the trial court of a 30/30 rifle, a .38 pistol and a .45 revolver to the parties' eight-year-old son, on the ground that the fact the weapons were kept in a locked safe and the child did not have access to the safe without the consent of the parents suggested that the “gift” of these guns to the child had not been completed. Second, the Court of Appeals affirmed the trial court's determination that certain real property gifted to the husband by his parents had been transmuted into marital property,

because the parties used the property as their marital residence and the wife had contributed to its upkeep and improvement. The Court of Appeals held that

The property was deeded to the husband by his parents, and both parties admitted that it was a gift. As such, it would be considered the husband's separate property pursuant to Tenn. Code Ann. §36-4-121. The courts of this State, however, have recognized that separate property may become marital property by transmutation, if it is "treated in such a way as to give evidence of an intention that it become marital property". *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002). This Court has explained that:

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.

*Fox v. Fox*, 2006 WL 2535407 (Tenn. Ct. App. Sept. 1, 2006) (citations omitted). In this case, the property was never titled jointly, but the evidence supports the Trial Court's conclusion that this property should be treated as marital. The 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. The evidence shows that this property was intended to be part of the marital estate, and the evidence does not preponderate against the Trial Court's findings.

*Id.*

*Anderson v. Anderson* (Court of Appeals, November 3, 2009). Trial court held that property owned by husband prior to marriage became marital when wife signed refinancing note and the parties paid the mortgage over the 16 year life of the marriage. The Court of Appeals affirmed, stating that

Whether an asset is separate property or marital property is a question of fact. *Cutsinger v. Cutsinger*, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995). The trial court's findings of fact are reviewed de novo with a presumption of corrections unless the evidence preponderates otherwise. *In re Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); Tenn. R. App. P. 13(d). Based on the fact that Ms. Anderson signed the note which allowed Mr. Anderson to refinance and improve the Brick Church Pike property and helped him make the payments, we cannot find that the evidence preponderates against a finding that the brick Church Pike property became marital property by transmutation.

*Id.*

## 2. Division of Retirement Plans

*Snodgrass v. Snodgrass* (Supreme Court, October 5, 2009). The Supreme Court affirmed in part and reversed in part a decision by the Court of Appeals concerning the division of a 401(k) accumulated during the marriage. The Court's summary stated that:

We granted permission to appeal in this divorce case to address whether a spouse's 401(k) account is a "retirement or other fringe benefit right[] relating to employment" under Tennessee Code Annotated section 36-4-121(b)(1)(B) such that any increase in the account's value that accrues during the marriage is marital property. We hold as follows: (1) the parties' 401(k) accounts are "retirement or other fringe benefit rights relating to employment"; (2) the entire net amount by which the parties' 401(k) accounts increased in value during the period of the parties' marriage is marital property; (3) the premarital balances in the parties' 401(k) accounts remain their separate property; (4) Husband did not transmute his entire 401(k) account to marital property when he made a single withdrawal for marital purposes; and (5) the trial court correctly divided the parties' defined benefit pensions by reference to the monthly income each spouse was receiving rather than by reference to the present cash value of each spouse's pension. The judgment of the Court of Appeals is affirmed in part and reversed in part.

*Id.* The language of the decision reiterates this summary:

We clarify today that 401(k) accounts held through a spouse's employer are "retirement or other fringe benefit rights relating to employment." Accordingly, net gains from any source accruing in such accounts during a marriage are all marital property within the meaning of the second clause of section 36-4-121(b)(1)(B),<sup>15</sup> and it is not necessary to consider the relative contributions of the parties to the increase in value. Also, we agree with the parties that the balances that existed in each of their 401(k) accounts as of the date of their marriage remain their separate property."

*Id.* The Supreme Court went on to note that the decision only clarifies what is marital property, not how that property ought to be equitably divided.

Additionally, *Snodgrass* looked to the question of whether Husband's withdrawal of \$180,000 from his 401(k) transmuted the entire 401(k) into marital property, on the theory that it was impossible to tell whether the \$180,000 came from separate assets or marital assets. The trial court did not address this issue, because it found that all of the 401(k) was marital; the Court of Appeals found that there was transmutation; the Supreme Court reversed, holding that

We agree with the reasoning of the *Avery* court. At the time Husband withdrew the \$180,000 from his 401(k) account, it totaled more than \$2,000,000, including his premarital balance of approximately \$54,000. Obviously, there was more than sufficient marital property in the account to support the withdrawal. There is no basis for concluding that Husband's withdrawal of the \$180,000 for the marital home transmuted his premarital balance into marital property. Certainly, there is no proof that Husband intended that result. The Court of Appeals therefore erred in concluding that Husband's entire 401(k) account became marital property upon his withdrawal of the \$180,000 for marital purposes. Husband is entitled to the balance that existed in his 401(k) account at the time he married as his separate property.

*Id. Avery v. Avery*, No. M2000-00889-COA-R3-CV, 2001 WL 775604 (Tenn. Ct.

App. July 11, 2001). The Supreme Court cited with approval *Avery*'s reasoning that "we think it would be bad policy for a court to hold that a party risks all of his or her separate property by spending some of it for the benefit of his or her family." *Id.* at \*9 n.12.

***Lund v. Lund*** (Court of Appeals, March 19, 2009). This is a case concerning the division of two retirement plans which increased in value over the course of a marriage. (For those of you who are immediately jealous of or suspicious of such a thing occurring, it is worthwhile to note that the case was tried in June 2007.) The first plan was an annuity that was worth \$26,000 at the time of the marriage and \$450,000 at the time of the trial, of which \$258,000 represented the original value of the annuity plus interest. The Court of Appeals overturned the trial court's equal division of all accumulation on the husband's annuity during the course of the marriage and held that

In the present case, as in *Pedine*, "while Wife no doubt fulfilled her role of homemaker, there is absolutely no evidence that she contributed in any way to the appreciation of Husband's separate [annuity]. Any increase in value was purely market-driven." *Pedine*, 2009 WL 585943, at \*6. We agree with Husband that the Trial Court incorrectly determined the amount of Husband's separate property contained in the annuity. The judgment of the Trial Court is modified to reflect that of the \$453,331.78 contained in Husband's annuity at the time of trial, \$258,842.74 is Husband's separate property, and the remaining \$194,489.04 is marital property subject to equitable distribution.

*Id.* With regard to the second plan, which was a TVA pension plan, the Court of Appeals found that the appropriate method of dividing a pension plan is by the deferred distribution method earlier described by the Tennessee Supreme Court in *Cohen v. Cohen*. The court noted as follows:

In *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996), our Supreme Court explained the deferred distribution method of dividing uncertain retirement benefits as follows: In other circumstances in which the vesting or maturation is uncertain or in which the retirement benefit is the parties' greatest or only economic asset, courts have used the "deferred distribution" or "retained jurisdiction" method to distribute unvested retirement benefits. This method has distinct advantages when the risk of forfeiture is great. *Kendrick v. Kendrick*, 902 S.W.2d at 927.

Under such an approach, it is unnecessary to determine the present value of the retirement benefit. Rather, the court may determine the formula for dividing the monthly benefit at the time of the decree, but delay the actual distribution until the benefits become payable. *In re Marriage of Brown*, 126 Cal. Rptr. at 639, 544 P.2d at 567; *In re Marriage of Gallo*, 752 P.2d at 55; *Deering v. Deering*, 437 A.2d at 891; *Janssen v. Janssen*, 331 N.W.2d at 753.

The marital property interest is often expressed as a fraction or a percentage of the employee spouse's monthly benefit. The percentage may be derived by dividing the number of months of the marriage during which the benefits accrued by the total number of months during which the retirement benefits accumulate before being paid. *Kendrick v. Kendrick*, 902 S.W.2d at 927 n. 17.

For example, if retirement benefits had accrued during ten years of a twelve year marriage, and if the benefit payments would be payable at the end of twenty years, the ratio would be 120/240. Fifty percent of the potential benefit would be marital property. The trial court would then make an equitable division of that fifty percent allotting a portion to the nonemployee spouse. One advantage to the deferred distribution method is that it allows an equitable division without requiring present payment for a benefit not yet realized and potentially never obtained. *In re Marriage of Gallo*, 752 P.2d at 55. Another advantage to the approach is that it equally apportions any risk of forfeiture.

While a disadvantage may be that the approach requires a trial court to retain jurisdiction to oversee the payment, the entry of an order awarding a certain percentage of the benefits at the time of payment should lessen the administrative burden of the court. Courts routinely retain jurisdiction to supervise payments of alimony and child support and have, in the past, successfully divided vested pension rights by awarding each spouse a share. An administrative burden should not excuse an inequitable distribution of marital property. *Cohen*, 937 S.W.2d at 831 (footnote in the original).

*Id.*

***Pedine v. Pedine*** (Court of Appeals, March 9, 2009). This case was cited by *Lund*, above. The court found that the appreciation of separate retirement assets that accumulated during the marriage based wholly on market factors were separate property, and that pension plans based on years of service should be divided pro rata according to the length of time the plan was in place prior to the marriage, and the length of time the plan was in place during the marriage.

***McNeal v. McNeal*** (Court of Appeals, October 13, 2009). The parties were divorced in 2001 and the husband retired the same year, at age 51. The Marital Dissolution Agreement approved by the Court provided that all retirement accounts in the parties' joint or individual names would be owned by them jointly after the divorce. The Husband began drawing on his retirement while the Wife continued to contribute to her retirement. In 2008, the Wife filed a petition to address this issue. The trial court found that the Wife had a valid complaint, and ordered that the Husband's retirement accounts were to be divided one-half to each party, and that Wife was entitled to a judgment against Husband for half of the amount he had withdrawn from the account since the divorce. The trial court also rejected the Husband's defenses of failure to apply T.C.A. 36-4-121, entitlement to credits for amounts paid on Wife's behalf from withdrawn funds, and waiver. The Court of Appeals affirmed.

*\*Strange v. Strange* (Court of Appeals, February 2, 2010). Husband who lived off retirement, received a lump sum distribution on a retirement plan without disclosing this to Wife. When Wife, after the divorce, discovered the cashing out of the retirement plan, she brought a Rule 60.02 action for one-half of the plan and her attorneys fees. The trial court granted her the relief sought, and refused to hold an evidentiary hearing as requested by Husband. The Court of Appeals affirmed, stating that

We find that all the contentions of Husband lack merit. Husband had been told by the court that the funds were marital, had not been awarded to him, and were subject to redistribution at trial. If he disposed of them, he did so at his own risk. How Husband used the funds was not relevant. The evidence properly before this court does not preponderate against the findings of the trial court.

*Id.* The lesson: if you intend to live off a retirement fund during the pendency of the divorce, get the approval of the court or the other party.

### **3. Post Judgment Interest**

*Martin v. Martin* (Court of Appeals, February 24, 2009). In *Martin*, the Husband was ordered to pay a sum certain to Wife as her share of the marital estate. He appealed, unsuccessfully, and the case was remanded to the trial court. The Husband sought and was allowed to sell a number of properties in order to pay Wife the amount of the judgment. He sold the property and was ordered to pay the income tax and property taxes resulting from the sales. In a second appeal, the Court of Appeals affirmed this order. The trial court on remand also ordered the Husband to pay Wife 6% interest on the judgment amount, which Husband also appealed on the theory that the Wife was allowed to live in one of the properties pending the appeal and therefore the court should not have ordered any interest on the judgment. The

Wife appealed from the 6% figure, and the Court of Appeals reversed, finding that the trial court had no authority to order less than 10% post judgment interest:

Next, we must consider Wife's argument that the trial court erred in awarding her postjudgment interest at the rate of 6% rather than 10%. The trial judge noted that she was only awarding Wife 6% interest because Wife was allowed to reside in the Arkansas residence until September 30, 2005. As stated above, Tennessee Code Annotated section 47-14-121 is a mandatory statute. The rate of interest prescribed by the statute "is deemed controlling and not subject to reduction by reason of equitable considerations." *Bedwell v. Bedwell*, 774 S.W.2d 953, 956 (Tenn. Ct. App. 1989); *see also Childress v. Union Realty Co., Ltd.*, No. W2003-02934-COA-R3-CV, 2005 WL 711960, at \*5 (Tenn. Ct. App. Mar. 28, 2005) *perm. app. denied* (Tenn. Oct. 31, 2005) (discussing the "mandatory rate of 10%"); *Haren*, 1998 WL 10358, at \*4 (modifying a postjudgment interest award from 6% to 10%); *Perkins v. Perkins*, No. 01A01-9504-CV-00158, 1995 WL 675850, at \*3 (Tenn. Ct. App. W.S. Nov. 15, 1995) (same). Therefore, we modify the trial court's award of post-judgment interest from the rate of 6% to 10%.

*Id.*

#### 4. The Devil is in the Details

*Myers v. Myers* (Court of Appeals, January 21, 2009). This is a case in which the husband's interest in a trucking company, and the value of that company, was almost as much of a mystery at the close of the trial as it was at the outset of the trial. The only evidence of value came from the husband's testimony as to the gross income of the company over a period of several years and an accountant's testimony that he could not assign a value to the company "due to the mixed ownership of assets and debts." The trial court nonetheless awarded wife \$125,000 for her marital interest in the company. The Court of Appeals reversed and remanded, reminding the parties that "[w]hen a trial court fails to apply the proper legal standard and omits necessary factual and legal analysis, it is often appropriate to

remand the case to the trial court for reconsideration. *Raines v. Nat'l Health Corp.*, No. M2006-1280-COA-R3-CV, 2007 WL 4322063, at \*7 (Tenn. Ct. App. Dec. 6, 2007) (no Tenn. R. App. P. 11 application filed) (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970); *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007); *First Tennessee Bank v. Hurdlock*, 816 S.W.2d 38, 40 (Tenn. Ct. App. 1991)).”

## 5. Who Let the Dogs (In)?

*Ballard v. Ballard* (Court of Appeals, January 21, 2009). Wife appealed from a judgment of the Eighth Circuit Court for Davidson County which awarded her 40% of the difference in the appreciation in the fair market value of the husband’s residence from the date of the marriage to the date of the divorce, less offsets for forgeries, credit card debts, and unreimbursed repairs by husband, for a resulting total of \$5,015 for her interest in the property. The Court of Appeals reversed, finding that the wife was entitled to no interest in the appreciation:

We need not consider whether the trial court erred in considering the home’s fair market value rather than the equity built during the marriage, as we find that Wife is entitled to no appreciation in the marital home as she did not “substantially contribute[] to its preservation and appreciation.” See Tenn. Code Ann. § 36-4-121(b)(1)(D) (2005). Tennessee Code Annotated section 36-4-121(b)(1)(D) expressly states that “direct or indirect contribution[s] of a spouse as homemaker” may be considered “substantial contributions,” which will convert separate property into marital property. However, contributions as a homemaker must nonetheless be “real and significant.” Not just any contribution will do...

We find the record devoid of any significant contributions by Wife, as homemaker or otherwise, to the marital residence’s appreciation. Instead, the record reveals significant evidence to the contrary. We find Wife’s only “contributions” were contributing to two fires at the home, causing approximately \$200,000 in damage, and contributing to the home’s filthiness by bringing two pot-bellied pigs into the home.

*Id.* The Court of Appeals, apparently distressed by the pot-bellied pigs and the evidence that the house stank of urine from dogs and cats, also affirmed the award of over \$18,000 in attorneys fees to the husband.

Also, as an aside, it is worth noting that the Court of Appeals affirmed the application of local rule 26.04(d) to this case, which is a rule that the divorce courts in Davidson County regularly ignore. This rule requires written responses to motions to be filed by parties, supported by legal authorities, or else the motion “shall” be granted. In this particular case, the wife did not even show up to argue the motion, but the basis on which the decision on the motion was affirmed was the local rule.

#### **6. Post Filing Increases in Property Values**

***Herbison v. Herbison*** (June 10, 2009). In *Herbison*, the trial court found that most of the appreciation in the value of the husband’s business occurred after the wife had filed for divorce, and that the wife clearly made no genuine contribution to this appreciation between the divorce filing and the trial. Here is the Court’s own summary:

This is a divorce case involving the distribution of marital property. Prior to the parties' marriage, the husband owned and operated a medical supply business, and continued to operate the business after they were married. The business experienced some increase in value during the marriage. After the parties separated, the business' increase in value was very substantial. The husband filed for divorce. Subsequently, he filed a motion for partial summary judgment. The trial court declared the parties divorced and adopted the consent permanent parenting plan, reserving for trial issues relating to child support and the division of the marital estate. After the trial, the trial court found that the wife had not substantially contributed to the increase in value of the husband's business, and that it remained the husband's separate property. The trial court then divided the marital property. The wife appeals, arguing that the increase in value of the husband's business is marital property and that the distribution of the marital estate was inequitable. We affirm, finding that the evidence does not preponderate against the finding that the increase in the value of the company is the husband's separate property and finding no abuse of discretion in the trial court's distribution of the marital estate.

The Court made several findings that explained its decision, including the following:

We must conclude that, even if Wife's testimony is credited, her activities are insufficient to support a finding that the increase in value is marital property. In *Keyt*, cited above, the Tennessee Supreme Court found that a husband's contributions to the family-owned trucking company did not constitute a substantial contribution to the increased stock price of the company, even though he had worked for the company for over twenty years, traveled on company business on a weekly basis, helped open trucking terminals by driving and picking up freight, and did "whatever needed to be done." *Keyt*, 244 S.W.3d at 330-32. The Court noted that the tasks done by the husband were consistent with those done by low-level or mid-level employees and that he was not responsible for "directing the company or contributing to its growth." *Id.* at 332.

Like the husband in *Keyt*, Wife performed tasks that are usually done by low-level employees, and she admits that she was not involved in the management of the company. Most importantly, the trial court found that the majority of the increase in value of Herbison Medical occurred after the parties' separation, indicating that Wife's alleged direct contributions did not substantially contribute to the appreciation in value because Wife ceased contributing when the parties separated. Therefore, we cannot conclude that the evidence preponderates against the trial court's finding that any direct contributions by Wife did not substantially contribute to the increase in value of Herbison Medical.

*Id.*

#### 7. **Dividing the Pie, Twice**

*Zimmerman v. Zimmerman* (Court of Appeals, June 9, 2009). Again, from the Court's own summary:

The husband fled the state without making any provisions for his wife's support. She filed a petition for legal separation and asked the trial court for permission to sell the marital home to pay her living expenses. After the home was sold, the trial court allowed the wife to use half the net proceeds for support and placed the other half in escrow. Both parties subsequently filed for divorce. After a hearing at which the court declined to consider awarding alimony to the wife because of procedural reasons, the court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b). The court divided the remaining funds from the sale of the marital home between the parties, giving most of the money to the husband in the belief that wife's earlier receipt of proceeds from the home amounted to an earlier division of marital property in the wife's favor. The wife argues on appeal that she was entitled to a greater share of the remainder because the first half of the proceeds was actually awarded to her as a form of support and was used for that purpose, and thus that the funds previously escrowed constituted the only marital property within the court's power to divide. We agree, and we amend the trial court's division of marital property, but we affirm its decision not to award alimony to the wife.

*Id.* In this case, the Court of Appeals ultimately gave the wife two-thirds of the remaining one-half of the equity in the marital residence as her share of the division of the marital estate.

## 8. Dissipation Issues

*Averitt v. Averitt* (Court of Appeals, July 24, 2009). Averitt addressed a number of issues, but the most worthwhile part of the opinion was its focus on allegations of dissipation of the marital estate by the husband. The trial court did not find dissipation, and the Court of Appeals affirmed. The Court noted that:

In equitably dividing the marital assets, the trial court should consider whether one party dissipated such marital assets. Tenn. Code Ann. § 36-4-121(c)(5) (2005). The concept of dissipation is based on waste. *Altman v. Altman*, 181 S.W.3d 676, 681 (Tenn. Ct. App. 2005). A party dissipates marital property when he or she uses marital property frivolously and without justification for a purpose unrelated to the marriage at a time when the marriage is breaking down. *Id.* The party alleging dissipation of marital assets has the burden of persuasion and the initial burden of production. *Burden v. Burden*, 250 S.W.3d 899, 919 (Tenn. Ct. App. 2007).

To satisfy this burden, the alleging party cannot simply argue that he or she is uncertain of how the money was spent. *Id.* Once the alleging party has made a prima facie case of dissipation, the burden shifts to the party who spent the money to present evidence that the challenged expenditures were appropriate. *Altman*, 181 S.W.3d at 683. As we have previously noted:

It is also important to differentiate between “dissipation and discretionary spending.” “Trial courts must distinguish between what marital expenditures are wasteful and self-serving and those which may be ill-advised but not so far removed as from ‘normal’ expenditures occurring previously within the marital relationship to render them destructive.” *Burden*, 250 S.W.3d at 919–20 (internal citations omitted).

In determining whether a particular transaction constitutes dissipations, courts most frequently consider the following: 1) whether the expenditure benefitted the marriage or was made for a purpose entirely unrelated to the marriage, 2) whether the expenditure or transaction occurred when the parties were experiencing marital difficulties or were contemplating divorce, 3) whether the expenditure was excessive or de minimus, and 4) whether the dissipating party intended to hide, deplete, or divert a marital asset. *Altman*, 181 S.W.3d at 682–83.

*Id.* In Averitt, the Court of Appeals affirmed the trial court where it refused to find dissipation of marital assets by the husband, and overturned the one instance in which it found dissipation: an occasion in which the husband loaned a third party \$410,000 that was ultimately not repaid. As the Court of Appeals said, the “[s]imple mismanagement of family finances is not dissipation nor is using marital funds to prop up a failing business.” *Id.*

**9. Determine Values, Don’t Sell (Unless Necessary)**

*Mathis v. Mathis* (Court of Appeals, November 13, 2009). In this case, the parties spent \$860,000 to value a business the evidence showed was worth somewhere between \$330,000 and \$1,200,000. The trial lasted 16 days, spread out over a 14 months period. The *list* of motions and pleadings filed by the parties over the five years of divorce litigation took up 20 pages. At the conclusion of the case, the trial court entered an order requiring the sale of all the parties’ assets, except their personal property and one vehicle for each party. The trial court also refused to enforce what the Husband called a valid post-nuptial agreement. The Court of Appeals affirmed the trial court in its decision on the post-nuptial agreement (“the facts surrounding the preparation of the writings [is] so uncertain that the plaintiff fails to carry his burden of proof to establish the parties reached an agreement.”) but overturned the order to sell the assets and divide the proceeds. With regard to this issue, the Court of Appeals noted that

This court has “repeatedly stressed the importance not only of classifying the parties’ property but also placing a specific value on the property when trial courts turn their attention to the financial aspects of a divorce case.” *Davidson v. Davidson*, No. M2003-01839-COA-R3-CV, 2005 WL 2860270, at \*3 (Tenn. Ct. App. Oct. 31, 2005). In order to fulfill its duty of equitably dividing the marital estate, a trial court must assign a reasonable value to the assets in question. *Fox*, 2006 WL 2535407, at \*7; *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at \*11 (Tenn. Ct. App. May 13, 2003). This view is consistent with the rule applied in most states that “the trial court must determine the value of all marital property before distributing it.” 3 John Tingley & Nicholas B. Svalina, MARITAL PROPERTY LAW § 44:1, at 44-2 (rev. 2d ed. 2006).

*Id.*

#### 10. ***Batson*, Resurrected**

\**Amos v. Amos* (January 25, 2010). Finally, a case that remembers the word “*Batson*.” *Batson*, you will recall, was a case in which the Court of Appeals found that the division of assets in a short term marriage should be accomplished in such a way as to place the parties in approximately the same position they occupied prior to the marriage. In *Amos*, the Court of Appeals found that this marriage, “a mere four years” in duration, required the application of the *Batson* principles. As the Court of Appeals held:

The equitable division of marital property is to be guided by the factors contained in Tennessee Code Annotated § 36-4-121(c), and it should be determined by considering and weighing the most relevant factors in light of the unique facts of each case. The most relevant factors in this case are: (1) the short duration of this marriage, and (2) that Husband contributed \$90,000 of his separate property toward the purchase of the lot and the construction of the house.

*Id.*

#### 11. **Dividing an Attorney’s Fee**

\**Ball v. Ball* (Supreme Court, January 14, 2010). Said the Supreme Court:

We granted appeal to address whether the \$17 million attorney fee acquired after Ms. Ball filed the complaint for divorce but before the final divorce hearing is marital property under Tennessee Code Annotated section 36-4-121(b)(1)(A) and therefore subject to equitable division.

...

[W]e hold that marital property includes all property owned as of the date of filing of the complaint for divorce or acquired up to the date of the final divorce hearing. In the instant case, Mr. Ball acquired the \$17 million attorney fee on August 31, 2006, almost a full year before the final divorce hearing on August 28 and 29, 2007. We therefore affirm the determinations of the trial court and the Court of Appeals that the attorney fee is marital property under Tennessee Code Annotated section 36-4-21(b)(1)(A) and therefore subject to equitable division.

....

As the Court of Appeals accurately noted, property is either marital or separate—there is no third category of property under Tennessee’s domestic relations law.

*Id.* Having determined that this modest fee was marital property, the Supreme Court went on the affirm the 60/40 split of the fee ordered by the trial court.

We should all be so lucky...

## **Evidence**

### **1. Don’t Read, Listen**

*Everett v. Everett* (Court of Appeals, May 12, 2009). This case was tried before a special master, who listened to the testimony of the expert and established a parenting plan. The case was then reviewed by the trial judge, who did not have the transcript or a record of the expert’s testimony, but instead only read the expert’s report. The Court of Appeals reversed, holding that

[Rule 706] contemplates that if the findings of the expert witness are to be considered as evidence, the expert will be called to testify. This requirement is not a departure from the general rule that the court may not rely on an unsworn report from an expert to decide issues before the court. See *Reed v. Tennessee Farmers Mutual Insurance Co.*, 483 S.W.2d 721 (1972); *Hultberg v. Hultberg*, 259 N.W.2d 41 (N.D. 1977); *Brown v. St. Clare's Hospital*, 13 A.D.2d 734, 214 N.Y.S.2d 614 (1961).

*Id.*

## Jurisdiction

### 1. UCCJEA

*Graham v. Graham* (Court of Appeals, January 26, 2009). In *Graham*, the children and the mother had moved to Georgia in 2000, and later, by agreement, to Florida. (This followed several years of litigation over whether the mother should have been permitted to relocate from Georgia to Florida, and at least on prior Court of Appeals decision.) The father then filed a petition for contempt and to modify the parenting arrangement, and the trial court ordered a change of custody from the mother to the father. The mother appealed, and, while she did not raise the issue of subject matter jurisdiction on appeal, the Court of Appeals raised it sua sponte, and found that the Tennessee court, by law, had lost its jurisdiction over the case and dismissed the entire action for want of subject matter jurisdiction.

In reaching its conclusion, the Court of Appeals held that if the relationship between the child and the parent remaining in the state with exclusive, continuing jurisdiction “becomes so attenuated that the court could no longer find significant connections and substantial evidence,” jurisdiction by that state’s courts would cease to exist. The Court of Appeals found that

In the instant case, as in *Lee*, the only connection the children have with Tennessee is that their father lives there and they visit with him during holidays and summers. Moreover, all the evidence regarding the father's allegation that the mother's problems with her husband, Jason Lewis, and their divorce proceeding created a material change in circumstances for the children and that a modification of custody would be in their best interest originated in Florida.

The principal evidence given by the father as to the "chaotic, dysfunctional and argumentative" Florida home environment came from the mother's estranged husband, and all of the events relied upon took place in Florida. The videotape and testimony from a private investigator regarding an extramarital affair the father alleged the mother had engaged in was exclusively related to Florida. Additionally, the witnesses, such as teachers, coaches, ministers, doctors, neighbors and family members, best qualified to testify and present other evidence regarding the children's well-being, protection, training and personal relationships are all located in Florida. The evidence establishes that the courts of Tennessee no longer have continuing exclusive jurisdiction over custody issues regarding these children. Tenn. Code Ann. § 36-6-217(a)(1), .

*Id.*

## 2. UAA (Uniform Arbitration Act)

*Hogan v. Hogan* (Court of Appeals, August 27, 2009). In *Hogan*, the Court of Appeals addressed several unique jurisdiction issues raised by the parties, and, after considering those, raised one of its own, and dismissed the case for lack of subject matter jurisdiction. First, the Court of Appeals found that an arbitration agreement which did not specifically provide for arbitration in this state, the trial court did not have subject matter jurisdiction to enforce the arbitration agreement. Second, the court held that where Tennessee would not have jurisdiction to make an initial custody determination, it did not have jurisdiction to modify an existing order from another state, and the father's refusal to return the child to the child's home state did not confer jurisdiction on Tennessee courts. Finally, the Court of Appeals held that the trial court had no authority to order the mother and father to

arbitration, and that, even though neither party raised the issue on appeal, the lack of such authority was fatal to the case in that the court had no subject matter jurisdiction, and the Court of Appeals vacated the orders of the trial court and dismissed the case.

## **Mediation**

### **1. Mediation v. Arbitration**

*Tuetken v. Tuetken* (Court of Appeals, August 5, 2009). Court held that parties may agree to binding arbitration in lieu of mediation under Rule 31, but that such an election must be specific and must be in writing. The Court of Appeals cited *Team Design v. Gottlieb*, 104 S.W.3d 512, 519 (Tenn. Ct. App. 2002) to conclude that:

In *Gottlieb*, the court further explained the manner in which parties can agree to make the result of a Rule 31 proceeding final and binding:

To assure that a waiver of the fundamental right of access to the courts is knowing, voluntary, and intelligent, the record must demonstrate, at a minimum, that parties agreeing to make the outcome of a Tenn. S.Ct. R. 31 alternative dispute resolution procedure final and binding know and understand:

(1) that they have a right to insist that the Tenn. S.Ct. R. 31 proceeding be non-binding, (2) that they have a right to a judicial remedy if the Tenn. S.Ct. R. 31 proceeding is unsuccessful, (3) that they may reject the outcome of a non-binding Tenn. S.Ct. R. 31 proceeding without fear of reprisal, (4) that they understand that by agreeing to make the outcome of the proceeding final and binding they are waiving their right to have their dispute adjudicated by a court and that they are limiting their right to have the outcome of the proceeding reviewed by a court, (5) that they have consulted with their lawyers in making the decision whether or not to waive the right of access to the courts or their rights under Tenn. S.Ct. R. 31 and that their lawyers have fully advised them of the advantages and disadvantages of waiving their rights, and (6) that they voluntarily and personally waive these rights. *Gottlieb*, 104 S.W.3d at 529. If these requirements are not met, the outcome of a Rule 31 proceeding will be considered non-binding.

*Id.*

### **Parentage**

*Watermeier v. Moss* (Court of Appeals, October 29, 2009). We need good parentage cases every few years, just to keep ourselves guessing as to who and what decides on the difference between a legal parent and a biological parent. *Watermeier* does not disappoint. In this case, Mr. Watermeier and Ms. Moss had an affair. Ms. Moss was married to Mr. Moss. The affair produced a child born in 2003. Mr. Watermeier filed an action in 2007 to be declared the father of the child. Ms. Moss and Mr. Moss were living separately but were still married at the time of the filing of the action, and filed an answer seeking to have Mr. Moss declared the legal father of the child. The trial court dismissed the petition, and the Court of Appeals reversed.

The trial court found that the Appellant failed to commence this litigation within the time limit provided in Tenn. Code. Ann. § 36-2-304(b)(2) and that it was thus time barred.

Tenn. Code. Ann. § 36-2-304(b)(2)(1997) provides in pertinent part:

If the mother was legally married and living with her husband at the time of conception and has remained together with that husband through the date a petition to establish parentage is filed and both the mother and the mother's husband file a sworn answer stating that the husband is the father of the child, any action seeking to establish parentage must be brought within twelve (12) months of the birth of the child.

This statute provides a twelve month limitation period on parentage actions, running from the child's date of birth, when three conditions are met. These conditions are: (1) the mother must have been legally married and living with her husband at the time of conception; (2) the mother and her husband must have "remained together" through the time the petition is filed; and (3) both the mother and her husband must file a sworn statement stating that the husband is the father of the child. Unless these three conditions are met, the statute of limitation is the same as that for all other parentage actions and the action must be brought within three years of the child reaching the age of majority. Tenn. Code Ann. § 36-2-306 (1997).

*Id.* The Court of Appeals distinguished the facts of this case from another parentage case which involved a married couple separated by the husband's military service, and which involved a brief separation between the parties, and found that the separation of Mr. and Mrs. Moss from 2005 through the date of the hearing made the statute of limitations inapplicable to this case. *See Ardoin v. Laverty*, 2003 WL 21634419, M2001-03150-COA-R3-JV (Tenn. Ct. App. 2003) and (The argument on the other side, of course, is that the Mosses really only needed to remain together for 12 months, but this argument failed.)

The Court of Appeals also held that the husband's statement in this case, that he desired to be named the father of the child, did not go far enough: he has to swear that he is the father of the child, and this means that he needs to swear that he is the biological father of

the child. This might be difficult to do in the face of DNA evidence, which Ms. Moss also challenged, but that did not stop the Court of Appeals from suggesting that the only way the husband can fit within the statute is to swear to something that is not true. As the Court pointed out:

To meet the requirements of Tenn. Code Ann. §36-2-304(b)(2), both mother and her husband must file a sworn answer stating that husband is the father of the child. The parentage statutes clearly define father for purposes of the statutes, as the biological father. Tenn. Code Ann. § 36-2- 302(3)(1997). As stated by the Supreme Court, “the very point of the parentage statutes is to determine the biological father of a child.” *In re T.K.Y.*, 205 S.W.3d 343, 350 (Tenn. 2006). “The legal father may or may not be the biological father of a child. *Id.* at 351. Because the purpose of the statute is to determine the biological father and father is defined in the statute as being the biological father, mother and her husband must file a sworn statement stating that husband is the biological father of the child.

*Id.*

## **Parenting Issues**

### **1. Modification of Parenting Plans**

*Adams v. Adams* (Court of Appeals, March 19, 2009). This is a case in which the Court of Appeals affirmed a change of primary parent from the mother to the father. The lesson: if you want to keep primary care of your children, don't have beer and alcohol parties in your home with underage drinkers, don't allow them to engage in “dirty dancing,” don't have sex with your 19-year-old friend, don't keep pornography on your cell phone, and—most particularly—don't do these things when your children are present! Enough said.

*Brewer v. Swinea* (Court of Appeals, June 16, 2009). The parties were divorced and were granted substantially equal parenting time. The mother found a new love and filed a

petition to modify the plan. The father objected. The trial court found that the mother had shown a pattern of instability, and modified the parenting plan to provide that the father would be the primary parent but that the parties would continue to have about the same parenting time unless the mother elected to move to her new husband's home, several counties away. The mother appealed. The Court of Appeals affirmed, but vacated the determination of what mother's time with the children would be if she elected to relocate to another county, finding this was an issue for another day.

***Ortega v. Flores*** (Court of Appeals, March 4, 2009). The Court of Appeals reversed a trial court's decision not to modify a parenting plan which provided that the parties' young child would alternate her time with her parents by spending three months with the mother in Maryland followed by three months with the father in Coffee County, Tennessee. The original order provided that the parties would try this arrangement for a year "and see how it works," which the Court of Appeals found was a final order. Nonetheless, the Court of Appeals was convinced that the alternating three month arrangement had been bad for the child and needed to be changed, and found that the mother was the most fit of the parents to be designated the primary residential parent.

***Scoggin v. Sorg*** (Court of Appeals, January 30, 2009). This is a rare case in which the Court of Appeals agreed with the trial court that there had been a substantial and material change of circumstances that justified a review of a modification of parenting time decision, but reversed the trial court's ultimate decision to change the primary residential parent from the mother to the father. It is a lengthy decision in which the Court of Appeals addressed each of the factors for custody determinations, and found that the trial court had gotten it wrong.

*Webb v. Webb* (Court of Appeals, October 14, 2009). The trial court found that mother's involvement with a boyfriend which led mother to seek an order of protection and shelter, and additional actions undertaken by mother since the original decree, constituted substantial and material changes in circumstances which permitted the trial court to review the parenting plan. The trial court then transferred primary care of the child to the father.

\**Heffington v. Heffington* (Court of Appeals, February 19, 2010). Court of Appeals overturned trial court's finding of a material change in circumstances and modification of parenting plan where trial court did not permit the 15 year old child of the parties to testify. The Court found that the trial court is required by law to consider the preference of a child 12 years of age or older, and that failure to consider the preference (even if it is not a determinative factor) merited returning the case to the trial court for a new hearing on this issue.

## **2. Natural Parent vs. Grandparent**

*Free v. Free* (Court of Appeals, February 13, 2009). In *Free*, the father was originally granted primary care of the parties' two children, and moved in with his parents. When the mother discovered that the father had moved out of the house, she petitioned the court to change primary care to her, which the trial court did. The father and the grandparents appealed, but the father dropped his appeal. The grandparents argued, among other things, that the children had lived with them and should stay with them, and that the mother had dated a sex offender. The trial court and the court of appeals found that the mother was unaware that the man she dated was a sex offender, and quit dating him as soon as she found out. The court also dismissed the grandparents custody petition, finding that:

The Stanfields petitioned the court for custody of the children. Based upon the evidence, the trial court denied their request. As discussed in Richards on Tennessee Family Law:

[E]ven though the best interest of the child is the paramount concern of the court in making custody determinations, a constitutional right of privacy arises when the custody dispute is between a natural parent and a third party. In a series of recent cases, the supreme court has made clear the rule that in a custody dispute between a third party and a natural parent, the parent may not be deprived of custody without a showing of parental unfitness or a showing of substantial harm to the child. The supreme court reaffirmed the doctrine of superior parental rights in *Blair v. Badenhope* as follows: Through Article I, section 8 and its implicit recognition of parental privacy rights, our Constitution requires that courts deciding initial custody disputes give natural parents a presumption of "superior parental rights" regarding the custody of their children. Simply stated, this presumption recognizes that "parental rights are superior to the rights of others and continue without interruption unless a biological parent consents to relinquish them, abandons his or her child, or forfeits his or her parental rights by some conduct that substantially harms the child."

Janet L. Richards, Richards on Tennessee Family Law § 8-(3)(b)(8) (3d ed. 2008) (footnotes omitted).

The Court of Appeals noted that this case did not involve an initial order, but rather a modification of an initial order. However, since the grandparents had never been granted primary care of the children, they found themselves in the same position as a third-party litigant in an initial custody dispute. As the Court of Appeals held:

This court addressed this same issue in *Elmore v. Elmore*, 173 S.W. 3d 447 (Tenn. Ct. App. 2004). In *Elmore*, now Justice Sharon Lee wrote the following:

In a contest between a parent and a non-parent, a parent cannot be deprived of the custody of a child unless there has been a finding, after notice required by due process, of substantial harm to the child. Only then may a court engage in a general "best interest of the child" evaluation in making a determination of custody. *In Re Adoption of Female Child (Bond v. McKenzie)*, 896 S.W.2d at 548. Further, this Court has held that the required showing of risk of substantial harm to the children must be demonstrated by clear and convincing evidence. *Ray v. Ray*, 83 S.W.3d 726, 733-34 (Tenn. App. 2001); *Hall v. Bookout*, 87 S.W. 3d 80, 86 (Tenn. App. 2002); *Henderson v. Mabry*, 838 S.W. 2d 537, 540 (Tenn. App. 192). As the Supreme Court discussed in *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002), the applicable analysis is somewhat different when a natural parent is seeking to modify a valid order granting custody to a non-parent. But [\*\*6] in the present case, there is no prior decree granting custody to a non-parent, and so the Grandparents and Aunt were required to make a showing, by clear and convincing evidence, that granting custody to Father subjected the children to a risk of substantial harm. *Elmore* at 449.

*Id.*

### **3. Paramours and Other Miscellaneous Issues**

*Burton v. Burton* (Court of Appeals, February 9, 2009). Trial court awarded primary care of the parties' children to father, and mother appealed. Court of Appeals affirmed, finding that mother's interference with the father's relationship with the children and the fact that mother and her married boyfriend resided together, went on camping trips together with the children, and lied to the children about certain matters, reflected poorly on the mother and justified the trial court's decision. The Court of Appeals went through each of the statutory factors for custody decisions, and held that "[w]hile a court may not punish an adulterous parent for an extramarital affair by designating the other parent as the primary residential custodian, a court may consider the effect of a parent's extramarital affair on the children and on the parent's fitness as a custodian under the best interest analysis provided by Tenn. Code Ann. §36-6-106(a). *Lockmiller v. Lockmiller*, No. E2002-02584-COA-R3-CV, 2003 WL

23094418 at \* 5 (Tenn. Ct. App. Dec. 30, 2003). Equally important was the trial court's finding of six specific ways in which the mother had demonstrated she would not encourage a close relationship between the father and the children, including her statement that she did not believe it was in the children's best interest for their father to be more involved with their lives.

***Brown v. Brown*** (Court of Appeals, May 14, 2009). Forty-two year old guy marries 19 year old woman, and they have three children. Fifteen years after the marriage the father is disappointed that the trial court gave primary care of the children to mother, stating that the father needed to keep working while he still had time to support the family. The Court of Appeals affirmed, explaining that

Since the children were born, Father has been the only breadwinner for this family. Quite apart from Father's age, it is clear that, if these children are to have the financial support required to meet their needs, it will be through Father. In the type of work Father performs, his earnings are driven by the hours he works. If Mother is designated as the primary residential parent, Father will be better able to work the hours necessary to meet the children's financial needs.

Therefore, while the trial court may have referred to Father's age, the primary consideration appears to have been that the fullest use of Father's earning capacity is clearly in the best interest of these children. That is not an inappropriate factor to consider.

*Id.*

***Barker v. Chandler*** (Court of Appeals, September 18, 2009). In *Barker*, the trial court refused to remove the prohibition contained in its form against overnight paramours staying with a parent while that parent is caring for the children. (The provision stated that "[a]ny paramour of any parent and that parent are not to spend the night in the same residence when that parent and one of the minor children are present." This provision was inserted in the plan

pursuant to the local rules of court.) The father was married, and the mother lived with her same-sex partner. A psychologist who examined the children found that they had a good relationship with both parents, their step-parent, and the mother's paramour.

The Court of Appeals reversed, holding that "while a rule such as Local Rule 23 can be instructive, it is subordinate to Tennessee public policy mandating that trial judges make decisions regarding residential parenting of children "upon the basis of the best interest of the child." Tenn. Code Ann. § 36-6-106(a)."

#### **4. Material Change of Circumstances**

*Keller v. Keller* (Court of Appeals, May 20, 2009). Father sought to change primary parenting from the mother to himself. The trial court found there was no material change of circumstances since the entry of the original decree. The Court of Appeals reversed, finding that the trial court should have paid more attention to the testimony of the expert who testified that the child's change in behavior has materially affected her well-being.

#### **5. A Rose by Any Other Name...**

*Connor v. King* (Court of Appeals, November 18, 2009). *Connor* contains an excellent discussion of the factors that a court must review in deciding whether it is proper to grant a petition by a parent to change a child's name, over the objection of the other parent. In this case, the father of an infant sought to be declared the father and to have the child's last name changed to match his own. The trial court changed the name, and the mother appealed. The Court of Appeals affirmed the name change (with the proviso that the child's last name could be hyphenated to also include the mother's last name) after a discussion of the case law concerning name changes. As the Court stated:

“The parent seeking to change the child’s surname has the burden of proving that the change will further the child’s best interests.” *Barabas v. Rogers*, 868 S.W.2d 283, 287 (Tenn. Ct. App. 1993) (citing *In re Petition of Schidlmeier*, 344 Pa. Super. 562, 496 A.2d 1249, 1253 (1985); *In re M.L.P.*, 621 S.W.2d 430, 431 (Tex. Ct. App. 1981)). Courts have generally declined to change a minor’s name if only to avoid an insubstantial inconvenience or embarrassment to the child or the custodial parent, and they have approved name changes when doing so furthers the child’s substantial interests. *In re Lackey*, No. 01A01-9010-PB-00358, 1991 WL 45394, at \*2 (Tenn. Ct. App. Apr. 5, 1991) (citing *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277, 1279-80 (1975); *Flowers v. Cain*, 218 Va. 234, 237 S.E.2d 111, 113 (1977)).

*Id.*

## 6. Pain and Suffering...

\**Smith v. Smith* (Court of Appeals, January 25, 2010). If you wish to beat yourself with a stick, or enjoy the company of a hornet’s nest, or spend time watching the Home Shopping Network or listening to Wayne Newton’s Greatest Hits, you can spare the trouble of finding a stick, or a hornet’s nest, or a television or stereo system, and just open up the Administrative Office of the Courts website to January 25, 2010 and read the *Smith* case. It is less trouble and every bit as painful. This is a case involving parties whose combined income is approximately \$110,000, every bit of which was apparently spent on unending litigation over children and property. I can’t discern any new or cogent rules of law from reading the case, although that is not the fault of the writer of the opinion. It is the fault of the mess that the parties left the case, in apparently submitting orders that were not consistent with the trial judge’s findings, in complaining about parenting days, and modest marital assets, and in calculating to no end various alleged arrearages and arguing over almost every minor issue they could find.

Oh, there is one nugget involving the award of the tax exemption by the trial judge to the mother, although the father was awarded primary parenting responsibilities and the mother was ordered to pay the father child support. You might recall that at the bottom of the form parenting plan, there is a statement that the guidelines presume the tax exemption is awarded to the party receiving child support. In this case, the trial judge awarded the exemption for one child to the mother. The father appealed, claiming that this was a deviation from the guidelines and the trial court failed to explain its reasons for deviating, and therefore the award of the exemption to the mother was improper. The Court of Appeals disagreed, finding that an explanation of a deviation is only necessary where the court deviates from the *amount* of child support ordinarily required under the guidelines, and that awarding the exemption to the non-primary parent is not a deviation which requires a written explanation by the court. Instead, the Court of Appeals looked to the record and decided that a variety of factors supported the trial court's award, including the disparity of incomes between the parties and the fact that both parties had to maintain a home for the children.

### **Preuptial Agreements**

*Nicholson v. Nicholson* (Court of Appeals, October 29, 2009). The parties entered into a prenuptial agreement prior to their marriage. The agreement provided that, if they divorced, they would do so on a no-fault basis and the reasons for divorce would be kept as private as possible. The agreement also provided that, if they could not agree on the division of the equity in the marital home, the home would be sold and the proceeds divided equally. Less than a year after the marriage, the wife filed an action for divorce on the ground of inappropriate marital conduct, and the parties fought over the disposition of the home. The husband sought his attorneys fees for enforcement of the agreement (as allowed by the

agreement) because of the inappropriate conduct filing and because wife sought to block the sale of the home. The trial court did not award fees, and the husband appealed. The Court of Appeals affirmed, finding that neither alleged breach by wife was in fact a breach of the terms of the agreement.

### **Relocation**

***Cundiff v. Cundiff*** (Court of Appeals, February 23, 2009). This was a relocation case in which the parties had shared equal time with their seven year old daughter for five years. The mother was a nurse, the father a lawyer, both living in Nashville. The mother decided to move to Kentucky to pursue new employment as a nurse in Kentucky, and the father opposed the relocation. The trial court held that the wishes of the child to live with mom justified the relocation of the child to Kentucky, but that if the father also relocated to Kentucky, the court would continue the week-to-week parenting arrangement followed by the parties in the five years since the divorce. The father appealed, and the Court of Appeals affirmed. The Court of Appeals held that there is no need in an equal time case for the court to determine whether or not the mother's purpose for relocating with the child is reasonable, and that the evidence did not preponderate against the trial court's decision that the relocation was in the best interest of the child.

***Webb v. Webb*** (Court of Appeals, February 11, 2009). Mother sought to relocate with her children to the Cayman Islands. Although she did not have a job saved for her at the time of the hearing, she testified and others testified that there was plenty of work available and that she would be able to make more in the Caymans than she was earning in Tennessee. The father objected to the relocation, on the ground that the mother did not have a reasonable purpose to relocate in light of the fact that she did not have a job waiting. The trial court

permitted the relocation, and the father appealed. The Court of Appeals affirmed, agreeing with the trial court that “because of the mother’s financial constraints, the loss of her job, and her financial plight, that the proposed move is not unreasonable under all the circumstances of this case.” *Id.*

*Mann v. Mann* (Court of Appeals, April 30, 2009). The issue presented in this case was whether a mother’s remarriage to an engineer in Knoxville was a reasonable purpose to relocate with the parties’ children from Nashville to Knoxville. The trial court held against the mother, finding that the move was not for a reasonable purpose, posed a specific and serious harm to the children, and was not in the children’s best interest. The Court of Appeals reversed on all issues, and allowed the relocation. The Court reminded the parties that the burden on proving unreasonable purpose and the other defenses was on the non-relocating parent, not the relocating parent, and made short work of the claims that the move to Knoxville posed a specific and serious harm to the children. In rejecting this finding by the trial court, the Court of Appeals stated that

[T]he statute is triggered by affirmative findings rather than negative findings. In other words, when examining the “threat of serious and specific harm” to a child, see Tenn.Code Ann. § 36-6-108(d)(2), the trial court should look for proof of such a threat, rather than a lack of proof that there is no such threat. *Id.*(emphasis added). Father contended that relocation to Knoxville posed a threat of serious and specific harm to the children. The trial court determined that relocation posed a specific and serious threat based upon the expressed findings the children “are very attached to baseball, playing two seasons each year, plus basketball in the winter; they have friends in the neighborhood,” and that “Father’s contribution to the children’s well-being is substantial.”

*Id.* This was not enough. The Court of Appeals went on to hold that, since none of the defenses to relocation was proven, the move would be permitted without the necessity of a “best interest” analysis.

***Rogers v. Rogers*** (Court of Appeals, April 16, 2009). In *Rogers*, the mother, a German citizen, had primary care of the parties two minor children. The mother sought permission to relocate to Berlin, Germany because (1) she claimed she needed the medical insurance benefit provided to all German citizens by the German government; and (2) she had a dietician certificate that would enable her to work as a dietician in Germany but was not recognized in the United States. The father objected to the relocation on the grounds that it was not for a reasonable purpose and it presented a risk of harm to both children, each of whom had been treated for an anxiety disorder that might be exasperated by a move to Germany. The trial court permitted the relocation, and the Court of Appeals reversed. In reversing the trial court, the Court of Appeals held that

As we have previously stated, mere “belief and hope” in the possibility of career advancement is not sufficient to establish a reasonable purpose. *Slaton*, 2005 WL 2756076, at \*3. We believe that Father met his burden of proving that Mother’s plans in this case represent little more than belief and hope without a solid foundation. Mother does not have a job offer with a higher salary and does not have a business plan for establishing her own business. Looking at the totality of the circumstances, we conclude that the evidence does not support the trial court’s determination that Mother’s proposed relocation had a reasonable purpose.

*Id.* The case was remanded to the trial court for a determination as to whether relocation was in the best interest of the children. The Court of Appeals held that “[i]n making this determination, the trial court should consider the effect of the proposed relocation upon the children.”

***Hudson v. Hudson*** (Court of Appeals, September 29, 2009) (the original opinion was later substituted for another opinion and dissent filed November 3, 2009). Mom filed a petition to relocate with the parties’ minor children to Kentucky. The father opposed the relocation. The trial court permitted the relocation. On appeal, the Court of Appeals agreed

with many of the father's contentions, including the fact that the father's motivations in resigning from his work were immaterial to the relocation, that the economic reasons presented by the mother for moving were insufficient, and that the social consequences of the parties' divorce did not rise to the level of hostility that support a relocation of children to another state. However, the appeals court found that the presence of family support for the mother in Kentucky was a reasonable purpose for the mother's relocation.

One judge dissented, and filed an opinion in which he expressed, among other sentiments, the following:

I am especially troubled by, and find exceptionally revealing, the Trial Court's statement that "There is nothing negative about the move to Hopkinsville except that the children will not get to see their Father quite as much as they do now...." The fact that the children will have to see their Father less because of the move is a relevant fact that should not be dismissed as inconsequential...

I disagree with the majority when it agrees with the Trial Court's having found that the short distance between Hopkinsville and Nashville somehow militates towards the reasonableness of the relocation. Apparently the sixty miles between Nashville and Hopkinsville is of a sufficient distance so as to prevent Mother's family in Hopkinsville from providing her any support in Nashville. Yet this same sixty miles is at the same time such a short distance so as to support the move being for a reasonable purpose. I am at a loss as to how the same sixty miles is such a barrier to Mother's Hopkinsville family that it prevents their providing her any support in Nashville, and yet at the same time is such a short distance as it actually supports there being a reasonable purpose for Mother's relocation. Both the Trial Court and the majority in focusing on this "short distance" ignore the most obvious result of the move, the children are being forced to spend less time with their Father even though the evidence, I believe, preponderates in favor of a finding that the relocation is not for a reasonable purpose but instead is vindictive under the statute.

*Id.*

*\*Rudd v. Rudd* (Court of Appeals, December 9, 2009). There were two principal issues on the father's appeal from the decision of the trial court in a divorce trial to allow the mother to relocate with the children and to prohibit father from having any visitation with the children. Father first argued that the trial court should have applied the factors under the relocation statute to mother's effort to relocate as part of the divorce case. The Court of Appeals sided with the trial court and disagreed with the father, finding that the Tennessee relocation statute only applies to a modification proceeding, not to an original proceeding:

As in *Gregory*, the record shows that, in this case, the trial court considered Mother's relocation in making its best interests analysis under Tenn. Code. Ann. § 36-6-106. Consequently, we find that the trial court did not err when it did not apply the factors in Tenn. Code. Ann. § 36-6-108(d) in its decision to allow Mother to relocate.

*Id. citing Gregory v. Gregory*, No. W2002-01049-COA-R3-CV, 2003 Tenn. App. LEXIS 499 (Tenn. Ct. App. 2003). On the second issue, the Court of Appeals held that the trial court had not specified why the father should not have visitation with his children, and remanded the case to the trial court for specific findings on that issue.

## **Retirement**

### **1. Separate v. Marital Property**

*Nesbitt v. Nesbitt* (Court of Appeals, January 14, 2009). In this case, which involved a little bit of everything, the Court of Appeals affirmed a classification of husband's retirement accounts which allowed husband to keep as his separate property all of the retirement he had at the time of the marriage plus the market appreciation of that retirement, with the marital portion of the retirement account divided 50/50, notwithstanding the fact that the husband had continued to contribute to the same account during the marriage. While it is often easier to

simply determine the value of a retirement account at the time of the marriage and to then consider all appreciation in that account during the marriage as marital property, the Court of Appeals permitted the husband to show, through expert testimony, what portion of the appreciation during the marriage was related solely to the amount held by the husband at the outset of the marriage. The Court of Appeals noted that

According to the statute, assets acquired by the parties during the marriage are presumed to be marital property, see Tenn. Code Ann. § 36-4-121(b)(1)(A), but that presumption may be rebutted by a preponderance of proof that an asset is actually the separate property of either spouse. *Woodward v. Woodward*, 240 S.W.3d 825, 828 (Tenn. Ct. App. 2007); *Dunlap v. Dunlap*, 996 S.W.2d 803, 814 (Tenn. Ct. App. 1998). The Tennessee Supreme Court has recognized that property acquired during the marriage that is traceable to separate property will be considered separate property unless it has been gifted to the marital estate or has been inextricably commingled with marital assets. *Keyt*, 244 S.W.3d at 328 n.7. The party seeking to have such separate property included in the marital estate bears the burden of proving that it fits within the statutory definition of marital property. *Id.*

*Id.* The Court of Appeals also affirmed the trial court's decision to hold the parties to a negotiated parenting arrangement agreed by the parties and announced to the trial court—which the wife later sought to repudiate—and to award the husband 60% of the equity in the marital residence based on his substantial contributions to that equity in comparison to the wife's contributions.

### **Termination of Parental Rights**

*In the Matter of M.L.P.* (Tenn. Sup. Ct. March 27, 2009). The Supreme Court affirmed the Court of Appeals determination that the father had abandoned the child by willfully failing to visit the child for a period of over four months, and remanded the case to

the trial court to determine whether or not termination of the father's parental rights was in the best interest of the child. The court described the standard as follows:

A party seeking termination of parental rights must prove two elements by clear and convincing evidence. Tenn. Code Ann. § 36-1-113©. First, the party must prove one of the statutory grounds for termination enumerated in Tennessee Code Annotated section 36-1-113(g). *Id.*; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). Second, the party must show that termination is in the best interests of the child. Tenn. Code Ann. § 36-1-113©(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

*Id.* In M.L.P., the father argued that the temporary guardian had interfered with his visitation with the child, an argument accepted by the Juvenile Court but not the Court of Appeals or the Supreme Court. As the Supreme Court noted:

To constitute abandonment, the failure to visit must be willful. We have held that when a parent attempts to visit his child but is "thwarted by the acts of others," the failure to visit is not willful. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); see *In re F.R.R., III*, 193 S.W.3d at 530. Thus, a parent's failure to visit is willful when it is "the product of free will, rather than coercion." *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005).

Father argues that he was not aware of his duty to visit M.L.P. or the consequences of his failure to visit. We decline to hold that a parent must be aware of the consequences of his failure to visit for such a failure to be willful.

The plain language of the statute requires that the failure to visit be "willful," not that the parent be fully apprised of every consequence the failure to visit might produce. Persons are presumed to know the law, see *Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996); *Bd. Of Educ. V. Shelby County*, 339 S.W.2d 569, 584 (Tenn. 1960), and parents should know that they have a responsibility to visit their children.

*Id.*

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## **The Devil Made Me Do It**

*Johnson v. Carnes* (Court of Appeals, October 29, 2009). This is not a divorce case, and may not have any relationship to a divorce action. But it does involve a set of facts that we occasionally run into in family law cases: the church expels a member, often for sexual misconduct or inappropriate behavior. In this case, Johnson was expelled, and sued the minister. The trial court dismissed the case and the Court of Appeals affirmed, holding that

[U]nder the Ecclesiastical Abstention Doctrine the trial court lacked subject matter jurisdiction to entertain claims of defamation allegedly made by the church minister in reading the letter to the congregation. Mr. Johnson also argues that the trial court also erred when it dismissed Mr. Johnson's allegations that Reverend Carnes' description of him as a "bad influence" to Mr. Johnson's wife and church members was defamatory. In order to be actionable the statement must involve fact and not a matter of simple opinion. *Milkovich v. Lorain Journal, Inc.*, 497 U.S. 1, 20 (1990); *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000); *Windsor v. Tennessee*, 654 S.W.2d 680, 685 (Tenn. Ct. App. 1983). Furthermore, a minister's comments to church members about who is and is not a "bad influence" likewise involves religious belief, the truth or falsity of which requires examination of what is or is not appropriate religious influence.

*Id.*