Tennessee Judicial Conference
Case Law Update - October 2022

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2022 Case Law Update: Tennessee Judicial Conference

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

Contents

I. Alimony

1. A Bit of Everything, in a Small Package

Himes v. Himes (Court of Appeals, April 20, 2021). *Himes* is a case involving modification of alimony, ability to pay, retroactive awards, and more—all wrapped up in a case in which the ultimate alimony award by the trial court was $1,500 per month. Here, the former husband filed an action to terminate his alimony upon his retirement, and the former wife filed an action to return his alimony to the original amount of $5,000 per month. The trial court awarded the wife a retroactive increase during the 14 month period after the wife filed her petition to increase alimony and before the husband retired, after which his alimony was set at $1,500 per month. The court of appeals affirmed in almost every respect. Of interest was the court of appeals' holding that proceeds earned by the husband from the sale of the marital residence should not be considered, citing *Norvell v. Norvell*, 805 S.W.2d 772, 775 (Tenn. Ct. App. 1990). In addition, the trial court and the court of appeals each referenced and relied upon a potential inheritance to be received by wife and a potential inheritance to be received by husband. In wife's case, her inheritance was to be received from her mother, who passed away several years ago. In husband's case, his inheritance was expected from an uncle—who, at the time of the opinion, was still alive and well.

2. Alimony In Solido for Attorneys' Fees?

Smith v. Smith (Court of Appeals, September 7, 2021). *Smith* dealt with issues common to many divorces, including the husband's complaints that (1) wife should not have an interest in assets he built during the parties' lengthy separation, and (2) that he should have received a larger share of the marital estate because of his substantially greater financial contribution to the accumulation of that estate. In both arguments, the trial court held in favor of wife and the

court of appeals affirmed. The appellate court also affirmed the trial court's decision not to award attorneys' fees to either party (wife had requested that husband pay hers), and the court of appeals again affirmed, finding as follows:

> We cannot say that the court abused its discretion in failing to award alimony in solido on this basis. True, Husband has historically earned a substantial income. The monthly income shown on Husband's income and expense statement was twice that of Wife. With his skills and experience, Husband also has the higher earning capacity. And his dilatory tactics forced Wife to incur unnecessary legal expenses.
>
> Yet, his income and expense statement showed a monthly deficit. He remains liable for all the marital debt and a significant amount of separate debt. He is also required to pay Wife $120,727.74 to equalize the division. In light of Husband's substantial debt burden, we cannot say that the evidence preponderates against the trial court's finding that Husband lacks the ability to pay Wife's attorney's fees.

Id.

II. Child Support

1. Joint Decision Making, Wherefore Art Thou?

Bastone v. Bastone (Court of Appeals, April 30, 2021). *Bastone*, like *Vance v. Vance*, is a reminder that joint decision making on educational decisions doesn't actually mean joint decision making, unless it is referring to joint decision making between one parent and the trial court. Here, the parties had agreed to joint decision making on educational decisions. The mother, who earned $16,000 per year, decided to enroll the child in Baylor, a private school in Chattanooga. The father, who earned $115,000 per year, objected. The trial court found specifically that mother had "made a unilateral decision to enroll Stella at Baylor" and that father objected to paying for Baylor tuition**.** Nonetheless, the trial court found that it was in Stella's best interest to attend Baylor and assessed the father with up to 50 percent of Stella's tuition. The father appealed. The court of appeals affirmed, essentially finding the enrollment of Stella in private school was not specifically prohibited by the parenting plan, and that the enrollment presented more of a child support modification question than an educational question. In doing so, both the trial court and the court of appeals left in place the "joint decision making" for educational decisions that was present in the parties' existing plan. The court of appeals slightly modified the father's financial obligation for Stella's attendance at Baylor to account for future tuition increases, and affirmed the trial court's ruling that the father would not be responsible for tuition costs for the parties' two youngest children, for now.

So, where does this leave the concept of joint decision making on education? In both *Bastone* and *Vance*, we have seen opinions in which the court of appeals has affirmed findings that a parent may take unilateral action in contravention of an order requiring joint decisions. If a party may unilaterally enroll a child in private school notwithstanding a requirement for joint

decisions on educational issues, what educational decision would actually require joint decision making?

2. And Another Nail in the Coffin of Private School Limits…

Roberts v. Crafton (Court of Appeals, April 19, 2021). *Roberts* is a case with complex arguments about whether certain orders are void as against public policy and the right to contract, but it revolves around a particular paragraph in the parties' original parenting plan:

> In lieu of the payment of child support, the parties agree that Father shall share equally in the cost of private school. When the children have reached the age where Christ Methodist School is no longer an option, the parties agree that the children will attend private school chosen by Mother. At that time, Father's obligation to pay his share of private school will cease. Any child support obligation will be limited to the amount of support pursuant to the Child Support Guidelines without consideration of this tuition amount paid by Mother.

Id. At some point, the trial court found that father was obligated to pay a pro rata portion of the private school chosen by mother, and father objected. The court of appeals ultimately agreed with mother, on the ground that payment of private school is a child support obligation that is modifiable by a court when the original circumstances change. The lesson: an agreement between the parties that private school will be the responsibility of one party or the other is NOT enforceable under Tennessee law, but rather may be modified by the court with little effort.

3. Insurance to Secure Child Support

McGrath v. Hester (Court of Appeals, April 14, 2021). In *McGrath*, the trial court granted summary judgment to a mother with regard to a $300,000 life insurance policy maintained by the deceased father pursuant to a Permanent Parenting Plan. The plan called for both parties to maintain a $300,000 policy with the other parent to be named as trustee for the

children. Notwithstanding two separate reductions in father's child support obligation after the original plan, this provision remained unchanged. Upon father's death, he left the entirety of a $500,000 policy to his new wife. The trial court awarded the children an amount equal to the balance of the child support owed to them under the existing parenting plan.

The court of appeals reversed, finding that the agreement was clear that the children were to receive the entire $300,000 provided by the parenting plan. The court also found that the mother's failure to maintain insurance as required by the plan was immaterial, and that the mother was not entitled to attorneys' fees in her litigation against the new wife, either as a contractual matter or a discretionary one.

4. Voluntary Underemployment—or Not!

Mercer v. Chiarella (Court of Appeals, February 25, 2021). In *Mercer*, the principle issue was whether the father, a former professional basketball player, was voluntarily underemployed. But that issue, while pursued on appeal, was not raised in pleadings or arguments at the trial level:

> Mother first argues that the trial court erred when it failed to impute income to Father for purposes of his child support calculation. Specifically, she maintains that Father was voluntarily underemployed and has purposefully failed to earn money in order to avoid his child support obligations.
>
> At the outset, we note that this issue was not raised before the trial court. During closing arguments, the trial court questioned Mother's counsel regarding this contention, wherein the following discussion occurred:
>
> > TRIAL COURT: . . . Secondly, if, and you have to prove all of this, he is either underemployed, willfully underemployed or unemployed. There is no evidence in the record to that at all; is there?
> >
> > MOTHER'S COUNSEL: We did not argue that this time. . .

> TRIAL COURT: Did you allege that he was underemployed?
>
> MOTHER'S COUNSEL: No. I did not.
>
> TRIAL COURT: Well, you are not before the Court on that.
>
> It is well established that issues not raised before the trial court may not be raised for the first time on appeal. *Taylor v. Beard*, 104 S.W.3d 507, 511 (Tenn. 2003). As indicated by the exchange above, we find that Mother failed to raise this issue before the trial court. As such, this issue is waived on appeal.

Id. The court of appeals also noted that although Mother had waived this issue on appeal, "[W]e find it pertinent to note that, under current Tennessee law, the burden of proof is on the party asserting that the other parent is willfully underemployed. *Massey v. Casals*, 315 S.W.3d 788, 796 (Tenn. Ct. App. 2009). The Tennessee Child Support Guidelines do not presume that a parent is willfully underemployed. Id.; see also TENN. COMP. R. & REGS. 1240-02-040.04(3)(a)2(ii). Therefore, it is Mother's burden to prove that Father is willfully underemployed, rather than requiring Father to present evidence that he is not underemployed." *Id*.

The trial court and the court of appeals similarly shot down several other issues raised by mother on appeal, and ultimately assessed mother with $14,080 of father's attorneys' fees at trial, as the prevailing party.

5. Division of Retirement Assets as Child Support-Not!

Baker v. Baker (Court of Appeals, January 28, 2021). *Baker* is a case with some interesting arguments, including the father's claim that mother's share of his military pension should count as income to mother to offset father's child support, and the question of whether the court improperly considered the $130,000 paid by father in a failed Hague case constituted dissipation of marital property.

On the pension issue, the trial court found and the court of appeals affirmed that the division of a pension was a property division, not a payment from father to mother, and thus income from that pension is not considered in the calculation of child support. As the court of appeals held,

> [U]nder Tennessee law, [Father's] military retired pay is marital property subject to equitable distribution." Johnson v. Johnson, 37 S.W.3d 892, 895 (Tenn. 2001), abrogated on other grounds by Howell v. Howell, --- U.S. ---, 137 S. Ct. 1400 (2017). Thus, as previously stated, the trial court divided Father's military retirement as part of the property division. Tennessee Code Annotated section 36-4-121(b)(1)(E), part of the provisions concerning the division of marital property, states that "assets distributed as marital property will not be considered as income for child support or alimony purposes, except to the extent the asset will create additional income after the division." (Emphasis added).

Id. The court of appeals also rejected efforts by the father to claim that the alimony he paid to mother should have been considered in mother's income for child support purposes, referencing the child support guidelines. See TENN. COMP. R. & REGS. § 1240-02-04- .04(3)(a)(1)(xxii). ("Thus, gross income includes "[a]limony or maintenance received from persons other than parties to the proceedings before the tribunal." *Id*.)

The court of appeals further noted as follows:

> In *Farmer v. Stark*, No. M2007-01482-COA-R3-CV, 2008 WL 836092 (Tenn. Ct. App. Mar. 27, 2008), this court encountered facts

> similar to those at issue here. The mother in *Stark* challenged the trial court's child support determination in part based upon its failure to include as part of the father's gross income withdrawals he made from retirement accounts. *Stark*, 2008 WL 836092, at *1.
>
> As in the present case, the retirement accounts at issue had been distributed as part of the division of marital property. Id. at *5. After summarizing the pertinent provisions of the child support regulations and property division statutes (set forth above), this court considered analogous case law regarding capital gains and concluded that the withdrawals from the father's retirement account should properly be considered income only "to the extent they represent an appreciation in the value of those accounts since the time of the divorce." Id. at *6. As this court explained with respect to a deferred compensation account divided as part of the division of marital property, "any distributions of the principal amount of this asset would not be included as income to either party for child support purposes, based on the plain language of [Tenn. Code Ann. § 36-4-121(b)(1)(E)]." *Bajestani*, 2013 WL 5406859, at *5**.**

On the question of dissipation, the court of appeals was careful to point out that the trial court did not find the attorneys' fees spent by father out of the marital estate in a failed Hague action to be dissipation. Instead the trial court simply considered the amount paid in its overall division of assets, and awarded certain assets to mother as part of the "equitable division." This was good work by the trial court, since it did not have to find that the monies spent constituted a "wasteful" expense, but instead could determine the division under the discretionary division of assets standard.

6. Modification of Deviated Child Support[1]

Tigart v. Tigart (Court of Appeals, September 24, 2021). There are several aspects of this case which make it interesting. One is the court of appeals' vacating the dismissal of a contempt charge by the trial court, and remanding the case to the trial court for a new hearing

[1] Of course, there is no such thing as "deviated child support." But it is hard to pass up the opportunity to deviate from the ordinary language in order to use a much more colorful phrase…

or new findings on the contempt. Now, this is okay in civil contempts, but it is not okay in criminal contempt, which follows rules normally reserved for criminal cases. In *Tigart*, all of the charges were characterized as civil contempt, but some, like the father's allegedly unlawful entry into house awarded to the mother, could not be undone (i.e., cannot be purged), and therefore are ordinarily criminal in nature, not civil. Under non-divorce criminal law, if the trial court finds the defendant not guilty, that is the end of the case. (Double jeopardy anyone?) That result is not appealable by the prosecution, absent a mistaken evidentiary ruling.

On the question of the deviation in child support that the husband agreed to in the divorce but sought to modify at trial, the court of appeals held that

> **"**The parent seeking to modify a child support obligation has the burden to prove that a significant variance exists." *Wine v. Wine*, 245 S.W.3d 389, 394 (Tenn. Ct. App. 2007). To determine whether a significant variance exists, the trial court must compare the existing ordered amount of child support to the proposed amount and must "not include the amount of any previously ordered deviations or proposed deviations in the comparison." Tenn. Comp. R. & Regs. 1240-02-04-.05(4).
>
> Furthermore, Tennessee Code Annotated § 36-5-101 provides, in relevant part: [T]he court shall decree an increase or decrease of support when there is found to be a significant variance . . . between the guidelines and the amount of support currently ordered, unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances that caused the deviation have not changed. Tenn. Code Ann. § 36-5-101(g)(1); *Wade*, 115 S.W.3d at 921.
>
> If the circumstances that result in the deviation have not changed, the order may be modified only if "there exist other circumstances, such as an increase or decrease in income, that would lead to a significant variance between the amount of the current order, excluding the deviation, and the amount of the proposed order[.]" Tenn. Comp. R. & Regs. 1240-02-04-.05(5).

Id., citing *Wade v. Wade*, 115 S.W.3d 917, 921 (Tenn. Ct. App. 2002). While the trial court had originally modified father's child support, on re-examination in a Rule 59 motion, the trial court reversed itself to apply to above law, and the court of appeals affirmed.

Tigart also echoed the Tennessee Supreme Court's holding in *Eberbach v. Eberbach*, 535 S.W.3d 467, 479 (Tenn. 2017). In this case, the parties' marital dissolution agreement contained the following fee shifting language:

> In the event it becomes reasonably necessary for either party to institute legal proceedings to procure the enforcement of any provision of this Agreement, that party shall also be entitled to a judgment for reasonable expenses, including attorney's fees, incurred in prosecuting the action.

Id. The court of appeals held that

> As noted above, notwithstanding the question of contempt, the record supports the trial court's findings that Father failed to comply with the MDA. As such, it was reasonably necessary for Mother to institute legal proceedings to enforce the MDA. Under the plain language of the foregoing provision of the MDA, Mother is entitled to an award of her "reasonable expenses including attorney's fees" incurred at both the trial level and on appeal.

Id. Equally important, in a footnote, the court of appeals found that "We note that the MDA does not require that the party seeking enforcement of the MDA be the "prevailing party." Therefore, even if Father is not held in contempt, Mother should be awarded attorney's fees if it was reasonably necessary for her "to institute legal proceedings to procure the enforcement of any provision" of the MDA.

7. Attorneys' Fees Awards and Winning

Standley v. Standley (Court of Appeals, May 9, 2022). Question: does a party have to win every issue at trial in order to be awarded attorneys' fees when such fees are available by statute? Answer, no. In Standley, the husband prevailed in a custody modification case and the

mother prevailed in a modification of child support case. The trial court awarded each party his or her fees, and offset the smaller fee awarded to mother against the larger fee awarded to father. The mother appealed. Affirmed.

III. Civil Procedure/Evidence

A. Civil Procedure

1. Failure by Trial Court to Resolve Key Issues of Fact

Artry v. Artry (Court of Appeals, September 22, 2022). *Artry* is a reminder that the role of the trial court is not always an easy one:

> In this divorce case, we do not reach the substantive issues concerning the trial court's division of the marital estate due to the fact that the trial court failed to designate all property as either marital or separate, failed to assign values to all property, and failed to consider the factors set out in Tennessee Code Annotated section 36-4-121(c). As such, we vacate the trial court's division of the marital estate and its denial of alimony. Because the trial court failed to resolve the parties' dispute over the Tennessee Rule of Appellate Procedure 24 statement of the evidence by providing this Court with one cohesive statement, we reverse the trial court's order concerning the statement of the evidence.

Id. (from the Court of Appeals' summary of the decision). Of particular interest was the issue concerning the statements of the evidence submitted by each party. Although the Court of Appeals found numerous errors in the decision of the trial court which needed to be resolved before the Court of Appeals did its own work, it noted the following concerning the hybrid statement of the evidence relied upon by the trial court:

> Although there are no bright-line rules concerning the format of Rule 24 statements of the evidence, normally in resolving competing statements, a trial court will synthesize the evidence into one, cohesive statement. Here, the trial court's decision to simply use redacted versions of the parties' respective statements along with its previous order as a statement of the evidence is not a good practice. Respectfully, a court order is not a statement of the evidence; rather it is the trial court's findings of fact and conclusions of law adduced from the evidence. Furthermore, simply redacting two competing statements places this Court in the position of having to piecemeal the evidence from both parties' statements, neither of which contains the true summation of the trial court's proceedings.

Id.

2. Rule 10 Recusal, Again

Adkins v. Adkins (Court of Appeals, July 9, 2021). Making its third appearance before the Court of Appeals, Adkins is a 31-page dissertation on recusal (or not) of state trial judges. In the end, the Court of Appeals found that the trial court acted appropriately in denying the ex-Wife's motion to recuse the trial judge under Rule 10B of the Tennessee Rules of Civil Procedure. The Court of Appeals characterized the issues on appeal as follows:

> In the Third 10B, Wife alleged the following grounds for recusal: (1) the trial judge cited Adkins I that had been marked as "Not for Citation" when he decided the Motion to Disburse; (2) the trial judge held two hearings and took action in the case when the Appellate Courts had jurisdiction over the matter; (3) the trial judge's partial recusal should have been an absolute recusal; (4) the trial judge disregarded the Tennessee Supreme Court's opinion in Cook v. State, 606 S.W.3d 247 (Tenn. 2020), which Wife alleged "make[s] clear that partial recusals are not allowed and recusals must be complete in any proceeding in the case . . . ;" and (5) the trial judge made comments at the November 5, 2020 hearing on the Motion to Disburse, which demonstrated bias against Wife and her attorneys and partiality in favor of Husband.

Id. The Court of Appeals rejected each of these claims after noting that its *only* role under Rule 10B was to determine whether the trial judge should be recused, not to address ancillary issues.

Among its rulings, the Court of Appeals held that a trial court which orally makes a ruling prior to the filing of a Rule 10B motion may still properly issue that ruling after the filing of a 10B motion. The Court of Appeals also held that the trial court committed no error by quoting from the Husband's own motion in denying that motion.

Additionally, the Court of Appeals held that the three year delay by the Wife in appealing under Rule 10B from the trial court's partial recusal was not the sort of "prompt" filing required under Rule 10B. (The Wife had raised this issue in her appeal under Rule 3 some time ago, but that appeal was dismissed because it was not a final order.)

The Wife also complained that the trial judge referenced a previous appellate court decision in the Adkins case in a subsequent opinion in the trial court. The essence of the Wife's complaint was that the "not for citation" reference in the prior appellate decision somehow prohibited the trial court from citing from the opinion in a later hearing in the same case. That "not for citation" reference, said the Court of Appeals, prohibits use of the case as precedent in other cases, but it is part of the history of the case in which it was stated.

There is more, of course, to fill out the 31-page opinion. Of particular interest was the Court of Appeals finding that the Wife's appeal was frivolous, and that the Husband was entitled to his fees on appeal. As the Court of Appeals held,

> Having reviewed the record, and in light of the foregoing discussion, we conclude that the present appeal is both frivolous and likely taken to further delay these proceedings.
>
> As discussed in detail above, Wife has failed to present any cogent argument to support her allegation that the trial judge was biased or prejudiced against her. Most of Wife's alleged grounds for recusal fall into four categories—the grounds either: (1) relitigate the same argument from a previous motion for recusal; (2) are untimely; (3) argue the merits of a different order; or (4) fail to allege any bias. The few grounds Wife asserts that are both timely and allege bias are wholly unsupported by the record.
>
> Indeed, after review, it is clear to this Court that many of the "facts" Wife alleged in her pleadings to support the grounds for recusal are inaccurate, misleading, and taken out of context. For example, Wife omitted from her pleadings the fact that the trial court substantively ruled on Husband's Motions to Disburse and to Rule on February 11, 2021, several days before she filed the Third 10B. She also declined to provide this Court with a transcript from that hearing that would show the trial court's substantive ruling.
>
> Also, Wife quoted a section from Husband's pleading to support her argument, but ignored another section from Husband's pleading that was actually relevant to the issue. For these and many other reasons, we conclude that Wife's appeal is devoid of merit and, thus, frivolous.

> However, not only is Wife's appeal frivolous, but there is also little doubt that the appeal is an attempt to manipulate Rule 10B to delay or prevent the payment of Husband's judgment for attorney's fees. Based on the foregoing, we grant Husband's request for appellate attorney's fees, and remand for determination of Husband's reasonable attorney's fees incurred in this appeal and for entry of judgment on same.

Id.

3. Attorney Fees Under Rule 12.02(6)

Pagliara v. Moses (Court of Appeals, September 14, 2022). This is a case which reminds us of at least two things: (1) attorneys' fees and costs are available to prevailing movants in T.C.A. 12.02(6) cases (motions to dismiss for failure to state a case), but are limited to $10,000 per case under that statute; and (2) if you want any attorneys' fees, you can't wait until the final order has been entered, appealed and remanded to ask for them. As the Court of Appeals noted,

> [In this case] Defendants never requested their attorney fees prior to the entry of the trial court's judgment of dismissal. Defendants cemented their waiver by failing to raise during the appeal from the underlying final judgment of dismissal the issue of whether, pursuant to section 20-12-119(c), they were entitled to an award of attorney fees incurred in the trial court.
>
> Following remand, it was too late for Defendants to move for attorney fees or otherwise introduce the issue into the litigation for the first time. Furthermore, as in Seaton, considering our limited remand instructions for the "collection of the costs below," the trial court erred by hearing a claim that was never before asserted.
>
> As previously explained:
>
> > Once the mandate [from an appellate court] reinvests the trial court's jurisdiction over a case, the case stands in the same posture it did before the appeal except insofar as the trial court's judgment has been changed or modified by the appellate court. . . . [T]he trial court does not have the authority to modify or revise the appellate court's opinion, or to expand the proceedings beyond the remand order. The

> trial court's sole responsibility is to carefully comply with directions in the appellate court's opinion.
>
> Freeman Indus. LLC v. Eastman Chem. Co., 227 S.W.3d 561, 567 (Tenn. Ct. App. 2006) (citing Earls v. Earls, No. M1999-00035-COA-R3-CV, 2001 WL 504905, at *3 (Tenn. Ct. App. May 14, 2001)). Here, when Plaintiff first appealed to this Court, the complaint had been dismissed in its entirety, the judgment of dismissal was final, and the case below was concluded. Our opinion did not modify the judgment so, when the mandate issued, the case returned to the same concluded posture.

Id.

4. Rule 59 and Contracts

Shannon v. Shannon (Court of Appeals, April 23, 2021). In Shannon, the parties entered into a Marital Dissolution Agreement and the trial court approved the agreement and entered a final decree of divorce. The wife filed a timely motion to alter or amend, and the court, after a hearing in which it determined that the agreement failed to provide the wife with an interest in husband's military retirement, modified the final decree. The husband appealed, arguing that there was no basis for setting aside the MDA, as there was no evidence of fraud or duress. The court of appeals rejected husband's appeal, finding that the trial court itself found that it had not complied with Tenn. Code Ann. § 36-4-103(b)**,** which requires the trial court to affirmatively find that the parties have made adequate and sufficient provision by written agreement . . . for the equitable settlement of any property rights between the parties." Although this language was included in the final decree, the trial court found that should not have made the finding that the agreement was equitable. As the court of appeals held:

> In divorces filed on the ground of irreconcilable differences, before granting the divorce, the court has a statutory obligation to find "that the parties have made adequate and sufficient provision by written agreement . . . for the equitable settlement of any property rights between the parties." Tenn. Code Ann. § 36-4-103(b) (Supp. 2020).

> In granting the motion to alter or amend, the court conceded that it had failed to fulfill this mandate. The court's concession distinguishes this case from our decision in *Vaccarella v. Vaccarella*, 49 S.W.3d 307 (Tenn. Ct. App. 2001), on which Mr. Shannon relies.
>
> Here, the trial court acknowledged its lack of compliance with statute. This constituted a clear error of law justifying relief from the final decree. See *Bradley*, 984 S.W.2d at 933; *Vaccarella*, 49 S.W.3d at 312. And an injustice resulted from the oversight. The court found that the differences in the values of the retirements resulted in "an inequitable property division."

Id.

5. Limits of Rule 60

Kautz v. Berberich (Court of Appeals, March 18, 2021). *Kautz* is an interesting case involving a petition for relief under Rule 60. The wife claimed, based on post-divorce communications from husband, that the husband had hidden from her certain assets at the time of their 2012 divorce. In 2016, she filed an action to modify the divorce decree. Originally, the trial court granted relief, but upon hearing proof, found that the husband had not hidden significant assets and that he was acting out of malice toward wife. The court declined to make modifications to the agreement and ordered husband to pay wife's attorneys' fees. The husband appealed.

On appeal, the court of appeals found that there was no vehicle in which to make modifications without finding a ground under Rule 60. As the court stated,

> Wife is seeking, long after the divorce was final, an agreement more favorable to her (at the April 2018 hearing, Wife requested a 60/40 division of assets in her favor) than the one she freely and knowledgably entered into with the aid of counsel in 2012 (which apparently resulted in an 82/18 division in favor of Husband)—a "do-over," if one will. That is not a proper basis for Rule 60.02 relief. See Higdon v. Higdon, No. M2019-02281-COA-R3-CV, 2020 WL 6336151, at *7 (Tenn. Ct. App. Oct. 29, 2020), no appl. perm. appeal filed ("The parties agreed to a settlement, and it was duly entered. We decline Wife's request to re-open via a Rule 60.02 motion the division of the marital estate on the basis of alleged

> inequitableness."). We discern no reversible error in the Trial Court's declining to order a new division of the marital estate.

Id. The court of appeals also declined to award attorneys' fees to either party, holding that,

> Neither party identifies this request as a distinct issue; they simply ask for attorney's fees in their brief's conclusion almost as if in passing. "Courts have consistently held that issues must be included in the Statement of Issues Presented for Review required by Tennessee Rules of Appellate Procedure 27(a)(4). An issue not included is not properly before the Court of Appeals." *Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001). This would-be issue is waived. We decline to grant an award of attorney's fees to either party.

Id. As to the Rule 27(a)(4) issue, see also *Nelson v. Justice* (Court of Appeals March 9, 2021) (Our Supreme Court has held that "an issue may be deemed waived when it is argued in the brief but is not designated as an issue in accordance with Tenn. R. App. P. 27(a)(4)." *Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012).**)**

6. Summary Judgment in Termination Proceedings

In re Rhyder C. (Court of Appeals, July 21, 2022). Question: can the termination of parental rights be accomplished through summary judgment proceedings, or does termination require the ability of both parties to confront and cross-examine witnesses. Answer:

> We begin by noting that summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone. Psillas v. Home Depot, U.S.A., Inc., 66 S.W.3d 860, 863 (Tenn. Ct. App. 2001) (citing Fruge v. Doe, 952 S.W.2d 408, 410 (Tenn.1997); Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); Church v. Perales, 39 S.W.3d 149, 156 (Tenn. Ct. App. 2000)).
>
> Moreover, we are unaware of any authority that precludes the use of summary judgment in termination of parental rights proceedings. To the contrary, this court affirmed the use of the summary judgment process in a termination proceeding in M.P.P. v. D.L.K., No. E2001-00706-COA-R3CV, 2002 WL 459010, at *7 (Tenn. Ct. App. Mar. 26, 2002). In that case, we held that "the trial court properly granted judgment as a matter of law to Mother and Stepfather on [one of the grounds for termination] because the undisputed material facts

> establish the ground for termination of Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(6)." M.P.P., 2002 WL 459010, at *5. However, we also held "[s]ince Mother's and Father's affidavits create a genuine issue of material fact regarding whether termination of Father's parental rights would be in the best interest of the Child, the Motion for Summary Judgment should have been denied." Id. at *7.
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> ……
>
> While we respectfully reverse the trial court's finding on one ground, we affirm the judgment of the trial court in all other respects, and this matter is remanded with costs of appeal assessed against Tesla F**.**

Id. (Note: we rarely discuss termination of parental rights in these case law updates, because there are so many such cases that we would be overwhelmed in doing so. But occasionally, as in Rhyder, the legal issue is unique and instructive to many other cases. For example, if parental rights can be terminated by summary judgment, what about custody and alimony? Why not?)

7. Attorneys' Liens

Baker-Brunkhorst v. Brunkhorst (Court of Appeals, February 22, 2021). The entire story is laid out in the court of appeals summary of the case:

> This appeal arises from a divorce action. The matter in controversy concerns an attorney's fee lien and abstract of suit filed and recorded by the wife's former counsel following the entry of the divorce decree.
>
> In pertinent part, the decree required the husband to pay the entire equity in jointly owned real property to the wife contemporaneous with the wife quitclaiming her interest in the property to the husband; however, the husband died prior to the conveyance or the payment. Thereafter, the wife's former counsel filed a motion to perfect and enforce its attorney's lien on the property, and the court granted the motion.
>
> The administrator of the husband's estate filed a motion to release the attorney's lien, and the court ruled that the lien was valid and enforceable because neither party performed their respective obligations under the divorce decree. The administrator for the

> husband's estate then filed a Tenn. R. Civ. P. 59.04 motion to alter or amend on the grounds (1) there was no legal basis for allowing the wife's attorneys to file a charging lien against property awarded to the husband and (2) the lien was not valid because the attorneys based the lien on the wrong section of the statute.
>
> The court denied the Rule 59.04 motion to alter or amend, and this appeal followed. The singular issue in this appeal is whether the trial court abused its discretion by denying the Rule 59.04 motion. Because the administrator's motion was not based on a change in controlling law, previously unavailable evidence, or a clear error of law, see *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005), we hold that the trial court did not abuse its discretion in denying it. Therefore, we affirm.

Id.

8. *Eberbach*, Remembered

Bachelor v. Bachelor (Court of Appeals, January 21, 2021). *Eberbach* is a Tennessee Supreme Court case that reminded us that a marital dissolution agreement which provides for attorneys' fees to the prevailing party means what it says. *Bachelor* reminds us that Eberbach means what it says. Here, the trial court refused to award fees to the former wife based on the breach of a marital dissolution agreement by the former husband, finding that the husband's actions were "not willful". The wife appealed, and the court of appeals reversed, holding as follows:

> In *Eberbach v. Eberbach*, the Tennessee Supreme Court confronted the issue of attorney's fees as they relate to MDAs. There, the Court specifically noted Tennessee courts' history in observing that, at the trial court level, parties are contractually entitled to recover reasonable attorney's fees provided there is an agreement providing for such relief. See *Eberbach*, 535 S.W.3d at 478 (citing *Seals v. Life Inv'rs Ins. Co. of Am*., No. M2002- 01753-COA-R3-CV, 2003 WL 23093844, at *4 (Tenn. Ct. App. Dec. 30, 2003)) (stating that attorney's fees could be awarded to a "prevailing party" where the parties' agreement has provided for such an award to a "prevailing party").

> In such cases, the trial court may not use its discretion to "set aside the parties' agreement and supplant it with its own judgment." Id. (citing *Christenberry v. Tipton*, 160 S.W.3d 487, 494 (Tenn. 2005)). Instead, the trial court may only use its discretion in determining the amount of attorney's fees that it finds reasonable under the circumstances. Id. (citing *Hosier v. Crye-Leike Commercial, Inc*., No. M2000-01182-COA-R3-CV, 2001 WL 799740, at *6 (Tenn. Ct. App. July 17, 2001)). This notion is also applicable to the appellate courts. Id. Therefore, absent mistake, fraud, or another defect, courts must interpret contracts as they are written, giving the language a "natural meaning." Id. (citing *U.S. Bank, N.A. v. Tennessee Farmers Mut. Ins. Co.*, 277 S.W.3d 381, 386-87 (Tenn. 2009)).

Id. As to the case at hand, the court of appeals found that husband's argument that he was in substantial compliance with the terms of the MDA was non-availing:

> Here, the Appellant filed her petition for contempt in order to enforce her contractual rights afforded to her under the provisions of the MDA. Although the Appellee maintains that he was in compliance with the MDA such that the Appellant's need to file her petition for contempt was obviated, we note again that the trial court found that the Appellee was in noncompliance with the MDA at the time the Appellant's petition was filed. Therefore, it is reasonable under the MDA's provisions that the Appellant would file a petition to seek compliance and for contempt, and thus incur attorney's fees, in order to enforce her contractual rights. As such, any arguments that awarding the Appellant attorney's fees would contravene the intent of the MDA are without merit. Instead, we find that an award of attorney's fees in this case clearly carries out the parties' stated intent in the MDA, as it states that the defaulting party should be required to pay the attorney's fees of the non-defaulting party who incurred fees and expenses due to noncompliance or a breach.

Id. For good measure, and in accord with *Eberbach*, the court of appeals also awarded fees to wife on appeal.

9. What, No Hearing?

Stine v. Jakes (Court of Appeals, June 27, 2022). The Court of Appeals' own summary is almost enough for this one:

> Following proceedings before a juvenile court magistrate, Mother filed a timely request for a de novo hearing by the judge pursuant to Tennessee Code Annotated section 37-1-107(d).
>
> In lieu of an evidentiary hearing, the juvenile court considered the matter on the parties' briefs and argument of counsel. The court determined it could not make factual findings without conducting a de novo trial and advised the parties that, in lieu of a hearing, a direct appeal to this Court was "a remedy for either party." Mother did not set a hearing, and the juvenile court affirmed the magistrate's findings of fact and conclusions of law. Mother appeals.
>
> We vacate the juvenile court's order and remand this matter for a de novo hearing before the juvenile court judge**.**

Id. The authors of these materials were initially skeptical that a Juvenile Court judge can simply pass on conducting a *de novo* trial on a case "appealed" from a magistrate's court to the Juvenile Court, and instead send the case directly to the Court of Appeals. But it turns out there is such a provision in the Juvenile Court rules if properly followed by the parties. Unfortunately for the father and grandparents, those rules were not properly applied.

Here, as set out in the Court of Appeals decision,

> Mother requested a hearing before the juvenile court judge pursuant to Tennessee Code Annotated section 37-1-107 after the entry of the magistrate's order. Following a hearing on April 19, the juvenile court entered an order finding that counsel for the parties had agreed that the matter would be reheard "by way of oral arguments." The court instructed the parties to file briefs and set oral argument to be heard on June 17, 2021.
>
> Following the hearing on June 17, the juvenile court judge determined that the matter was timely "appealed" from the magistrate pursuant to Tennessee Code Annotated section 37-1-107(d) and that, in lieu of "retrying the case," the parties agreed to submit the matter on briefs.
>
> In its June 21, 2021 order, the court stated:
>
> > The Court, having not heard the testimony and evidence presented at the underlying trial, cannot make factual findings without conducting a de novo trial of the case and

> considering the merits of the parties' arguments. The Court advised the parties a Rehearing is not mandatory and a direct appeal to the Tennessee Court of Appeals is a remedy for either party.

Id. The key to the ultimate resolution of this appeal was that Tennessee Code Annotated section 37-1-107 ("section 37-1-107") governs juvenile court magistrates. Section 37-1-107(d) provides, in relevant part: (d) Any party may, within ten (10) days after entry of the magistrate's order, file a request with the court for a de novo hearing by the judge of the juvenile court. The judge shall allow a hearing if a request for hearing is filed. No later than ten (10) days after the entry of the magistrate's order, the judge may, on the judge's own initiative, order a hearing of any matter heard before a magistrate. . . .

Additionally,

> Section 37-1-107(e) governs direct appeals from the magistrate's judgment to this Court. The section provides: (e) If no hearing before the judge is requested, or if the right to the hearing is expressly waived by all parties within the specified time period, the magistrate's order becomes the order of the court. A party may appeal the order pursuant to § 37-1-159.

Id. As the Court of Appeals stated,

> In this case, however, Mother exercised her right under section 37-1-107(d) to request a de novo hearing before the juvenile court judge. A hearing under the section is not an "appeal." Rather, the section requires "a traditional de novo hearing." Kelly v. Evans, 43 S.W. 3d 514, 515 (Tenn. Ct. App. 2000). A de novo hearing requires "a new trial on both issues of law and fact as if no other trial had occurred." In re Piper H., No. W2015-01943-COA-R3-JV, 2016 WL 5819211, at *6 (Tenn. Ct. App. Oct. 5, 2016). The juvenile court judge must "decide the issues without deference to the magistrate's actions." Id. The de novo hearing is not a review of the record or proceedings before the magistrate. Kissick v. Kallaher, No. W2004-02983-COA-R3-CV, 2006 WL 1350999, at *3 (Tenn. Ct. App. May 18, 2006).
>
> The hearing before the judge requires a full evidentiary trial, including the testimony of witnesses. Id. Further, briefs and unsworn

> statement of counsel "constitute neither testimony nor trial." Id. (internal quotation marks omitted). Accordingly, the juvenile court in this case erred in attempting to decide this matter on briefs and oral argument of counsel. When Mother requested a de novo hearing under section 37-1-107(d), it was incumbent on the juvenile court judge to conduct an evidentiary trial. Although it appears the juvenile court offered Mother the opportunity to set the matter for a de novo hearing after unsuccessfully attempting to decide the matter on the argument of counsel, it also informed her that she could waive a hearing and appeal the magistrate's order to this Court. The juvenile court then affirmed the magistrate's order without a hearing.
> …
>
> We consistently have held that when a party requests a de novo hearing under Section 107(d) and the juvenile court fails to conduct an evidentiary trial, the judgement of the juvenile court will be vacated and the matter remanded for a de novo hearing as contemplated by the statute. State ex. Rel. Groesse v. Sumner, 582 S.W.3d 241, 257 (Tenn. Ct. App. 2019); Kelly v. Evans, 43 S.W.3d 514, 515 (Tenn. Ct. App. 2001). We accordingly vacate the order of the juvenile court and remand this matter for a de novo hearing before the juvenile court judge.

Id.

10. Defamation, Not!

Vanwinkle v. Thompson (Court of Appeals, June 2, 2022). The Court of Appeals summary tells the story:

> A wife and husband obtained a "Final Decree of Divorce." The wife then remarried. Her first husband claimed their divorce was not final, and thus filed a declaratory judgment action claiming that her second marriage was bigamous. The declaratory judgment action was ultimately dismissed. The wife and her new husband filed a defamation action against the first husband, claiming that he had falsely accused them of bigamy. The trial court dismissed the defamation action. Because the first husband's allegedly defamatory statements are entitled to the absolute litigation privilege, we affirm.

Id. In Vanwinkle, the Court of Appeals reminded us that the parties' pleadings cannot form the basis of a defamation lawsuit, as long as the pleadings are pertinent and relevant to the issues in the underlying case. As the court explained:

> "There are two types of privileges that can be raised as a defense in a defamation case, absolute and qualified." Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18, 22 (Tenn. 2007) (citing Jones v. Trice, 360 S.W.2d 48, 51 (Tenn. 1962)). "A privilege is described as absolute when it is not defeated by the defendant's malice, ill-will, or improper purpose in publishing the defamatory communication. Thus, an absolute privilege is, in effect, a complete immunity." Id. (footnote and citations omitted). "By contrast, a qualified or conditional privilege is one that may be defeated if the defamatory publication was made with malice, ill-will, or for an improper purpose." Id. (citations omitted).
>
> In Tennessee, the "absolute litigation privilege" applies, such that "statements made in the course of a judicial proceeding, if pertinent or relevant, are absolutely privileged, and this is true regardless of whether they are malicious, false, known to be false, or against a stranger to the proceeding." Trice, 360 S.W.2d at 54. Such statements, "therefore[,] cannot be used as a basis for a libel action for damages." Id. at 50; see also id. at 54–55 ("Our opinion is consistent with the free and unrestricted use of all reasonably pertinent and relevant information available to litigants in presenting their causes before the courts of this State.").
>
> Thus, "a statement by a judge, witness, counsel, or party, to be absolutely privileged, must meet two conditions, viz: (1) It must be in the course of a judicial proceeding, and (2) it must be pertinent or relevant to the issue involved in said judicial proceeding." Id. at 52; see also Simpson Strong-Tie Co., 232 S.W.3d at 23 (citing Lambdin Funeral Serv. Inc. v. Griffith, 559 S.W.2d 791, 792 (Tenn. 1978); Trice, 360 S.W.2d at 54) (explaining how the Tennessee Supreme Court has adopted the absolute litigation privilege). "'As to the degree of relevancy or pertinency necessary to make alleged defamatory matter privileged, the courts favor a liberal rule." Trice, 360 S.W.2d at 53 (quoting 33 Am. Jur. Page 146, Section 150). "'The matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety.'" Id. at 53–54 (quoting 33 Am. Jur. Page 146, Section 150).

Id. In affirming the dismissal of the defamation claim, the Court of Appeals made clear that it was not deciding whether there was or wasn't bigamy on the part of the ex-wife, only whether or not her ex-husband was guilty of defamation for saying so in his pleadings—the sole source of the claims the ex-wife relied upon to pursue her defamation claim.

11. Statutory Interest Rate—No Changes

Coffey v. Coffey (Court of Appeals, April 11, 2022). In the federal courts, judgments are modified as the statutory interest rate changes. Not so in Tennessee courts. As we all know, the statutory interest rate is no longer 10% (or 12% for child support), but rather the rate set by the state as of the date of the entry of the judgment. Coffey reminds us that the interest rate on a judgment remains the same throughout the life of the judgment, regardless of periodic fluctuations in interest rates after the entry of the judgment.

12. Rule 59 and Marital Dissolution Agreements

Polster v. Polster (Court of Appeals, September 14, 2021). So, what happens when a husband agrees to the terms of a divorce, enters into a marital dissolution agreement, and the day of the final hearing he sends to the court a letter that states, in essence, "If she wants a divorce she can have it, but I want the court to order 3 months of marital counseling." The trial court enters a divorce decree, and the husband seeks to set it aside under Rule 59. Also, what of the husband's claims of duress and wife's claims for attorneys' fees fighting the Rule 59 motion and husband's appeal from the trial court's denial of the Rule 59 motion?

It turns out to be more bad news for the husband. First, it is unclear whether the husband's letter to the court arrived prior to or after the hearing, but it would have no effect anyway. The husband had signed the MDA and it was a contract, and the letter doesn't state

that the husband is revoking his consent to a divorce. The trial court denied relief to the husband and the court of appeals affirmed. As to duress, the court of appeals noted as follows:

> Turning to the issue of Husband's duress, Husband argues that, due to Wife's representations that "if he just signed the Marital Dissolution Agreement, they could work things out and continue to be married," he was experiencing duress and coercion at the time he executed the MDA.
>
> "A party wishing to avoid a contract on the grounds of duress must prove that in forming the contract he or she had been forced or coerced to do an act contrary to his or her free will." *Holloway v. Evers,* No. M2006-01644-COA-R3-CV, 2007 WL 4322128, at *9 (Tenn. Ct. App. Dec. 6, 2007). Our Supreme Court has defined duress as: "'[A] condition of mind produced by the improper external pressure or influence that practically destroys the free agency of a party, and causes him to do and act or make a contract not of his own volition, but under such wrongful external pressure.'" *Rainey v. Rainey*, 795 S.W.2d 139, 147 (Tenn. Ct. App. 1990) (quoting *Simpson v. Harper*, [] 111 S.W.2d 882, 886 ([Tenn. Ct. App.] 1937)).When such pressure exists "is a question to be determined by the age, sex, intelligence, experience and force of will of the party, the nature of the act, and all the attendant facts and circumstances." Id. (quoting 10 Tenn. Jur. Duress and Undue Influence § 3 at 112 (1983)). *Barnes*, 193 S.W.3d at 500. "***Duress consists of 'unlawful restraint, intimidation, or compulsion that is so severe that it overcomes the mind or will of ordinary persons***.'" Holloway, 2007 WL 4322128, at *9 (quoting *Boote v. Shivers*, 198 S.W.3d 732, 745 (Tenn. Ct. App. 2005); *McClellan v. McClellan*, 873 S.W.2d 350, 352 (Tenn. Ct. App. 1993)).

Id. (emphasis supplied).

13. Remember to Brief Your Issues on Appeal

McCartney v. McCartney (Court of Appeals, September 17, 2021). In this case, which began as a complaint for legal separation in 2003, morphed into a complaint for divorce in 2015, and was tried in 2020, the husband raised a number of procedural issues, five of which were dismissed for failure to brief them (i.e., to set out facts and legal arguments related to those issues). The trial court also held that the wife could not be compelled to bring financial

documents related to her assets acquired after the divorce to a hearing, and the court of appeals affirmed. Both courts also rejected husband's argument that "the parties intended the property each acquired during the marriage with marital funds to remain their respective separate property."

Id. The husband also argued that the trial court erred by including in the marital estate the appreciation during the marriage on husband's admittedly separate retirement funds. The reason? No information was provided to the court concerning the amount of that appreciation. The trial court was affirmed on that ruling as well. In addition, the husband claimed that the modular home which was purchased shortly before the marriage, built during the marriage, and lived in by the parties was his separate property. The court found that the home was originally separate but transmuted during the marriage to marital property, not least by the fact that the wife paid off a $52,000 mortgage on the home with her separate assets. The husband's argument that the $52,000 was a gift to him which he repaid to the wife was not convincing.

There is much more, including disability benefits, a tractor, a boat, alleged dissipation, an automobile accident and jewelry theft, drug addiction, and family gifts—all of which the trial court and the court of appeals sorted through, with the ultimate result that the decision of the trial court was affirmed in its entirety. All I will say about those issues is that the 2021 award for extraordinary judicial patience goes to Judge Melissa Blevins-Willis and Judge Kenny Armstrong.

14. Statutes of Limitations and Marital Dissolution Agreements

Felker v. Felker (Court of Appeals, August 10, 2021). The parties in *Felker* divorced in 2005. The divorce agreement required the husband to provide to wife by October 2005 proof of life insurance naming their son as the beneficiary of $150,000 in insurance. Wife sued

husband in 2019 for failure to maintain insurance as ordered. (Both the wife and the son were named as plaintiffs in the suit, but the complaint was signed only by the wife.) The trial court denied husband's motion to dismiss, found that the breach had occurred in 2016, and granted wife a judgment for $16,000 in attorneys' fees and ordered husband to procure a $150,000 life insurance policy. Husband appealed. The court of appeals reversed, finding that the cause of action had accrued in 2005 when husband failed to provide wife a copy of the life insurance, and that the six year statute of limitations on breach of contracts had expired in 2011. As the court of appeals held,

> "[W]e determine that the MDA is not severable because the purpose of the agreement was to distribute the parties' property and provide financial support and security for Wife (and Son) based on the parties' divorce. As such, the provisions were triggered by the same event and were part of a single divorce proceeding. Plaintiffs have failed to demonstrate that separate consideration was apportioned to each item or that performance was "divided into different groups, each set embracing performances which are the agreed exchange for each other." See *James Cable Partners,* 818 S.W.2d at 344.

Id.

15. Attorneys' Fees on Appeal, and Expenses

Nelson v. Justice (Court of Appeals, January 24, 2022). Nelson involves the question of whether an appellate order granting a party "attorneys' fees" on appeal also includes expenses related to the appeal. The answer is "no":

> Inasmuch as this Court's Opinion directed the trial court to award Mother her reasonable fees incurred on appeal but made no mention of awarding costs or expenses incurred by Mother's counsel, we conclude that the trial court's award of $458.02 in expenses was improper.

Id. So, there goes $458 of the fees ultimately awarded, leaving a mere $123,925. But don't think this $123,925 was not earned: according to the trial court which awarded the fees,

> The record consisted of 50 volumes of technical record, 78 volumes of transcript, and 311 exhibits and offers of proof. The court further found that Father's brief filed in the initial appeal was "not organized in a systematic manner that would allow a reasonable person under the circumstances to follow the 130 issues Father raised on appeal easily" and that Father's citations to the record contained in his brief were often incorrect. As such, the court concluded that Ms. Petersen was "tasked with an unusually complex and difficult case, requiring extensive time and labor, not only in terms of research and writing, but organization, fact-checking, and at times, manual labor."

Id.

B. Evidence

1. Expert Testimony, and Much More…

Murdoch v. Murdoch (Court of Appeals, March 2, 2022). Murdoch is an interesting case with a lot of moving parts, part of which involve the husband's argument on appeal that the trial court should not have allowed the opinion of wife's expert into evidence. The wife had hired Dr. Ciocca "to review her medical records and to render an opinion as to Wife's ability to work." Husband agreed that Dr. Ciocca was qualified as an expert, but sought to exclude his testimony because he had not personally examined the wife, and was not her treating physician. The trial court allowed the testimony and the Court of Appeals affirmed. In doing so, the Court of Appeals noted as follows:

> Generally, the opinion of an expert "must be based on facts in evidence." Evans v. Wilson, 776 S.W.2d 939, 942 (Tenn. 1989). However, "a treating physician [is permitted] to give an expert opinion based on hearsay reports and tests received in aid of diagnosis and treatment of a patient. It is an exception to the

> traditional view excluding expert opinions based on the hearsay reports of others." Id. (citing See, D. Paine, Tennessee Law of Evidence § 176 (1974)). The Evans court observed, "the reliability and trustworthiness of the hearsay [medical] reports and tests [are] established by their use by the treating physician in treatment and diagnosis." Id. Allen v. Albea, 476 S.W. 3d 366, 379-80 (Tenn. Ct. App. 2015), perm. app. denied (Tenn. Sept. 16, 2015).

*Id. a*dditionally, the Court of Appeals cited the following with regard to Dr. Ciocca's testimony:

> From Dr. Ciocca's undisputed testimony, it is clear that in forming his opinions concerning Wife's mental health and ability to work, Dr. Ciocca reasonably and appropriately relied on diagnostic and treatment records from Wife's various providers along with other information he gleaned from his own evaluation and from his referral of Wife to Dr. Biswas at Semmes-Murphey. In fact, throughout his testimony, Dr. Ciocca explained:
>
> - "I reviewed her medical records, her evaluations and I interviewed her to assess her current level, her current state."
> - "[I]f I had questions about some element of the [Wife's medical] records, I contacted the person who produced the records."
> - "I referred her to Dr. Biswas . . . ."
> - Explain[ed] that his opinions were "in my view" and "based on my assessment."

Id. As the Court of Appeals summarized, "If Husband was not satisfied with Dr. Ciocca's testimony, then cross-examination or countervailing expert proof were Husband's options for attacking it, not exclusion of the testimony. The trial court did not commit error in allowing, or relying on, Dr. Ciocca's expert testimony."

Murdoch addresses far more than just the admissibility of expert testimony, including alimony, division of assets, and "the missing witness rule." The case is recommended reading.

2. Sexually Transmitted Disease Litigation

P. H. v. Cole (Court of Appeals, June 7, 2021). As more and more cases involving sexually transmitted diseases are being litigated in the context of divorce and/or non-married relationships, appellate decisions are giving us more guidance on their resolution. In *Cole*, the court summarized its opinion as follows:

> The plaintiff tested positive for HSV-2, a sexually transmitted disease, after her sexual relationship with the defendant ended. She filed a complaint against the defendant, claiming that he was liable for transmitting the disease to her. The defendant had his blood tested after being served with the plaintiff's complaint, and his blood results were negative for both HSV-2 and HIV. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed. We affirm the trial court's judgment.

Id. While the plaintiff insisted that the negative test was insufficient to support summary judgment, the trial court accepted the proof involving negative tests for both HSV-2 and HIV, and the doctor's affidavit, to grant summary judgment and dismiss the case. One question regarding the appellate court procedure in this case: why name the defendant by first and last name and middle initial, but not the plaintiff, in this case? Medical information was provided for both of them, one who tested negative for STDs and the other who tested positive. Are negative results not health-related information?

3. *Culbertson*, Anyone?

In re Lucas H. (Court of Appeals, May 26, 2021). In a case out of Juvenile Court which cried out for the application of *Culbertson* from the beginning, the court of appeals reversed both a juvenile court order and a circuit court order that required a mother to release her psychological records to the father. The father argued that the records were necessary to protect the child; the mother responded that the records are protected by privilege. The case came to the court of appeals by writ of certiorari, which held that

> "Tennessee law recognizes a privilege against compelled disclosure of confidential communications between a psychologist and client." Culbertson v. Culbertson, 393 S.W.3d 678, 683 (Tenn. Ct. App. 2012) (Culbertson I). The importance of the psychologist-client privilege was emphasized by the United States Supreme Court wherein the Court explained the purposes behind this evidentiary privilege, noting:
>
> > Effective psychotherapy … depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.
>
> *Jaffree v. Redmond*, 518 U.S. 1, 10 (1996) (emphasis added). Furthermore, Tennessee Code Annotated section 63-11-213 states, in pertinent part:
>
> > [T]he confidential relations and communications between licensed psychologist or, psychological examiner or, senior psychological examiner or certified psychological assistant and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

Id. The court of appeals also rejected the argument that the records were available for disclosure under Tennessee Code Annotated section 37-1-411 states, in pertinent part, "[n]either the husband-wife privilege as preserved in § 24-1-201, nor the psychiatrist-patient privilege as set forth in § 24-1-207, nor the psychologist-patient privilege as set forth in § 63-11-213 is a ground for excluding evidence regarding harm or the cause of harm to a child in any dependency and neglect proceeding resulting from a report of such harm under § 37-1- 403 or a criminal prosecution for severe child abuse." Tenn. Code Ann. § 37-1-411. The father and the guardian ad litem maintained that father's Original Petition sufficed as a "report of harm under section

37-1- 403." The court of appeals disagreed, holding that there are specific requirements related to the application of that statute which were not met at the trial level and would not be treated as being met on appeal.

4. Evidence, Social Media, and Foolishness

In re Sitton (Tennessee Supreme Court, January 22, 2021). This case doesn't belong here, but it is hard to tell exactly where it would belong. Because it involves social media, bad relationships, and poor legal advice, it seems to fit very well in a case law update on Tennessee domestic relations. The Supreme Court's own summary is all enough:

> This case is a cautionary tale on the ethical problems that can befall lawyers on social media. The attorney had a Facebook page that described him as a lawyer. A Facebook "friend" involved in a tumultuous relationship posted a public inquiry about carrying a gun in her car. In response to her post, the attorney posted comments on the escalating use of force. He then posted that, if the Facebook friend wanted "to kill" her ex-boyfriend, she should "lure" him into her home, "claim" he broke in with intent to do her harm, and "claim" she feared for her life. The attorney emphasized in his post that his advice was given "as a lawyer," and if she was "remotely serious," she should "keep mum" and delete the entire comment thread because premeditation could be used against her "at trial."
>
> In the ensuing disciplinary proceedings, a Board of Professional Responsibility hearing panel found that the attorney's conduct was prejudicial to the administration of justice in violation of Rules of Professional Conduct 8.4(a) and (d). It recommended suspension of his law license for sixty days… We now hold that the sanction must be increased. The attorney's advice, in and of itself, was clearly prejudicial to the administration of justice and violated the Rules of Professional Conduct.
>
> In addition, his choice to post the remarks on a public platform amplified their deleterious effect. The social media posts fostered a public perception that a lawyer's role is to manufacture false defenses. They projected a public image of corruption of the judicial process. Under these circumstances, the act of posting the comments on social media should be deemed an aggravating factor that justifies an increase in discipline. Accordingly, we modify the hearing panel's judgment to impose a four-year suspension from the

practice of law, with one year to be served on active suspension and the remainder on probation.

Id.

IV. Contempt

1. 510 Days for Contempt? Yes.

Saleh v. Pratt (Court of Appeals, May 17, 2022). The summary of this contempt case which garnered a 510 day sentence for the ex-husband is brief and to the point:

> This appeal arises after the trial court found the defendant in contempt of an order of protection and sentenced him to 510 days of incarceration. We affirm the judgment holding the appellant in contempt in its entirety.

Id. As to the correctness of the 510 days sentence, the Court of Appeals stated as follows:

> "Criminal contempt should be imposed in appropriate cases when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice. Thus, sanctions imposed for criminal contempt generally are both punitive and unconditional." In re Sneed, 302 S.W.3d 825, 827-28 (Tenn. 2010) (internal quotation marks and citations omitted).
>
> Appellant has shown no respect for the rule of law in this case. In light of Appellant's continued disregard for the order of protection, we find the sentence necessary "to achieve the purpose for which the sentence [was] imposed." Wood, 91 S.W.3d at 776. Appellant has failed to illustrate how the evidence introduced at trial was insufficient to support the trial court's verdict of guilt. Thus, he has not overcome the presumption of guilt on appeal. See Black, 938 S.W.2d at 399.
>
> We find no abuse of discretion by the trial court in its disposition of Appellant's criminal contempt proceeding.

Id.

2. Remember: Victims of Stalking are Victims

Billingsley v. Gallman (Court of Appeals, March 29, 2021). Gallman is a good reminder that orders of protection may be granted to individuals who have not shared a family or intimate relationship with one another. As described in the court's own summary:

> A woman against whom the trial court granted an order of protection appeals the order of protection. The trial court granted the order based upon its finding that the woman, a former girlfriend of the petitioner's husband, threatened the petitioner and her husband with physical violence through a series of videos. Discerning no error, we affirm.

Id. The body of the opinion went further:

> Orders of protection are statutorily governed by Tennessee Code Annotated § 36-3- 601, et seq. Pursuant to Tennessee Code Annotated section 36-3-602(a), "[a]ny domestic abuse victim . . . who has been subjected to, threatened with, or placed in fear of, domestic abuse, stalking, or sexual assault, may seek" an order of protection. "'Stalking victim' means any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of the offense of stalking, as defined in § 39-17-315." Tenn. Code Ann. § 36-3-601(11).
>
> Tennessee Code Annotated section 39-17- - 4 - 315(a)(4) defines stalking as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."
>
> The court may issue an order of protection if "the petitioner has proven the allegation of domestic abuse, stalking or sexual assault by a preponderance of the evidence." Tenn. Code Ann. § 36-3-605(b). "Proving an allegation by a preponderance of the evidence requires a litigant to convince the trier-of-fact that the allegation is more likely true than not true." McEwen v. Tenn. Dep't of Safety, 173 S.W.3d 815, 825 n.19 (Tenn. Ct. App. 2005) (citing Austin v. City of Memphis, 684 S.W.2d 624, 634–35 (Tenn. Ct. App. 1984)).

Id. See also *Thomas v. Gallman* (Court of Appeals, March 24, 2021) which affirmed an order of protection sought by and granted to Ms. Billingsley's ex-husband.

3. ***Murray v. Godsey*** (Court of Appeals, July 19, 2021). The court's own summary provides the meat of the case:

> This appeal arises from a post-divorce contempt action. Darlene Christmas Murray ("Wife") filed a petition for contempt in the General Sessions Court for Roane County (the "trial court") in 2015, alleging that her former husband, Louis Wade Godsey ("Husband"), should be held in contempt for failing to pay Wife retirement benefits to which she was entitled under their final decree of divorce. The trial court found Husband in contempt and awarded Wife, inter alia, $25,000.00 in attorney's fees as punishment. Because the evidence in the record preponderates against the trial court's finding that Husband actually and willfully violated a court order, we reverse.

Id. This is an interesting case in which the Court of Appeals found that most of the elements of contempt were met in this case, but that the proof did not support the contention that the Husband was willfully in contempt of court. With regard to one of the QDROs drafted, Husband attempted to explain to his attorney and his Wife's attorney that his employer, the Federal Government, did not accept QDROs, but rather COAPs. Both lawyers disregarded these statements from the Husband. Additionally, with regard to a second QDRO, the Court of Appeals found that merely proving that Husband had knowledge of what he should have done was not enough—the burden on the Wife was to prove that Husband had willfully disregarded an order, a burden she did not meet.

V. Division of the Marital Estate

1. ***Haltom v. Haltom*** (Court of Appeals, February 10, 2021). *Haltom*, like *Lewis*, also found marital property despite the protests of the wife that the property, or at least a portion of it, should have been deemed separate property. Here, the wife owned certain property prior to the marriage. That property was sold and the proceeds used to purchase another piece of property which was put into joint names. The trial court found, and the court of appeals affirmed, that the placing of the new property into joint names evidenced an intent that the equity from the original property be marital property rather than separate. Likewise, wife's complaint that the trial court divided the marital property equally—including the value of the new property—was rejected by the court.

2. ***Ellis v. Ellis*** (Court of Appeals, August 29, 2022). Wow. In a competition to determine which 2022 case represents the most pain and suffering for the parties, Ellis would be a medal contender. The case was filed in June 2011. The wife challenged the validity of the parties' prenuptial agreement, and won at the court level and the appeal, which was decided in November 2014. (Wife's attorneys' fees through that date totaled approximately $368,259.95, according to the trial court.) The divorce case itself was not tried until over four years later, in February 2019. And this appellate opinion was entered almost four years later—August 2022—and includes a remand to the trial court to reconsider its division of assets and alimony.

In Ellis, the trial court found that the total marital estate was approximately $3 million. Of that $3 million, $921,000 was in unaccounted for or dissipated assets—"$600,000 in receivables by Husband and $321,000 in excess cash at closing." The trial court also found that certain business interests of husband were separate property, and other business interests were marital property. These two issues consumed the majority of the 25 page opinion, in which the

Court of Appeals affirmed the dissipation findings by the trial court, and rejected a substantial portion of the determination of marital property. The classification of the business interests was complicated by the trial court's finding that one of the business interests owned by the husband (Wedgecorp) was his separate property but a subsidiary of Wedgecorp (QMS) was marital property. The Court of Appeals reversed on this issue, finding that if Wedgecorp was separate property, then its wholly owned subsidiary, QMS, was also separate property. As the Court of Appeals held,

> QMS is a corporate entity separate from Wedgecorp. It is not owned by husband and consequently cannot be classified as marital property. To consider QMS as merely an increase in the value of Wedgecorp would be to improperly disregard the corporate forms of these entities. Wife did not argue at the trial level that the corporate veil of either Wedgecorp or QMS should be pierced on equitable grounds.

Id. On the dissipation issue, the Court of Appeals noted that "husband had engaged in a pattern of mingling business and personal assets and debts, pulling out excess cash from various property transactions, and hiding assets in an attempt to keep them from Wife after the divorce was filed." *Id.* It also quoted the trial court to the effect that "there has been no explanation provided to this court as to the disposition of the $600,000 notes receivable by husband, and is possibly in violation of the statutory injunction in divorce cases….Other documents…indicate husband received cash during the pendency of the divorce, which remains unaccounted for. Husband took unaccounted for cash out of his business in the amount of $321,803…" The Court of Appeals affirmed the dissipation finding, noting that

> Husband has not pointed to evidence in the record that tends to preponderate against the above-quoted factual findings. Giving due deference to the trial court's perspective of witness credibility, among other things, we hold [the trial court] did not err in its

> analysis of asset dissipation as a factor in the distribution of the marital estate.

Id.

3. Implied Partnership, or Not?

Runion v. Runion (Court of Appeals, August 29, 2022). Runion is an interesting case that brought back Bass v. Bass, 814 S.W.2d 38 (Tenn. 1991) which that a post-divorce enterprise between former spouses was an implied partnership subject to being divided the same as any other partnership. Except, here, the trial court and the Court of Appeals found the working arrangement between the husband and his father was not a partnership subject to being valued and divided in a divorce case between the husband and his wife. Instead, the trial court found that the husband's father in Runion owned the farm and its major assets and the husband was compensated as an employee, not a partner (albeit a very well compensated employee). The Court of Appeals did an excellent job in distinguishing Runion from *Bass* and Swecker v. Swecker, 360 S.W.3d 422 (Tenn. App. 2011) which considered an implied partnership in the context of farming.

Part of the problem in Runion for the wife was that both the husband and his father agreed that they were not business partners; the title to the farm properties as well as the cattle raised on the farm had always been held by the grandfather; and expert testimony established that the compensation of farm employees often differed in kind from the compensation of non-farm employees, but that difference did not translate into employees becoming partners. As the Court of Appeals held,

> [W]e conclude that a presumption of an implied partnership arose due to profit sharing but that Husband rebutted the presumption at trial. See Tenn. Code Ann. § 61-1-202(c)(3); see also Finch, 2013 WL 1896323, at *9 n.12. These cases must be decided not based on

> one fact or circumstance, or a conclusive test, but rather based "upon consideration of all relevant facts, actions, and conduct of the parties." Bass, 814 S.W.2d at 41 (citing Roberts, 779 S.W.2d at 795).
>
> In this case, all of the relevant circumstances, taken together, established that Husband was treated similarly to other farm employees and family friends. Wife's burden was to establish the existence of an implied partnership by the exacting standard of clear and convincing evidence; we cannot say, however, that the proof before us eliminates "serious or substantial doubt about" whether an implied partnership exists between Husband and Grandfather. Hodges, 833 S.W.2d at 901 n.3.
>
> Accordingly, Wife did not meet her burden, and the trial court correctly concluded that the Farms and the assets thereon are Grandfather's property, as opposed to marital property subject to division.

Id.

4. Dividing the Marital Estate Starts With Valuing It

Green v. Green (Court of Appeals, April 12, 2021). The trial court in Green divided the marital estate without determining the value of all of the assets which comprised the marital estate, and without determining with certainty which assets were separate and which were marital. The court of appeals reversed and remanded, finding as follows:

> In sum, the trial court should have classified and valued all of the relevant property in this case, because without the trial court's assigned classifications and values, we are unable to determine if the property distribution was equitable. This is especially relevant as to Husband's TCRS retirement benefits, as the parties dispute whether the trial court's division of this property was equitable given the other property divided. In order to determine this issue, it is essential that the trial court value this property under one of the methods outlined by the Tennessee Supreme Court. See, e.g., Cohen, 937 S.W.2d at 830– 31, 833; see also Kendrick v. Kendrick, 902 S.W.2d 918, 926, 927–28 (Tenn. Ct. App. 1994).
>
> Additionally, even though the value of the marital home and adjoining lot is undisputed, Wife takes issue with the trial court's award of the present possessory interest to Husband and the failure

> to value this interest. Therefore, upon remand, the trial court shall enter an order containing sufficient findings and conclusions regarding the classification and valuation of all relevant property, including the possessory interest in the marital home, along with its analysis of the factors in Tennessee Code Annotated section 36-4-121. See Kirby, 2016 WL 4045035, at *7.

Id.

5. Fault, as a Consideration in Alimony

Wiggins v. Wiggins (Court of Appeals, January 22, 2021). In this case, after a long term marriage, the trial court ordered husband to pay $700 per month in alimony *in futuro*, $650 per month for 36 months in transitional alimony, and $7,500 as alimony *in solido* toward wife's attorneys' fees. Husband appealed, arguing that wife did not need the alimony *in futuro* or the alimony *in solido*. Instead, the husband asserted that those awards were punitive because of his affairs during the marriage.

In a well-reasoned opinion, the court of appeals affirmed the trial court, and put to rest husband's argument about the allegedly "punitive" nature of the alimony awards:

> As for Husband's argument that the trial court improperly focused on his infidelity, as we stated previously, the trial court may consider fault under § 36-5-121(i)(11), though the primary focus must be the spouse's need for such support. See *Gonsewski*, 350 S.W.3d at 113. In addition to establishing Wife's need, the testimony also established Wife did not want the divorce and was willing to forgive Husband for his infidelity, but Husband refused to attend counseling at Wife's request. Similarly, in *Olinger v. Olinger*, this court affirmed an award of attorney's fees to the wife reasoning, "As a practical matter, had husband not 'strayed,' there would probably not have been a divorce and no attorney's fees to be paid in the first place." 585 S.W.3d 919, 923 (Tenn. Ct. App. 2019)

Id.

6. Kitchen Sink, and the Patio Furniture (a little bit of everything)

Sekik v. Abdelnabi (Court of Appeals, January 13, 2021). If you wish to combine 48 pages of pain and suffering with a thoughtful and well-written opinion, this is the case for you. Among the issues addressed by the court are the following raised by husband's family members:

(1) whether the trial court erred in asserting in rem subject matter jurisdiction over real property located in the Gaza Strip and assuming supplemental and/or pendent jurisdiction over non-spousal parties in a divorce case;

(2) whether the trial court erred in imposing liability for damages against non-spousal parties for civil conspiracy to dissipate marital assets in a divorce case;

(3) whether the trial court erred in assigning $1,380,714.00 as the value of marital property located in the Gaza Strip;

(4) whether the trial court erred as a matter of law in finding that the non-party defendants and engaged in a civil conspiracy with the husband to dissipate marital assets; and

(5) whether dissipation of marital assets sufficiently constitutes a predicate tort necessary for a plaintiff to sustain a claim for civil conspiracy.

The husband also raised issues of his own, including (1) whether the trial court erred in denying the Defendant's request for a continuance to allow new counsel time to prepare for trial; (2) whether the trial court erred in assessing an excessive amount of child support and alimony; and, (3) whether the trial court erred in adopting the Plaintiff's proposed parenting plan over the Defendant's objection.

The court of appeals affirmed each of the trial court's rulings on the above issues. In reaching its conclusions, the court of appeals patiently examined each of the numerous claims raised by the husband and the husband's family members who participated in the appeal. On

the issue of in rem jurisdiction over property located in a different country, the court of appeals noted that

> While "a court of one state is without jurisdiction to pass title to lands lying wholly in another state" and, thus, that "[t]he local court cannot by its decree bind [such] land," it is well-settled that, "in a proper case, with the necessary parties before the court, a decree in personam may be properly passed requiring a party defendant holding the legal title in trust, or otherwise, to transfer such title in accordance with the decree of the court." *Cory v. Olmstead*, 154 Tenn. 513, 290 S.W. 31, 32 (Tenn. 1926).

Id. The court of appeals held that the trial court had properly exercised its jurisdiction to order the land sold and equitably divide and distribute the proceeds from the sale of marital property located in the Gaza Strip. The court of appeals also noted that The Tennessee Supreme Court has held that Tennessee courts can exercise "conspiracy theory personal jurisdiction" over non-residents, citing *Chenault v. Walker*, 36 S.W.3d 45, 53 (Tenn. 2001).

The Brother and Sister-in-Law also challenged the court's imposition of liability against them, as "non-spousal parties [to the divorce] for engaging in a civil conspiracy with Husband to dissipate marital assets." As summarized by the court of appeals, "They argue that "there is no private cause of action for dissipation of marital assets against non-spousal parties in a divorce case in the State of Tennessee." As artfully stated by the court of appeals, that argument is long on the law of dissipation but short on any explanation as to why the brother and sister in law believe their actions do not amount to conspiracy with Husband to defraud Wife of a portion of the marital estate, which is the allegation that the court found was substantiated by the proof.

No other argument by the husband or his family members fared any better at trial. I highly recommend this opinion for its scholarship and clarity in dealing with a host of complicated issues.

7. "Independent Thinking"

Long v. Long (Court of Appeals, September 21, 2021). Long is an interesting case concerning remand, new findings, and mind changes. (Hint: new findings and changing minds are okay on remand.) On aspect of the decision bears further scrutiny. Here, the parties tried their case, and each party submitted proposed findings of fact and conclusions of law. The court did not, prior to its final ruling, state its own ruling or suggest its own reasoning as to the outcome. As stated by the court of appeals, after the submission of pretrial briefs and the trial, "The next indication of any activity in the record is Wife's filing of a proposed order on August 31, 2020, closely followed by Husband's filing of a proposed

order received by the trial court on September 2, 2020. The trial court signed, dated, and entered Husband's "Final Order" on September 2, 2020, with no modifications. We note that the final order includes four statements to the effect that the order is the product of the trial court's "independent deliberation and decision." *Id*.

Wife appealed, arguing among other things that the trial court's wholesale adoption of the husband's proposed order violated the standard set by *Smith v. UHS of Lakeside, Inc*., 439 S.W.3d 303, 315-16 (Tenn. 2014), which held that, "First, the findings and conclusions must accurately reflect the decision of the trial court. Second, the record must not create doubt that the decision represents the trial court's own deliberations and decision." In rejecting wife's appeal, the court of appeals noted as follows:

> As in *Huggins III*, we agree with Wife that the trial court's practice in this instance was "not fully compliant with either the letter or the spirit of Smith."…. However, we are also somewhat persuaded by Husband's request that "[f]or the sake of judicial economy and the finality for these parties," this matter not be remanded for entry of a judgment more clearly reflecting the trial court's independent deliberations.

> As Husband notes, this divorce has been pending for nearly seven years and has been previously remanded for the trial court to make specific findings of fact regarding, inter alia, the values of individual assets, the basis for determining that Wife's partnership interest in Pioneer Properties was marital property, and the equitable distribution of the marital estate. Additionally, during oral argument in the instant appeal, Wife's counsel stated that he would rely solely on the briefs concerning this issue and acknowledged that Wife "really [did not] want this case remanded."
>
> Therefore, as in *Huggins III*, we exercise our discretion to consider the merits of this appeal "[i]n the interest of providing the parties to this case a final resolution" while also cautioning litigants and trial courts that this Court *"may not choose to do so under similar circumstances in the future."*

Id. (emphasis supplied).

8. Burden of Proof on Separate Property Issues

Mitchell v. Mitchell (Court of Appeals, August 2, 2022). Mitchell is worth reading for several reasons in addition to its brevity and precedential value. In Mitchell, the husband claimed that an IRA that he alleged that he brought into the marriage was separate property. The trial court disagreed based on the failure of the husband to submit proof as to when the IRA was acquired, and the Court of Appeals affirmed. As the Court of Appeals stated,

> Marital property, generally, is "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce[.]" Tenn. Code Ann. § 36-4-121(b)(1)(A). Separate property is defined in part as "all real and personal property owned by a spouse before marriage, including, but not limited to . . . property acquired by a spouse at any time by gift, bequest, devise or descent[.]" Tenn. Code Ann. § 36-4-121(b)(2).
>
> The trial court's classification of property is a finding of fact, which we presume to be correct unless the evidence preponderates otherwise. Owens v. Owens, 241 S.W.3d 478, 485 (Tenn. Ct. App. 2007). The only documentation presented before the trial court on this issue included a beneficiary designation signed in 2009 and tax forms from 2019, both of which are documents that originated

> during the marriage. Wife asserted at trial and now on appeal that the property is marital as evidenced by the forms she presented. Without an originating statement, we, like the trial court, are unable to classify the property as separate property as argued by Husband. See id., 241 S.W.3d at 485-86 (providing that the person asserting that an asset acquired during the marriage is separate property has the burden of establishing such by a preponderance of the evidence).

Id. Additionally, in Mitchell, the trial court awarded husband parenting time with the parties' three children on Tuesday, Wednesday and Thursday afternoons during the school year and overnight on Tuesdays and Wednesdays during the summer. Father appealed, claimed the trial court failed to abide by the "maximum participation" language found in both statute and domestic case law. On appeal, the Court of Appeals affirmed, holding as follows:

> It is clear from the record before us that the court considered the Children's best interest and fashioned a plan that would permit each parent's maximum participation in their lives. Our review confirms that Wife was the primary caretaker of the Children throughout the marriage and that Husband's participation would best be described as "sleepy." He worked the night shift throughout the marriage and slept most of the day upon his return, causing his inability to meaningfully participate on a daily basis.
>
> While Husband has changed his work schedule during the pendency of these proceedings, the trial court found that this was accomplished to reduce his support obligation, not to spend more time with the Children. Husband now sleeps during the day when the Children are most available, e.g., the weekends. The plan fashioned by the court allows Husband specific time with the Children during the week that will not interfere with their schooling and his work schedule.

Id.

9. And Another…

C.W. v. Mitchell W. (Court of Appeals, February 26, 2021). If you worry that there are fewer and fewer big cases with numerous issues because those big cases have been killed by

Covid, quit worrying. They are still plenty of them out there. *Mitchell* is exactly that kind of case. Here, the court of appeals characterized the issues on appeal as follows:

> (1) whether the Trial Court erred in declining Wife's request, made after trial but before entry of the final decree, to re-open proof in the matter stemming from [the child]'s serious incident;
>
> (2) whether the Trial Court erred in its division of assets;
>
> (3) whether the Trial Court erred in its award of child support; and,
>
> (4) whether the Trial Court erred in declining to award Wife alimony in solido and in the amount and duration of its transitional alimony award to Wife.
>
> Husband raises the separate issue of whether Wife's brief should be stricken pursuant to Rule 9 of the Rules of the Tennessee Court of Appeals for what he describes as its disrespectful tone and content toward him and the Trial Judge.

Id. The Wife's appeal actually raised nine separate issues on appeal; the court of appeals found she was entitled to relief on one—the division of the marital assets. With regard to the others, the court of appeals held as follows:

- "Res judicata does not bar a respondent/parent opposing a residential parenting schedule modification from putting on countervailing proof relevant to the best-interest analysis concerning the petitioner/parent's history of bad behavior just because that behavior took place before the entry of the last parenting plan. To hold otherwise would elevate the court's interest in finality over the best interest of the child." *Bowen v. Wiseman*, No. M2017-00411-COA-R3-CV, 2018 WL 6992401 (Tenn. Ct. App. June 29, 2018), citing Teutken v. Teutken, 320 S.W.3d 262, 272 (Tenn. 2010). Accordingly, the court of appeals found that the trial court did not abuse its discretion in refusing to reopen the proof in the case months after the close of the proof while the court was writing its decision.

- "We find no abuse of discretion by the Trial Court in its decision that Husband's expenditures on the higher education of his children from a prior marriage does not constitute dissipation."

- As to wife's attempts to shift the burden to the husband to prove that certain funds during the marriage were *not* dissipated by husband, the court held that "Wife is incorrect in her attempted burden-shifting. If the funds are not accounted for, they are just that. Wife never proved that Husband's expenditures were for a purpose contrary to the marriage."

- That there was insufficient proof of contributions by both parties to the appreciation in the value during the marriage of husband's business interests, which meant that the appreciated value remained husband's separate property. The trial court and the court of appeals also noted that husband could not liquidate his interest in the business, a law firm, and that supported a finding that it had no value for divorce purposes.

- The court of appeals also rejected wife's argument that husband should pay 100% of the children's uncovered medical expenses, finding that wife's stipulation that she could earn $192,000 allowed the trial court to assess wife with 10% of those expenses. Similarly, the court of appeals found the trial court had acted within its discretion to award wife $5,000 per month for 48 months in transitional alimony.

- The court of appeals also affirmed the trial court's refusal to reopen the proof to obtain more current values of the parties' assets. The two courts found that the

wife had failed to timely request the court to amend or modify the stipulation concerning the value of the assets entered at the outset of the trial.

On the issue of the division of the marital property, the court of appeals found that the trial court had placed too much emphasis on the age of the parties (the husband was substantially older than the wife) and too little emphasis on their respective incomes (the husband earned substantially more than the wife). The court of appeals remanded the case to the trial court with instructions to divide the marital estate close to 50/50 as possible. On a Rule 11 application to the Supreme Court, the Supreme Court held that the court of appeals had failed to give proper deference to the discretion of the trial court on this issue, and remanded the case back to the court of appeals. The court of appeals then entered a new order, which no longer contained the 50/50 instruction.

10. Fuller Revisited—And Distinguished

Hollis v. Hollis (Court of Appeals, June 29, 2022). Hollis involved a thorough and learned trial court decision upheld by an equally thorough and persuasive Court of Appeals opinion. One of the primary issues on appeal was whether the "book of business" held by the husband in his financial management role with UBS was as asset like the "trail income" in Fuller v. Fuller, (Tenn. Ct. App. Dec. 21, 2016) . The trial court and the Court of Appeals both agreed it was not. In Fuller, the trail income for financial products sold by the husband could in fact be valued and sold distinct from other income earned by the husband during the course of his employment. By contrast, the "book of business" held by husband in Hollis was owned by the company and, as the courts found, could be used to generate future income for the husband depending on his success in transitioning the business to others within the company. While it was true that husband's "book of business" in Hollis might generate future income for

husband if he switched firms because the new firm might anticipate the husband bringing his "book of business" with him, that was not sufficient to treat the "book of business" as a marital asset. (Lawyers change firms, and are often paid good money based on the hope that their clients will follow them to the new firm, but that doesn't make the lawyer's "book of business" a marital asset subject to division by the court in a divorce.) As the husband argued, and the courts agreed,

> If Husband changes employment and agrees to provide 8-10 more years of service to his new employer, he could perhaps negotiate a deal which attaches value to his "book of business"—although his attempt to negotiate such a deal with Raymond James was not successful, and it has become harder to negotiate such a deal since then.
>
> But any owner of individual goodwill can do that. An attorney can convert a favorable reputation into money by agreeing to change firms. A physician can convert a favorable reputation into money by agreeing to change practices. The individual goodwill of attorneys and physicians is still not marital property, because the goodwill can be monetized only in the form of increased future earnings, and future earnings are not presently existing marital property.

Id. By contrast, the court in Fuller concluded as follows:

> [T]he trail income under review in the present case could be sold or assigned by Father, as he acknowledged. According to Father, a recognized methodology exists for valuing a financial planning practice if it were to be sold, which is one times the annual value of income due to direct commissions plus two times the annual value of trail income.
>
> Father testified that his clients were not mandated to keep their accounts with whomever might purchase his practice, however. Such a sale would therefore usually require that the sale price be paid out over a period of time in order to insure client retention. Father also explained that in the event of his death or disability, he could assign his trail income to another financial planner in order to maintain an income stream for himself or his family.

> According to Father, this type of transaction would normally require an agreement with the assignee that Father or his family would be paid a percentage of the ongoing trail income. Mr. Jones confirmed Father's testimony regarding the valuation methodology for the sale of a financial planning practice, stating that the "guideline is two times a year's trail, plus ... one times the [direct] commission."
>
> Inasmuch as the undisputed evidence demonstrated that Father's trail income could be sold or assigned and that there exists a recognized methodology within the industry for valuing such trail income as sellable property, we conclude that the trial court properly determined Father's trail income to be a divisible marital asset. In contrast to professional goodwill, Father's trail income could be sold separately. See Smith, 709 S.W.2d at 591- 92.
>
> We therefore determine this to be a controlling factor, distinguishing its nature as an asset from the concept of goodwill. Furthermore, the fact that Father could assign his trail income for value upon his disability or death also supports the conclusion that such income constitutes a divisible marital asset. See, e.g., Ray v. Ray, 916 S.W.2d 469, 470 (Tenn. Ct. App. 1995) (holding that income payable to the husband, an insurance agent, upon his death, based on the value of his customers' insurance policies "on the books" of his agency, was a marital asset subject to division). We therefore affirm the trial court's determination in this regard.

Fuller, 2016 WL 7403791, at *6.

On appeal in Hollins was also the trial court's award of $8,500 per month in child support and $6,200 per month in alimony, and the division of marital property. The husband's complaints with regard to the division of the marital estate were quickly dealt with as within the discretion of the trial court: "[W]e will not disturb a trial court's division of a marital estate where the alleged math error is really just an unfavorable result. In the end, "what we are concerned with as to property division is the overall division of the entire marital estate and whether that overall division is equitable."] The same was true of the child support award (the

parties had two disabled children who required full time care from the mother) and the alimony award. As the court stated in affirming the alimony type and amount awarded by the trial court:

> In granting an award of alimony to Wife in the type and amount that it did, the Trial Court did not apply an incorrect legal standard; did not reach an illogical or unreasonable decision; and did not base its decision on a clearly erroneous assessment of the evidence. We find instead that the Trial Court's decision has a factual basis properly supported by evidence in the record; that the Trial Court applied the most appropriate legal principles applicable to the decision; and that the Trial Court's decision was within the range of acceptable alternative dispositions. We discern no abuse of discretion in the Trial Court's award of alimony in futuro to Wife.

Id.

11. Dissipation and the Burden of Proof or Persuasion

Robinson v. Robinson (Court of Appeals, June 29, 2022). There were several issues raised in Robinson, including valuation of a business asset and the division of the marital estate, but one issue stood out: the alleged dissipation by the husband. Here, wife alleged dissipation by husband of $85,000; the trial court found dissipation of $68,000; and the husband admitted to dissipation of $39,000. On appeal, the Court of Appeals reminded us that dissipation is not so easy to prove. As the Court of Appeals stated:

> We have explained the concept of dissipation and the related burdens of proof as follows: Among the factors that courts may consider when fashioning an equitable division of a marital estate is a party's dissipation of the marital or separate property. Even though no statutory definition of "dissipation" exists, the term has a common meaning in the context of divorce. The concept of dissipation is based on waste. Dissipation of marital property occurs when one spouse uses marital property, frivolously and without justification, for a purpose unrelated to the marriage and at a time when the marriage is breaking down. Dissipation involves intentional or purposeful conduct that has the effect of reducing the funds available for equitable distribution.

> Whether a particular course of conduct constitutes a dissipation depends on the particular facts of the case. The party claiming that dissipation has occurred has the burden of persuasion and the initial burden of production. After the party alleging dissipation establishes a prima facie case that marital funds have been dissipated, the burden shifts to the party who spent the money to present evidence sufficient to show that the challenged expenditures were appropriate. Altman v. Altman, 181 S.W.3d 676, 681–82 (Tenn. Ct. App. 2005) (citations omitted).
>
> As noted above, "[t]he spouse alleging dissipation has the burden of persuasion and the initial burden of production to show that the other spouse engaged in 'intentional, purposeful, wasteful conduct.'" Trezevant v. Trezevant, 568 S.W.3d 595, 618 (Tenn. Ct. - 13 - App. 2018) (quoting Berg v. Berg, No. M2013-00211-COA-R3-CV, 2014 WL 2931954, at *18 (Tenn. Ct. App. June 25, 2014)). Moreover, that burden includes distinguishing "between 'dissipation and discretionary spending.'" Burden v. Burden, 250 S.W.3d 899, 919–20 (Tenn. Ct. App. 2007) (quoting Wiltse v. Wiltse, No. W2002-03132-COA-R3-CV, 2004 WL 1908803, at *4 (Tenn. Ct. App. Aug. 24, 2004)).
>
> After careful review of the record, we have determined that Wife failed to carry her burden of proof to establish that Husband dissipated assets in excess of the $39,044.72 that Husband admits Wife provided sufficient testimony to prove.
>
> Accordingly, we modify the trial court's ruling and remand with instructions for the trial court to enter judgment indicating that Husband dissipated the marital estate in the amount of $39,044.72, not $65,000.

Id. In light of the fact that the wife's proof involved allegations of husband taking money from a store safe; withdrawing $10,000 from a joint bank account; withdrawing funds from a business account; paying funds from the parties' joint account toward his personal credit card balances; writing a check to himself from a joint checking account; withdrawing money from the children's savings accounts; demanding a refund check from a contractor working for the

company's business; "stealing" three royalty checks payable to the business franchise operations; and withdrawing money from a joint checking account to purchase a car for his sister, it is abundantly clear that claims for dissipation are not always as easy as one's lawyer might claim. Beware of spending more money alleging dissipation of marital monies than actually proving the alleged dissipation.

12. Batson, Revisited

Myers v. Boone (Court of Appeals, June 8, 2022). Myers is a Batson case, where the trial court found that the parties' marriage three year marriage at the time of filing was short-term, and held that husband would receive his $11,000,000 in separate property and wife would receive her $200,000 in separate property. The marital property, which the trial court found to be less than $260,000, was divided 60/40 in favor of wife. The court of appeals affirmed, finding that the division of the property was within the sound discretion of the trial court. As the Court of Appeals stated,

> "[I]n cases involving a marriage of relatively short duration, it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place." Batson v. Batson, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). In Batson, this Court found that a marriage of a little over five years was a marriage of relatively short duration. Id. at 859-60.

Id. This case reminds us that, even in cases in which Batson principles apply, it is worthwhile to analyze property to determine which assets are marital and which are separate, in order to achieve the results suggested by Batson.

13. VA Benefits and Disability Income and Commingling

Griffith-Ball v. Ball (Court of Appeals, May 13, 2022). Ball is an excellent case concerning commingling and VA benefits, including disability benefits. Here, the trial court found that the husband's regular VA benefits were marital property and divided those benefits equally between the parties. But the trial court also found that the husband's disability benefits were separate (no dispute there) and that the assets he purchased with the disability benefits were also separate. That's where the Court of Appeals disagreed:

> "VA benefits lose the protections of the anti-attachment provision and become marital property when "commingled with marital assets." …. [citations omitted] Here, Husband "jeopardized the identity of his separate [VA] funds" when he combined them with marital rent income in the Fortera account. See Eldridge v. Eldridge, 137 S.W.3d 1, 17 (Tenn. Ct. App. 2002); see also Ogle v. Duff, No. E2016-01295-COAR3-CV, 2017 WL 2275801, at *8 (Tenn. Ct. App. May 24, 2017) (reasoning that an account "may have become marital property . . . [by] commingling if [the husband] contributed marital funds to the account during the marriage").
>
> It was his burden to show that the benefits "continued to be segregated" or "could be traced into their product." See Eldridge, 137 S.W.3d at 17; see also United States v. Griffith, 584 F.3d 1004, 1021 (10th Cir. 2009) (explaining that, "even if VA funds are commingled in an account with other funds, they will retain their VA character as long as they are readily traceable"); [citations omitted]... Husband did not meet this burden. He only offered proof of the total value of the account; he did not show how much came from separate VA benefits as opposed to marital rent income. The two sources of funds were not segregated, and no amount of funds was traced to either source. [citations omitted]
>
> So Husband's VA benefits lost their exempt status under the anti-attachment provision and became marital property by commingling. Because Husband funded the Fortera account with marital income, the account is "presumed to be marital property." Husband failed to rebut this presumption. At trial, he relied on the fact that the account was in his name only, and Wife had no access to it.

But income earned during the marriage is marital property "regardless of the bank account into which it [i]s deposited." And the account did not meet any definition of separate property. See Tenn. Code Ann. § 36-4-121(b)(2). So the evidence preponderates in favor of a finding that the Fortera account was marital property.

As for the Granny White property, Husband purchased it with the Fortera account before commingling his VA benefits with marital rent income. He did not earn the rent income until purchasing the house and leasing it to the parties' daughter. But, unlike VA benefit funds that remain separate from other funds, the Granny White property purchased with such funds is not exempt under the anti-attachment statute. VA benefits only remain exempt if they "are readily available as needed for support and maintenance, . . . retain the qualities of moneys, and have not been converted into permanent investments." Porter v. Aetna Cas. & Sur. Co., 370 U.S. 159, 162 (1962) (construing predecessor statute).

Here, Husband's VA benefits "lost the qualities of moneys" when used to purchase the Granny White property. See Trotter v. Tennessee, 290 U.S. 354, 356 (1933). They were no longer "[p]ayments of benefits due or to become due." See 38 U.S.C. § 5301(a)(1); see also Carrier v. Bryant, 306 U.S. 545, 547 (1939) (reasoning that investments "purchased with . . . benefits are not such payments due or to become due" under the anti-attachment provision). Instead, they "were converted into [real estate]." See Trotter, 290 U.S. at 356. So "there was an end to the exemption." See id. (analyzing the tax exemption in the anti-attachment statute); see also Pfeil, 341 N.W.2d at 702-03 (holding that VA benefits "lost their exemption when invested in [a] real estate purchase" and a mortgage note); accord Bischoff v. Bischoff, 987 S.W.2d 798, 800 (Ky. Ct. App. 1998).

Because the Granny White property was not exempt under the anti-attachment statute, it need not be classified as Husband's separate property. And, under our statutes, it is marital property. Husband acquired it during the marriage, and it does not otherwise satisfy any definition of separate property. See Tenn. Code Ann. § 36-4-121(b)(1)(A), (b)(2).

Id. (This is a lengthy quote from the case, and not because the authors are lazy. The case is highly recommended as reading for issues involving military benefits and commingling claims. The citations omitted from the quote above are like reading a textbook: nearly every omitted citation has a description of the holding of the case—these are not simply string cites.)

14. Watch Out for Military Retirement Issues

Harper v. Harper (Court of Appeals, April 24, 2022). What happens when a spouse is awarded a part of a husband's military retirement pay in a divorce, and the husband later converts his retirement pay into disability pay? In Harper, the husband had agreed to share his retirement pay 50/50 with his ex-wife, but without her knowledge had waived 10% of his retirement pay in return for 10% service-related disability payment. The wife recognized that this would reduce her income, and argued that the trial court should reshuffle the deck of other assets to make up for this loss. The trial court held that it could not do so, and the Court of Appeals affirmed, deferring to a United States Supreme Court decision (Mansell):

> This problem was anticipated by the dissenters to the Mansell decision. As they recognized, under the Court's holding, "a military retiree has the power unilaterally to convert [marital] property into separate property and increase his after-tax income, at the expense of his ex-spouse's financial security and property entitlements." Mansell, 490 U.S. at 601 (O'Connor, J., dissenting). As the retiree increases his disability benefits and waives a corresponding amount of his retirement pay, his obligation to his former spouse decreases.

Id. Even if the above occurs, the former spouse is out of luck. One practice note: the Tennessee Supreme Court addressed this issue in Johnson v. Johnson in 2001, and held that the trial court could modify the remaining portions of the parties marital dissolution agreement to make up for the losses to the non-military spouse. But Johnson was abrogated by Howell v. Howell in 2017, a U.S. Supreme Court case with facts similar to Johnson. Another practice tip: you can't

fix this for the non-military spouse after the divorce, so try to do so prior to the entry of the final decree by putting into the agreement language that might be able to ameliorate the situation for the disadvantaged spouse. Also, read Harper: you need to understand the pitfalls.

15. A Coverture Refresher

Thompson v. Thompson (Court of Appeals, February 9, 2022). Every once in a while, we find ourselves in need of a refresher course on particular legal issues. Thompson is a single issue case discussing in detail (11 pages and 13 footnotes—thank you Judge Clement!) the division of the wife's retirement account through the deferred distribution coverture method. The parties had agreed in court that "[Wife] will be paying a coverture percentage of 27% of the marital portion of the retirement to [Husband] upon her retirement," and the trial court implemented that agreement in its own order. Wife objected to the division as set out by the court, and appealed. The Court of Appeals affirmed in all respects. For those needing the refresher on the coverture method, and even those who believe they already understand it, Thompson is recommended reading.

16. Does "Tax Free" Mean Tax Free?" No, Not Necessarily

George v. Smith George (Court of Appeals, January 17 2022). In George, the parties agreed in a Marital Dissolution Agreement that husband would transfer to wife a certain amount of his retirement as alimony in solido "tax free". The transfer was made, through a Qualified Domestic Relations Order to a qualified account in wife's name. Wife then withdrew the money from her account and received a $36,000 tax bill related to the withdrawal. She sued the husband for violating the terms of the marital dissolution agreement. The trial court disagreed, and the Court of Appeals affirmed:

> We conclude, as did the trial court, that if Husband was to be responsible for the taxes incurred on any future withdrawal Wife made, the parties would have provided for such in the MDA or the QDRO. However, upon review of both documents, we find that Husband's obligation was fulfilled upon his transfer of the funds tax free from his retirement accounts to Wife. Wife's actions concerning the funds thereafter are not of consequence to the parties' MDA**.**

Id.

VI. Jurisdiction

1. Jurisdiction, Modification and Parenting and Child Support

Baker v. Grace (Court of Appeals, September 13, 2022). Grace is a lengthy opinion addressing numerous substantive issues, and is well-worth a read. The parties were parents to one child. The father suffered from significant mental health issues and had limited time with the parties' child at mother's discretion and supervised by father's parents. After the father attended an event at the child's elementary school, the mother ceased allowing father supervised time with the child. Father filed a petition to modify the parenting plan to allow him regular contact; mother filed for back due child support; mother filed a petition to terminate the father's parental rights; and mother challenged the jurisdiction of the case being Tennessee rather than Kentucky with regard to both custody modification and child support modification.

The trial court denied mother's request to terminate the father's parental rights after hearing from the psychiatrist who had treated the father since 2016, finding that father's failure to visit the child was based on mother's unilateral decision not to permit him visitation; and that father reasonably believed that his SSDI payments were sufficient child support. (The trial court ultimately awarded mother a judgment in the amount of approximately $7,000 for retroactive support based on an increased award dating back to the date of the filing of father's petition, but most of this award was reversed on appeal) The court also found that the father was not a danger to the child and that terminating his parental rights was not in the best interest of the child.

The two jurisdiction issues were easily determined. Both parties and the child had lived in Tennessee for at least six months at the time the father's petition was filed, so Tennessee had subject matter jurisdiction to hear the petition. Tennessee law also applied with regard to child

support—the result being that modification of child support was effective as of the date mother filed her counter-petition to modify support in 2020-- not the 2017 date father filed his petition to modify the parenting plan, as found by the trial court. As the Court of Appeals stated,

> [C]hild support judgments "shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties." Rutledge v. Barrett, 802 S.W.2d 604, 606 (Tenn. 1991) (emphasis added) (quoting Tenn. Code Ann. § 36-5-101(f)(1)(A)); see also Tenn. Comp. R. & Regs. 1240-02-04-.05(8) ("No ordered child support is subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties.").

Id. citing T.C.A. § 36-5-101.

VII. Marriage

Not much new here….

VIII. Mediation

1. Partial Mediation

Lee v. Lee (Court of Appeals, January 28, 2021). In *Lee*, the parties resolved most of their differences through mediation, but left for the court questions about the division of two insurance policies, alimony and earning capacity. At trial, the husband also asked the trial court to set aside their mediated agreement. This request was rejected by the appellate court.

In refusing to set aside the mediated agreement, the court of appeals held as follows:

> Husband contends that the trial court erred in awarding Wife a judgment for $36,137.83 as part of its equitable division of property. It is undisputed that Husband owed Wife this amount under the terms of the mediated settlement agreement. Settlement agreements are enforceable as contracts. See Barnes v. Barnes, 193 S.W.3d 495, 498 (Tenn. 2006). To rescind a contract based on mistake, the mistake must be "innocent, mutual, and material to the transaction." Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 252, 261 (Tenn. 2010).
>
> Simply put, Husband failed to establish a mutual mistake. Wife contradicted Husband's story about their income tax liability. The trial court credited Wife's testimony on this issue, and we find no basis to overturn the court's credibility determination. See Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002) ("[F]indings with respect to credibility and the weight of the evidence . . . may be inferred from the manner in which the trial court resolves conflicts in the testimony and decides the case.").

Id. The court of appeals also confirmed over the husband's objections the trial court's award to wife of $3,500 per month in alimony *in futuro*, and the insurance policy on husband's life. The court of appeals noted that, "While the Legislature has expressed a preference for short term support, such as rehabilitative or transitional alimony, rather than long-term support, "courts should not refrain . . . from awarding long-term support when appropriate." Robertson v. Robertson, 76 S.W.3d 337, 341-42 (Tenn. 2002). Viewing the evidence in a light most

favorable to the trial court's decision, we find no abuse of discretion in the court's alimony award. See Gonsewski, 350 S.W.3d at 106."

IX. Parenting Issues

1. Sex Abuse Allegations, Continued…

Hoppe v. Hoppe (Court of Appeals, July 2, 2021). *Hoppe* is a case with a long, tortured history based on repeated false sex abuse allegations made by the mother against the father related to their son. Over the years, the mother had repeatedly lost parenting time, had gone to counseling and promised to quit making such allegations, and then had gone back to doing so. In this case, the trial court had restricted mother's parenting time after yet another series of false allegations, pending trial. When trial finally came around, mother showed progress and her current therapist testified to that progress, and the therapist recommended continued counseling between the mother and the child. The trial court found no material change of circumstances and restored mother's time with the child, and ordered therapy between the mother and the child. The trial court also denied the mother attorneys' fees as the prevailing party in a custody dispute. The court of appeals affirmed on all issues except the court-ordered therapy between the mother and the child, finding that this was not requested by either party and therefore the trial court did not have authority to order it.

2. Remember Rule 52.01 (Findings of Fact)

Colvard v. Colvard (Court of Appeals, July 1, 2021). As part of a custody trial, the trial court first interviewed the parties' six youngest children together in chambers, without the parties, a court reporter or an attorney present. The court then interviewed the parties' oldest child in chambers, again without the parties, a court reporter or an attorney present. (The parties had apparently agreed to allow the interviews to take place.) After doing so, the court entered an order reducing father's time with the children.

The father appealed, arguing that the court did not state with any degree of specificity what the court had learned from the interviews with the children. The court of appeals agreed, finding that the failure to comply with Rule 52.01 was fatal to the opinion, and the "statement of the evidence" from the court regarding the in camera interviews with the children was more of a statement of the case, without reference to facts or testimony adduced in the interviews. Reversed and remanded.

3. Parenting and *In Vitro* Fertilization

Potts v. Potts (Court of Appeals, June 2, 2021). This is an interesting case with a thoughtful decision by the trial court (Judge Phillip Robinson) and a thoughtful affirmation by the court of appeals. Here, the couple entered into a contract with a reproductive clinic in October 2013 to perform an *in vitro* fertilization procedure, with each party signing the contract as "Prospective Parent." The reproductive clinic impregnated the plaintiff with embryos created from the plaintiff's eggs and donated sperm. Twins were born. The parties later divorced and entered into a parenting plan for the twins. Several months after the entry of a divorce decree, the plaintiff filed an action under Rule 60.02 contending that the trial court had lacked jurisdiction to enter into a parenting plan involving the defendant because the defendant was not a "parent" under applicable Tennessee law.

The trial court held that the defendant was a parent under Tenn. Code Ann. § 36-2-403 because she met the requirements of the statute, in that she was a party to the written contract consenting to the *in vitro* fertilization procedure, and she accepted full legal rights and responsibilities for the embryos and any children that resulted. The trial court also determined that the defendant was entitled to the presumption that she was the children's parent in

accordance with § 36-2-304(a)(4) because the defendant held the children out as her natural children.

In a lengthy opinion that touched upon the U.S. Supreme Court's decision in *Obergefell*, issues of standing and subject matter jurisdiction, and other related issues, the court of appeals affirmed, holding, among other things the following:

> In addressing the issues raised by the *in vitro* fertilization procedure, the legislature clearly expressed its intent that contract principles—not biology—would control the question of parentage. Specifically, the parentage inquiry centers on whether the parties contractually agreed to accept "full legal rights and responsibilities for such embryo and any child that may be born as a result of embryo transfer." Tenn. Code Ann. § 36-2-402(6). Likewise, the Court held in In re C.K.G. that the non-biologically-related woman was the children's legal mother because she accepted "legal responsibility and the legal rights of parenthood." 173 S.W.3d at 730. Importantly, in In re C.K.G., the man's status as the biological parent did not give him an advantage over the woman, id., and, under § 36-2- 403, Plaintiff's status as the biological parent does not place her in a superior position to that of Defendant. Rather, because both parties in this case contractually agreed to accept legal responsibility for the embryos and any children born as a result, they are on an equal footing as the parents of the children.

Id.

3A. But, Hold that Applause…

Compher v. Whitfield (Court of Appeals, June 1, 2022). A year later, almost to the day, nearly the identical issue decided in Potts was decided by the Compher court. This 2022 case distinguished from Potts, thus denying the same sex partner of the biological mother from having any parental rights related to the child. The Court of Appeals held as follows on this distinction:

> Ms. Compher also argues that there is no functional difference between a child conceived by embryo transfer and a child conceived by artificial insemination. Therefore, she argues that the holdings in Pippin and Potts conflict by treating children and the people who

raise them in different manners for purposes of determining parentage.

The Court found in Pippin that the Legislature intended for the applicability of the artificial insemination statute in Tennessee Code Annotated section 68-3-306 to "be predicated upon the child being born to a married woman." Pippin, 2020 WL 2499633, at *6.

In contrast, the Court found in Potts that the Legislature intended for the applicability of the in vitro fertilization statute in Tennessee Code Annotated section 36-2-403 to be predicated on "contract principles" and "not biology." Potts, 2021 WL 2226622, at *11. As such, the artificial insemination statute is grounded upon marriage, while the in vitro fertilization is grounded upon contract principles.

Our Supreme Court has explained that "[t]he General Assembly is better suited than the courts . . . in such an issue as deciding whether generally to subject procreation via technological assistance to governmental oversight, and if so, to determine what kind of regulation to impose." In re C.K.G., 173 S.W.3d at 731; cf. Smith v. Gore, 728 S.W.2d 738, 747 (Tenn. 1987) ("The Court simply does not function as a forum for resolution of . . . generalized public issues; rather, it must decide the legal case or controversy presented by the particular parties before it.").

Why there is such a distinction between these two types of technologically-assisted procreation is a question we are neither equipped nor inclined to answer. This Court is not permitted "to question the wisdom of the statutory scheme." …Instead, our purpose is "to interpret and apply the law." …

While "the courts have the power to 'determine public policy in the absence of any constitutional or statutory declaration,'" we decline to do so here where the statutory language and the case law supports the conclusion we have reached… Based on the language of Tennessee Code Annotated section 68-3-306, the statute is grounded upon a child being born in the context of marriage. In re C.K.G., 173 S.W.3d at 728. "Tennessee's artificial insemination statute provides married couples who pursue artificial insemination a form of legal recognition by deeming the child born during their marriage to be their 'legitimate child.'" Harrison, 2021 WL 4807239, at *5.

Here, the parties were in a same-sex domestic partnership and chose to have a child by artificial - 18 - insemination, but they were not married nor did they choose to marry any time after the United States Supreme Court's decision in Obergefell legalized same-sex

> marriage. Ms. Whitfield is the individual who gave birth to the child and who is biologically and genetically connected to the child. While Ms. Whitfield had Ms. Compher's consent to proceed with the artificial insemination, they were not married, which the artificial insemination statute is predicated upon. Therefore, we conclude that the juvenile court's finding should be affirmed.

Id. Perhaps, as found by the trial court and the Court of Appeals, Potts was a contract case, not a parentage case, but it sure felt like a parentage case nonetheless.

4. Jurisdiction, Modification and Parenting and Child Support

Baker v. Grace (Court of Appeals, September 13, 2022). Grace is a lengthy opinion addressing numerous substantive issues, and is well-worth a read. The parties were parents to one child. The father suffered from significant mental health issues and had limited time with the parties' child at mother's discretion and supervised by father's parents. After the father attended an event at the child's elementary school, the mother ceased allowing father supervised time with the child. Father filed a petition to modify the parenting plan to allow him regular contact; mother filed for back due child support; mother filed a petition to terminate the father's parental rights; and mother challenged the jurisdiction of the case being Tennessee rather than Kentucky with regard to both custody modification and child support modification.

The trial court denied mother's request to terminate the father's parental rights after hearing from the psychiatrist who had treated the father since 2016, finding that father's failure to visit the child was based on mother's unilateral decision not to permit him visitation; and that father reasonably believed that his SSDI payments were sufficient child support. (The trial court ultimately awarded mother a judgment in the amount of approximately $7,000 for retroactive support based on an increased award dating back to the date of the filing of father's petition, but most of this award was reversed on appeal) The court also found that the father

was not a danger to the child and that terminating his parental rights was not in the best interest of the child.

The two jurisdiction issues were easily determined. Both parties and the child had lived in Tennessee for at least six months at the time the father's petition was filed, so Tennessee had subject matter jurisdiction to hear the petition. Tennessee law also applied with regard to child support—the result being that modification of child support was effective as of the date mother filed her counter-petition to modify support in 2020-- not the 2017 date father filed his petition to modify the parenting plan, as found by the trial court. As the Court of Appeals stated,

> [C]hild support judgments "shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties." Rutledge v. Barrett, 802 S.W.2d 604, 606 (Tenn. 1991) (emphasis added) (quoting Tenn. Code Ann. § 36-5-101(f)(1)(A)); see also Tenn. Comp. R. & Regs. 1240-02-04-.05(8) ("No ordered child support is subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties.").

Id. citing T.C.A. § 36-5-101.

As to the trial court's decision to modify the original parenting plan to give father specific supervised time with the child instead of leaving his time up to the mother's discretion, the Court of Appeals noted as follows:

> When considering a petition to modify a residential schedule, a court must first determine whether the petitioner proved "a material change of circumstance affecting the child's best interest." Tenn. Code Ann. § 36-6-101(a)(2)(C); see Armbrister, 414 S.W.3d at 697. Section 36-6-101(a)(2)(C) "provides the governing standard for determining whether a material change in circumstances has occurred." Armbrister, 414 S.W.3d at 704.
>
> This standard is "a very low threshold" for petitioners to pass. Id. (quoting Boyer v. Heimermann, 238 S.W.3d 249, 257 (Tenn. Ct. App. 2007)). Two factors are relevant: (1) "whether a change has

> occurred after the entry of the order sought to be modified"; and (2) "whether a change is one that affects the child's well-being in a meaningful way." Drucker v. Daley, No. M2019-01264-COA-R3-JV, 2020 WL 6946621, at *7 (Tenn. Ct. App. Nov. 25, 2020) (citations omitted).
>
> Among the changes identified in § 36-6-101 is "significant changes in the parent's living . . . condition that significantly affect parenting." Tenn. Code Ann. § 36-6- 101(a)(2)(C) (emphasis added). Thus,
>
> > for purposes of modifying a residential parenting schedule, a petitioner can establish that a material change of circumstances affects the child's well-being in a meaningful way through evidence of changes to the petitioner's circumstances . . . that will allow more parenting time and/or a better parent-child relationship in the future.
>
> Drucker, 2020 WL 6946621, at *9 (emphasis added). Additionally, "evidence that an existing custody arrangement was proven unworkable in a significant way is sufficient to satisfy the 'material change in circumstances' standard." Boyer, 238 S.W.3d at 257 (citation omitted).

Id. In this case, the original order allowed father time with the grandparents so long as his time was supervised by his parents, the child's grandparents. When the grandparents took the father to a kindergarten program at the child's school, the mother called the action "wildly inappropriate," and cut off the grandparents' ability to spend time around the child, thus effectively depriving the father of the ability to see his child. As the Court of Appeals found,

> Mother's refusal to allow Grandparents to see the Child demonstrated that the "existing arrangement" was unworkable. See Gentile v. Gentile, No. M2014-01356-COA-R3-CV, 2015 WL 8482047, at *5 (Tenn. Ct. App. Dec. 9, 2015) (citing Rose v. Lashlee, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2 n.3 (Tenn. Ct. App. Aug. 18, 2006)).
>
> Even if Mother's actions did not constitute a material change in circumstance, we would affirm the trial court's decision on other grounds. The record is replete with evidence that Father made great strides in his mental health since the divorce. This alone constitutes "a material change of circumstances [that] affects the child's well-

> being in a meaningful way" because it is "evidence of changes to the petitioner's circumstances . . . that will allow more parenting time and/or a better parent-child relationship in the future." Drucker, 2020 WL 6946621, at *9 (citing Armbrister, 414 S.W.3d at 705).

Id. There are additional thoughtful discussions in the Court of Appeals opinion regarding child support, pre- and post judgement interest calculations, and entitlement to attorneys' fees from the trial and on appeal—all of which is recommended reading.

5. A Parenting Plan with Conditions? Affirmed!

Smallbone v. Smallbone (Court of Appeals, May 4, 2022). In Smallbone, the trial court awarded the parties substantially equal time with equal decision making "conditioned on the parents remaining within the children's current school district after the divorce." Father appealed both the allocation of time and the joint decision making, and the school zone condition. The Court of Appeals affirmed:

> The court conditioned the parenting plan on both parties maintaining a residence within the children's school district. Father contends that the court's residency requirement was an abuse of discretion. See Cummings, 2004 WL 2346000, at * 15-16. In Cummings, the trial court issued an injunction to prevent one parent from moving outside the county without the consent of the other parent or the court. Id. at *15. We held the injunction was beyond the court's authority. Id. at *16.
>
> Here, the trial court did not issue an injunction. Rather, both parents agreed at trial that the children, particularly Nathaniel, should remain in their current schools. Father told the court that he intended to establish his new home within the school district. The court's plan merely incorporated the parents' agreement. Should one parent choose to move outside the school district, the plan may require modification. But the special residency provision in the plan was not an abuse of discretion.

Id.

6. No Alcohol at All

Williams v. Williams (Court of Appeals, April 7, 2022). There is a lot going on in this case, but this discussion focuses (very briefly) on one particular issue. At trial, after hearing evidence of father's alcohol abuse, entered a parenting plan which prohibited father from drinking alcohol to excess while caring for the children. The court of appeals affirmed the parenting plan, but modified this provision to restrict entirely father's use of alcohol while caring for the children. This provision had no termination date. In entering this order, the Court of Appeals relied on Smithson and Rogers. Of interest, in Williams the trial court specifically found that, while husband appeared to abuse alcohol, husband was not an alcoholic.

7. More Equal Parenting Time?

Woody v. Woody (Court of Appeals, March 8, 2022). Woody is a long, long case in which the primary issue is whether the trial court erred in awarding father only 120 days of parenting time throughout the year. As the Court of Appeals held, the case would be remanded to the trial court to enter a more equal plan, or, in other words (the court's words, not mine), "a plan that better maximizes each parent's time with the child." The Court of Appeals was especially concerned about the fact that the parties had shared equal or close to equal time with the child for an extended time prior to the trial in this case. Additionally, the court emphasized that while the parents did not get along with each other, they each had productive and loving relationships with their child.

8. Year On/Year Off?

Gravatt v. Barczykowski (May 25, 2021). *Gravatt* is a parenting time modification case which was resolved with the application of the parenting time factors. What was extraordinary was the original plan, which provided for a year on/year off parenting schedule, meaning the

child would go to school in Delaware for a year (where the father lived), and then attend school in Tennessee for a year (where mother lived), and continue to alternate thereafter. Both parties agreed that the plan was not workable, and so the trial court and the court of appeals built a different plan. I recalled picking up a case on appeal in which the trial judge had ruled that the children would live in Fayetteville, Tennessee for three months, and then Nashville for three months, and continued to alternate three months on/three months off thereafter. I told the client that I could not in good faith argue on appeal that schedule was in the children's best interest, but the court of appeals pretermitted that question. It ruled, prior to any briefs, motions, or any other action being taken on the appeal, that the three months on/three months off plan was an abomination, and modified the plan *sua sponte*. The appellate court in *Gravatt* was clearly relieved that the parties themselves had taken that issue off the court's hands.

9. Grandparent Visitation and "Severe Reduction"

Morisch v. Maenner (Court of Appeals, March 23, 2021). *Morisch* addressed many of the same issues addressed in *Horton*, and reversed the trial court on the same ground:

> The Grandparent Visitation Statute allows a grandparent to petition a court for visitation with a grandchild whose parents were never married to each other "if such grandparent visitation is opposed by the custodial parent or parents or custodian or if the grandparent visitation has been severely reduced by the custodial parent or parents or custodian." Tenn. Code Ann. § 36-6-306(a).
>
> "Severe reduction" or "severely reduced" is defined as "reduction to no contact or token visitation as defined in § 36-1-102." Id. § 36- 6-306(f). The petitioning grandparent bears the burden of proving that the parent(s) or custodian opposed, or severely reduced, his or her visitation. Uselton, 2013 WL 3227608, at *12; see Clark v. Johnson, No. E2017-01286-COA-R3-CV, 2018 WL 2411203, at *5 (Tenn. Ct. App. May 29, 2018).
>
> If the petitioner is unable to make this showing, a trial court has no basis for engaging in a substantial harm analysis or awarding the petitioner any relief. Manning, 474 S.W.3d at 257-58; see Tenn.

> Code Ann. § 36-6-306(b), (c) (directing court to determine existence of substantial harm and whether visitation would be in grandchild's best interest if petitioner can overcome initial hurdles).
>
> Our Supreme Court has addressed this statute and has stated: The Grandparent Visitation Statute expressly provides that an initial petition for grandparent visitation may only be filed "if such grandparent visitation is opposed by the custodial parent or parents." Tenn. Code Ann. § 36-6-306(a). Unlike divorcing or unmarried parents who may agree that visitation is appropriate but disagree merely about the details of a visitation schedule, a petitioner relying upon the Grandparent Visitation Statute must establish in the first instance that the custodial parent opposed or denied grandparent visitation.[footnote 2: The statute was amended effective May 20, 2016, to expand a grandparent's basis for relief to include a severe reduction of visitation. 2016 TENN. PUB. ACTS, c. 1076, §§ 1 to 4.] *Lovlace v. Copley*, 418 S.W.3d 1, 21 (Tenn. 2013) (citing *Huls v. Alford*, No. M2008- 00408-COA-R3-CV, 2008 WL 4682219, at *8 (Tenn. Ct. App. Oct. 22, 2008)).
>
> In the case at bar, Grandfather did not allege in his petition that Mother (or Father) opposed his visitation with Chevy or that his visitation was severely reduced. We stated in *Clark v. Johnson* that a grandparent must prove that his or her visitation was opposed or severely reduced before the petition was filed. *Clark*, 2018 WL 2411203, at *8 (citing *Uselton*, 2013 WL 3227608, at *13). At trial, Mother testified that Grandfather did not call, write, or send any e-mails in an effort to see Chevy or for any other reason. Grandfather did not dispute this; he did not testify that he ever tried to see Chevy and was told "no" by Mother or by Father. Moreover, Grandfather did not allege that his visitation with Chevy had been severely reduced. In fact, Grandfather admitted that he was able to see Chevy after he filed his petition. Grandfather filed his petition on March 18, 2019, and he testified that Mother allowed him to see Chevy the following month.

Id.

10. Change of Primary Custody Based on Alienation

Honea v. Honea (Court of Appeals, April 22, 2021). This is a fascinating case in which the trial court found and sentenced each of the parents to jail for contempt of court, and changed the primary residential parent from the mother to the father based on mother's repeated conduct since the divorce in bringing unsubstantiated allegations of abuse against the father. The court

had previously found that the mother's conduct leaned toward parental alienation, but the 15-18 referrals by mother or someone on her behalf to the Department of Children's Services—none of which had been substantiated—proved that mother was not likely to encourage a good relationship between the children and their father. As the trial court found and the court of appeals quoted:

> [Mother] has denied [Father] parenting time in willful violation of the Court's Order, has interfered with his ability to obtain childcare during his parenting time and has expended substantial effort in attempting to alienate the children from the father. [Mother] has demonstrated neither a willingness nor an ability to "facilitate and encourage a close and continuing parent-child relationship" between the children and their father.
>
> Further, . . . [Mother] has not evidenced a likelihood to honor and facilitate court ordered parenting arrangements and her history clearly reflects this. [Mother] has been on a quest, apparently prior to the divorce and subsequent to the divorce, to eliminate [Father] from the lives of his children. She has been successful in having third parties, either wittingly or unwittingly, assist her in this regard.
>
> For example, there was no reason for Dr. Bradley to call the Department of Children's Services for the "black eye" incident. The same appears true with - 28 - most of the teachers. The court finds [Mother] has discussed these issues at length with the teachers and the children's pediatrician and influenced their perceptions of comments made by the children.
>
> Further, [Mother] continuously comes to court seeking to eliminate [Father]'s parenting time. When a particular allegation fails to accomplish this purpose a different allegation, unsupported by the evidence, is brought forth. When that one fails, there is another and another. It appears [Mother] will not rest until the children cannot ever see [Father].

Id. The court of appeals went further to cite the trial court's concerns that the early signs of parental alienation by mother that had been noted in the original divorce action had blossomed since the divorce, quoting from another case as follows:

> [T]he most straightforward way to understand the harm from parental alienation is against the backdrop of the normal developmental support that parents provide in a healthy family. In a healthy parent/child relationship, parents provide by example and by instruction assistance in children's emotional development and their development of the capacity to relate to others in [the] development of a moral sensibility, in the development of capacity for empathy, to appreciate another person's state of mind and emotional experience.
>
> Parental alienation at one level or another undermines each of those developmental pathways so that when a child is alienated and that alienation is supported by the other parent, the parent who is supporting the alienation, whether this is their intent or not, is effectively supporting the child in cruel, unempathic behavior towards another human being, they are supporting the child in attitudes and behaviors towards interpersonal conflict that emphasize rejection, separation, and polarization, rather than resolution.
>
> Often, in dealing with the professed basis for the alienation, the child is being supported in oversimplified, polarized, black-and-white thinking, which undermines critical-thinking skills and so forth so that ultimately parental alienation is a risk to normal personality development because of those kinds of effects. To the extent that we have research on long-term outcomes of people who report having experienced parental alienation, there is certainly a basis for concern that these kinds of adverse effects can persist long-term and can have adverse effects on adult capacity for intimate relationships and on adult capacity for emotional self-regulation.

Id., citing McClain v. McClain, 539 S.W.3d 170, 205 (Tenn. Ct. App. 2017) (*citing Varley v. Varley*, 934 S.W.2d 659, 667 (Tenn. Ct. App. 1996)).

11. "Maximizing Parenting Time," Explained

Powers v. Powers (Court of Appeals, April 7, 2021). Thanks to *Powers*, and other appellate decisions, we have an answer to those parents who claim that "maximizing parenting time" means equalizing parenting time. (Hint: it does not mean that):

> Father is correct in stating that section 36-6-106(a) now directs courts to fashion custody arrangements that permit the "maximum participation possible" for each parent. See Tenn. Code Ann. § 36-

> 6-106(a); *Rountree*, 369 S.W.3d at 129. However, as noted in *Rountree*, the court's ultimate determination must be guided by the best interest of the child. *Rountree*, 369 S.W.3d at 129, 133. Stated differently, "the best interest of the child, not the 'maximum participation possible' concept, remains the primary consideration under the governing statutory scheme." *Flynn v. Stephenson*, No. E2019-00095-COA-R3- JV, 2019 WL 4072105, at *7 (Tenn. Ct. App. Aug. 29, 2019). "Section 36-6-106(a) directs courts to order custody arrangements that allow each parent to enjoy the maximum possible participation in the child's life only to the extent that doing so is consistent with the child's best interests." Id. (emphasis added) (quoting *In re Cannon H.*, No. W2015-01947-COAR3-JV, 2016 WL 5819218, at *6 (Tenn. Ct. App. Oct. 5, 2016)).
>
> We note that although several factors weighed in favor of both Mother and Father, "child custody litigation is not a sport that can be determined by simply tallying up wins and losses." Grissom, 586 S.W.3d at 395 (quoting *Paschedag v. Paschedag*, No. M2016-00864-COA-R3-CV, 2017 WL 2365014, at *4 (Tenn. Ct. App. May 31, 2017)). Custody determinations and ascertaining the best interest of a child require more than a "mechanical tallying of the section 36-6-106(a) factors." Id.

Id.

12 Support for Disabled Child

Lillard v. Lillard (Court of Appeals, March 8, 2021). Lilliard is an excellent case addressing the breadth of relief available to a parent caring for a disabled but active child. The court of appeals' own summary tells the story:

> This appeal arises from a post-divorce Petition to Modify Child Support and Declare Child to be Severely Disabled. After an evidentiary hearing, the court determined the parties' daughter had a severe disability and ordered the father to continue paying child support beyond the age of 21. The father raises three issues on appeal: (1) Did the trial court err in determining that the parties' daughter had a severe disability; (2) Did the trial court err in awarding child support beyond the age of 21 without making specific factual findings that the daughter was living under the care and supervision of the mother and it was in the daughter's best interest to remain in the mother's care; and (3) Did the trial court err in determining the amount of child support the father owed?

> We find the preponderance of the evidence supports the trial court's determination that the daughter has a severe disability, and it is in the daughter's best interest to remain in her mother's care. As for the amount of the child support award, the father primarily argues the daughter is underemployed; therefore, the court should have imputed additional income to her.
>
> We have determined that the trial court correctly identified and applied the relevant legal principles, the evidence supports the trial court's determination regarding the daughter's ability to earn income, and the award of child support is within the range of acceptable alternatives. Therefore, we affirm the trial court's decision in all respects.

Id.

13. Move from One County to Another

Emch v. Emch (Court of Appeals, September 1, 2022). The summary by the Court of Appeals tells the story:

> This appeal concerns a father's petition to modify the permanent parenting plan for his five-year-old daughter. The father filed his petition after the child's mother decided to move from Wilson County—where the father lived and the child attended preschool—to Williamson County, where the mother's fiancé lived.
>
> The mother was the primary residential parent and wanted the child to attend school in Williamson County, but the permanent parenting plan gave the parties joint authority over educational decisions, and the father wanted the child to attend school in Wilson County. In his petition, the father contended that the mother's move constituted a material change in circumstance, and he asked the court to name him as the primary residential parent, implement a 50/50 residential parenting schedule, and give him authority over where the child would attend school.
>
> After a three-day trial, the court ordered the parties to send the child to school in Williamson County. The court also found the mother's move was a material change in circumstance for the purpose of modifying the residential parenting schedule but not for the purpose of changing the primary residential parent or reallocating decision-making authority. The court concluded that a 50/50 residential schedule was in the child's best interests.

> This appeal followed. We affirm the trial court's judgment in all regards.

Id. Emch is well-worth reading because it addresses a situation we are likely to see with some regularity. But it is also worth reading because of the manner in which the Court of Appeals dealt with father's complaint that the mother's brief was severely deficient in its identification of the issues on appeal and on its references and citations to the record in the argument section, contrary to the requirements of Rules 6 and 27(a) of the Rules of Appellate Procedure. The Court of Appeals acknowledged that

> "[T]he argument sections of Mother's appellate brief do not comply with the letter or spirit of these rules. In support of her first issue,… Mother's brief does not apply [her cited] authority to the action of the trial court or the facts of this case…Mother's brief cites no legal authority supporting her second or fourth issues. Mother's brief also relies on many actions by the trial court without any reference to the page or pages in the record where the trial court's actions are recorded, and it makes several assertions of fact, only six of which are supported by references to the record. Suffice it to say, the vast majority of Mother's arguments are unsupported by references to legal authority and the record."

Id. But, says the Court,

> We are mindful, however, that the Rules of Appellate Procedure and the rules of this court "should be interpreted and applied in a way that enables appeals to be considered on their merits." Fayne v. Vincent, 301 S.W.3d 162, 171 (Tenn. 2009). In other words, we "should not exalt form over substance." Powell v. Cmty. Health Sys., Inc., 312 S.W.3d 496, 511 (Tenn. 2010)). Accordingly, we have the discretion to "suspend or relax some of the rules for good cause." Paehler v. Union Planters Nat. Bank, 971 S.W.2d 393, 397 (Tenn. Ct. App. 1997).

Id. In its analysis of the issues raised by the mother and the father, the Court of Appeals reminded the parties that "the material-change analysis under § 36-6-101(a)(2)(C) is used to determine when a party may invoke the court's authority to change the details of a permanent

parenting plan, and the best-interest analysis under § 36-6-106(a) is used to determine how the plan should be modified. See Armbrister, 414 S.W.3d at 697–98; Brunetz, 573 S.W.3d at 179. It went on to find that

> The undisputed evidence in the record satisfies the "very low threshold for establishing a material change of circumstances" under Tennessee Code Annotated § 36- 6-101(a)(2)(C). See Armbrister, 414 S.W.3d at 703 (quoting Boyer, 238 S.W.3d at 257). In particular, Mother's move to Williamson County, the Child's change of schools, and Mother's new work-from-home arrangement are "significant changes in the parent[s'] living or working condition that significantly affect parenting." Tenn. Code Ann. § 36-6-101(a)(2)(C).
>
> Mother testified that these changes would positively affect her parenting because she could spend more quality time with the Child in the afternoons. On the other hand, Father testified that these changes would harm his parenting by reducing the quality of time he has in the morning and evening.
>
> The undisputed evidence also shows that the "existing custody arrangement was . . . unworkable." See Boyer, 238 S.W.3d at 257 (citation omitted). Father testified that it would be impractical—although not impossible—to exercise his two hours of visitation on Thursday evenings due to the logistics of going from downtown Nashville to Franklin and then back to Wilson County. And both Mother and Father testified that they wanted to travel out of town for Thanksgiving in past years but could not agree on informal modifications to accommodate such travel. For these reasons, we find that Father established a material change in circumstance that "occurred after the entry of the order sought to be modified" and "affects the child's well-being in a meaningful way." See Drucker, 2020 WL 6946621, at *7 (citations omitted).

Id. The Court of Appeals went on to deny attorneys' fees to both parties, and to affirm the trial court's decision in all respects.

14. Presumptive Fathers

Audirsch v. Audirsch (Court of Appeals, January 22, 2021). In a short, decisive opinion, the court of appeals affirmed the trial court's denial of Rule 60 motion by a husband to obtain residential time with a child born during the marriage but for which DNA testing proved was not the husband's child. As the court of appeals held,

> There does not appear to be any dispute that the child at issue was born during the marriage of the parties, and we do not question under the law that such a fact made the Appellant the presumptive father. See Tenn. Code Ann. § 36-2-304 (noting that a man is rebuttably presumed to be the father of a child if the man and child's mother "are married or have been married to each other and the child is born during the marriage").
>
> Presumptions, however, by their very nature are not absolute as to their subject matter, and here, we agree with the trial court that the Appellant's presumption of parentage was sufficiently overcome by the very DNA testing he requested be performed. Moreover, the Appellant conceded he was not the biological father in his "Rule 60" motion.
>
> As for his argument that he carries a parental status such that he would even be required to be involved in termination proceedings should a future spouse of the Appellee wish to adopt the child, we note that the same statutory section relied upon by the Appellant for his position about him being the "legal parent" belies the point. Indeed, the Code provides that, where as here, "the presumption of paternity . . . is rebutted . . . the man shall no longer be a legal parent for purposes of this chapter and no further notice or termination of parental rights shall be required as to this person." Tenn. Code Ann. § 36-1-102(29)(C).

Id. The court of appeals also explained in a footnote that the husband's motion, styled as a Rule 60 motion, should have been decided as a Rule 59 motion, as it was filed within 30 days of the entry of the trial court's order. ("The divorce decree was entered on September 23, 2019. The "Rule 60" motion was filed thirty days later on October 23, 2019. Although we are of the opinion that it has no consequence to the result herein, technically this motion should have been

considered as a motion for relief under Rule 59," citing Tenn. R. App. P. 4(a); Thigpen, 1997 WL 351247, at *3; Black v. Khel, No. W2020-00228-COA-R3-CV, 2020 WL 7786951, at *4 (Tenn. Ct. App. Dec. 30, 2020)).

15. No Material Change of Circumstances

Canzoneri v. Burns (Court of Appeals, August 4, 2021). This is an interesting case in which the trial court found a material change of circumstances and went on to modify the parties' permanent parenting plan and to increase father's income for the purpose of child support based on a finding that the father was voluntarily underemployed. Both findings were overturned by the court of appeals. The change of circumstances urged by the father and found by the trial court was that the mother's boyfriend had threatened the children and the mother and that mother had originally sent the children to live with father before obtaining a permanent order of protection against the boyfriend. The court of appeals overturned that finding, holding that the change was not shown to have had a material effect on the lives of the children. As to the child support issue, the court of appeals found that there were insufficient factual findings to show that father was capable of making $800 per week instead of $600 per week as set forth in the original parenting plan. The court of appeals also struck all but a slight change in the transportation provisions of the original plan for failure to show a sufficient change of circumstances. As the court of appeals held,

> With the exception of the modification to the transportation provision, the trial court erred by making the previously-mentioned changes to the permanent parenting plan. "In the absence of proof of a material change in the child's circumstances, the trial court should simply decline to change custody." McClain, 539 S.W.3d at 189. Stated differently, "if [a material change in circumstances] has not occurred, then the parenting plan should not be changed in any way." Cowan v. Hatmaker, No. E2005-01433-COA-R3-CV, 2006 WL 521492, at *6 (Tenn. Ct. App. Mar. 3, 2006) (Susano, Jr., J., concurring); see also Brunetz v. Brunetz, 573 S.W.3d 173, 183-84

> (Tenn. Ct. App. 2018) (stating that "[a] modification [of] decision-making authority is analyzed utilizing the same standards governing any modification of the parenting plan").
>
> Despite this directive, the trial court modified the parties' permanent parenting plan by altering many of the decision-making directives under the plan and by requiring by-weekly phone calls with the children. Accordingly, having found that there was not a material change of circumstances to justify modifying the plan under Tennessee Code Annotated section 36-6-101(a)(2)(B), we reverse the trial court's decision to modify the decision-making provisions of the permanent parenting plan. For the same reasons, we also reverse the trial court's decision to require biweekly phone calls with the children.

Id.

16. Can Equal Parenting Time and Joint Decision-Making = Abuse of Discretion?

Rajendran v. Rajendran (Court of Appeals, September 16, 2020). The answer is "yes," according to *Rajendran*. Here, while the trial court found the parties unable to cooperate with each other in parenting issues, it awarded equal parenting time and provided for educational decisions to be made jointly. The court of appeals reversed, finding as follows:

> Previously, this Court explained the necessary amount of cooperation that is inherent in an equal parenting arrangement: Joint custody arrangements are appropriate in certain limited circumstances.
>
> However, while authorized by statute, joint custody arrangements are generally disfavored by the courts of this state due to the realization that such rarely serves the best interest of the child. The statute does not require that joint custody be awarded only when the parents are on friendly terms, however, in order for a joint custody arrangement to serve the best interest of the child, it requires a "harmonious and cooperative relationship between both parents."
>
> "While we have stopped short of rejecting this type of custody arrangement outright, divided or split custody should only be ordered when there is specific, direct proof that the child's interest will be served best by dividing custody between the parents." *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *8 (Tenn. Ct. App. July 19, 2005) (citations

omitted); see also *In re Emma E.,* No. M2008- 02212-COA-R3-JV, 2010 WL 565630, at *6 (Tenn. Ct. App. Feb. 17, 2010) (applying *Darvarmanesh* to the question of whether an equal parenting arrangement should have been awarded); *Zabaski v. Zabaski*, No. M2001-02013-COA-R3-CV, 2002 WL 31769116 (Tenn. Ct. App. Dec.11, 2002) (finding joint custody appropriate where the record revealed the parents were able to communicate effectively regarding their son, they shared parenting and household duties while married, and one of the parties suggested a joint custody arrangement); *Martin v. Martin,* No. 03A01-9708-GS-00323, 1998 WL 135613 (Tenn. Ct. App. Mar. 26, 1998) (affirming the trial court's award of joint custody due to the fact that the parents had previously agreed to a joint custody arrangement*); Gray v. Gray*, 885 S.W.2d 353, 354-55 (Tenn. Ct. App. 1994) (finding that the evidence demonstrated that both parents were very active in the child's life and there was no apparent animosity between the parties).

Id. The court of appeals went on to hold as follows:

> This Court, however, has indicated that this provision "does not mandate that the trial court establish a parenting schedule that provides equal parenting time[.]" *Gooding v. Gooding*, 477 S.W.3d 774, 784 n.7 (Tenn. Ct. App. 2015).
>
> > [Rather], the plain language of [s]ection 36-6-106(a) directs courts to order custody arrangements that allow each parent to enjoy the maximum possible participation in the child's life only to the extent that doing so is consistent with the child's best interests.
>
> Indeed, the General Assembly has expressly declared that in any proceeding involving custody or visitation of a minor child, the overarching "standard by which the court determines and allocates the parties' parental responsibilities" is "the best interests of the child." Tenn. Code Ann. § 36-6-401(a) (2014)[.] *Flynn v. Stephenson*, No. E2019-00095-COA-R3-JV, 2019 WL 4072105, at *7 (Tenn. Ct. App. Aug. 29, 2019) (quoting *In re Cannon H.*, No. W2015-01947-COA-R3-JV, 2016 WL 5819218, at *6 (Tenn. Ct. App. Oct. 5, 2016)). Indeed, despite the additional language added to section 36-6-106(a), another section of our child custody and visitation statutory scheme continues to provide that "neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child." Tenn. Code Ann. § 36-6-101(a)(2)(A)(i).

> As such, the maximum participation "aspirational goal" cannot be read as a preference for equal parenting time that significantly alters this Court's prior decisions on this issue. *Gooding v. Gooding*, 477 S.W.3d 774, 778 (Tenn. Ct. App. 2015).

Id.

17. Remember to Make Findings of Fact…

Friedsam v. Kristle (Court of Appeals, August 24, 2022). Friedsam is an excellent case for those looking for a comprehensive look at how domestic violence interacts with parenting time and custody issues, and is recommended reading. However, the 18 page opinion grounds to a halt at page 16 when the Court of Appeals correctly decides that "the trial court's order must be vacated and remanded for the trial court to resolve these outstanding factual questions [Did the father's alleged violence occur, or not?] and to enter a parenting plan that takes into account those findings as required by section 36-6-406(a)." In Friedsam, there was considerable discussion and evidence that there had been violence and misconduct, primarily on the part of the father, but no finding by the trial court that such violence actually occurred. The trial court instead ordered an equal time parenting plan, without answering that question. Interestingly, even in ordering the remand, the Court of Appeals noted that,

> If upon remand the trial court once again chooses to impose an equal parenting schedule, additional findings as to why this particular arrangement was chosen may also facilitate future appellate relief, given the trial court's findings that not a single factor favors Father alone and that the parties were unable to set aside their negative feelings toward one another to parent the child. See generally Rajendran v. Rajendran, No. M2019-00265-COA-R3-CV, 2020 WL 5551715, at *8–10 (Tenn. Ct. App. Sept. 16, 2020) (discussing the need for cooperation inherent in an equal parenting plan).

Id.

18. Grandparents and the Superior Parental Rights Doctrine

Jones v. Jones (Court of Appeals, August 23, 2022). This is a case in which the grandparents were awarded temporary custody of two minor children in 2018 when the parents were found to have serious drug issues. In 2021, father sought to recover custody of the children in a hearing in the Chancery Court, but instead was awarded 54 days of parenting time with the grandparents to have the balance of the time with the children. The trial court found that the father had not shown a substantial change of circumstances so as to permit him to regain custody of the children.

The Court of Appeals reversed and remanded for a new hearing based on the Superior Parental Rights Doctrine set forth in Blair v. Badenhope. 77 S.W.3d 137, 148 (Tenn. 2002) (superseded by statute on other grounds as recognized in Armbrister v. Armbrister, 414 S.W.3d 685 (Tenn. 2013)). As the Court of Appeals held,

> A different analysis may apply, however, when a parent seeks to modify an existing custody order that vests custody with a non-parent. In re R.D.H., 2007 WL 2403352, at *7. In particular, the Blair Court determined that "a parent who is given the opportunity to rely upon the presumption of superior rights in an initial custody determination may not again invoke that doctrine to modify a valid custody order." Blair, 77 S.W.3d at 148.
>
> Instead, when a parent has already been given an opportunity to rely upon the presumption of superior rights in an initial custody determination "a trial court should apply the standard typically applied in parent-vs-parent modification cases[,]" which is whether "a material change in circumstances has occurred, which makes a change in custody in the child's best interests." Id. at 148.
>
> However, the Blair court carved out four "extraordinary circumstances" in which parents continue to hold a presumption of superior rights against a non-parent: (1) when no order exists that transfers custody from the natural parent; (2) when the order

> transferring custody from the natural parent is accomplished by fraud or without notice to the parent; (3) when the order transferring custody from the natural parent is invalid on its face; and (4) when the natural parent cedes only temporary and informal custody to the non-parents. Id. at 143; see also Bryan, 2016 WL 4249291, at *9 ("[T]he fact that a non-parent has been awarded custody of a child does not necessarily prevent a biological parent from successfully asserting superior parental rights in a proceeding to regain custody of the child.").
>
> When any of the four scenarios listed above are present in a case, the "protection of the natural parent's right to have the care and custody their child demands that they be accorded a presumption of superior parental rights against claims of custody by non-parents." In re R.D.H., 2007 WL 2403352, at *7 (citing Blair, 77 S.W.3d at 143)). Moreover, this Court has held that we must focus on the "finality of the initial order, and not on the length of time that the custody arrangement has persisted." Id. at *9.

Id. The Court of Appeals went on to provide the standard the trial court should apply on remand:

> On remand, the maternal grandparents bear the burden of showing by clear and convincing evidence that the children would be exposed to substantial harm if placed in Father's custody. See Sharp v. Stevenson, No. W2009-00096-COA-R3-CV, 2010 WL 786006, at *6 (Tenn. Ct. App. Mar. 10, 2010); In re B.C.W., No. M2007-00168-COA-R3- JV, 2008 WL 450616, at *3 (Tenn. Ct. App. Feb. 19, 2008). Although our courts have acknowledged it is difficult to set out a precise definition of "substantial harm," we have determined: (1) there must be "'a real hazard or danger [to the child] that is not minor, trivial, or insignificant'"; and (2) "'the harm must be more than a theoretical possibility . . . it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.'" *In re R.D.H.*, 2007 WL 2403352, at *11 (quoting Ray, 83 S.W.3d at 732).

Id. This is a thorough and informative decision on an issue of parental rights that has been hotly litigated ever since Blair (2002) and before.

19. Grandparent Visitation Reversed by Court of Appeals

In re Houston D. (Court of Appeals, August 16, 2022). Houston D. is an interesting, far reaching grandparent visitation case in which the Court of Appeals (1) affirmed the juvenile court's subject matter jurisdiction of the case notwithstanding the subsequent marriage of the parents, based on the wording of the statute that juvenile courts had jurisdiction over grandparent visitation cases where the child is "born out of wedlock"; and (2) affirmed that the grandparents had been effectively denied time with the child after spending considerable time with the child the first several years of his life, and granted the grandparents visitation.

What the Court of Appeals found lacking was the proof to support the trial court's finding that the child was suffering substantial harm or severe emotional harm due to parents' decision to limit his interaction with grandparents. Here, the trial court made that finding, but did not cite any specific facts to support it. The Court of Appeals elected to "soldier on" in an independent review of the evidence instead of remanding the case back to the trial court. As the Court of Appeals held,

> Proving harm was grandparents' burden to bear, and the record demonstrates that they failed to carry that burden. Based on the lack of evidence regarding harm, we find that the evidence preponderates against the juvenile court's finding that the child was likely to suffer substantial harm or severe emotional harm. Consequently, we reverse the decision of the juvenile court awarding grandparent visitation and dismiss the case.

Id.

20. Grandparent Visitation, Affirmed

Rose v. Malone (Court of Appeals, July 25, 2022). In this tragic case, the mother was killed in a log truck accident three months after the divorce between the mother and father. In the

litigation between the grandparents and the father, the court found that the father had stopped permitting the grandparents to spend time with the child; that the failure by the father to allow the grandparents to visit with the child was harming the child, and that it was in the best interest of the child to have a relationship with the grandparents. Accordingly, the trial court permitted the grandparents the following time with the child:

> 1. Visitation. Grandparents shall have in-person visitation with [B.R.M.], every year, at the following times:
>
> - Mother's Day weekend, from after school on Friday (or 3:00 p.m., if school is not in session) until 5:00 p.m. on Sunday;
> - Up to ten (10) consecutive days in July. Grandparents shall notify Father, in writing, of their proposed dates for this visitation time no later than May 15 of each year;
> - The weekend closest to Mother's birthday in September, from after school on Friday (or 3:00 p.m., if school is not in session) until 5:00 p.m. on Sunday;
> - The weekend prior to Thanksgiving, from after school on Friday (or 3:00 p.m., if school is not in session) until 5:00 p.m. on Sunday.
>
> 2. Location. The location for Grandparents' visitation shall be any location of their choosing. The place of exchange shall be Father's residence, unless otherwise agreed. Grandparents shall be responsible for making any necessary transportation arrangements for [B.R.M.], and shall be responsible for all costs associated with transportation and visitation. Grandparents shall provide to Father, in writing, a detailed itinerary for their visits, no later than three (3) days prior to the beginning of their visits
>
> 3. FaceTime. Grandparents shall be allowed one (1) FaceTime call with [B.R.M.] each week, at 7:00 p.m. on Sunday for thirty (30) minutes unless otherwise agreed. Father will facilitate these FaceTime calls.
>
> 4. Extracurricular Activities. Upon written request from Grandparents, Father shall promptly provide to Grandparents an updated written schedule of [B.R.M.]'s extracurricular activities which are open to attendance by the public or by family members, including sporting events, school functions such as Grandparents' Day, and Chapel. Grandparent shall provide to Father at least forty-eight (48) hours' written notice of their intent to attend any of [B.R.M.]'s extracurricular activities. (a)

> In the event [B.R.M.] has any regularly-scheduled extracurricular activity during Grandparents' visitation time, Grandparents shall either:
>
> > (i) - 19 - facilitate [B.R.M.]'s attendance at her scheduled activities; or (ii) forego their visitation. (b) In the event [B.R.M.]has any regularly-scheduled extracurricular activity during the time for Grandparents' weekly FaceTime call, Father shall notify Grandparents in writing of an alternative time for their weekly call.

Id. On appeal, the Court of Appeals affirmed the trial court's order and schedule *in toto*. As the Court of Appeals stated.

> [W]e are not persuaded that [the visitation schedule] was unreasonable. Contrary to Father's argument on appeal, much of the visitation that was awarded were proposals he found agreeable when he testified…
>
> Moreover, the trial court noted in its order that it took care to minimize any potential interference with the parent-child relationship and considered Father's testimony heavily, which we find that it did.
>
> In regard to weekend visitation, the trial court took into consideration Father's preference to have the child returned by Sunday evening instead of allowing Grandparents to transport the child to school on Monday morning. Father thought that Grandparents' proposal of two-and-a-half consecutive weeks during the summer was too much, and the trial court reduced it to a maximum of ten days during July.
>
> There were only four visitation periods awarded by the trial court, and all of them were important for the child to continue her connection with Mother's family and to maintain her memory of Mother. Two of the visitation periods were Mother's Day weekend and the weekend closest to Mother's birthday. The other two visitation periods—the ten days in July and the weekend before Thanksgiving—were traditions that Grandparents had with the child and Mother when she was still alive.

Id.

X. Prenuptial (and Postnuptial) Agreements

1. Short Time Does Not Equal Duress

Howell v. Howell (Court of Appeals, February 5, 2021). The summary of the court of appeals decision is the following:

> This appeal concerns a prenuptial agreement that protected each spouse's premarital property and waived the right to alimony. The couple signed the agreement on the day it was drafted, 11 days before their wedding. Seven years later, after the husband filed for divorce, the wife sought to set aside the agreement, asserting that she did not sign it knowledgeably and freely.
>
> The wife alleged that the husband took her to the attorney's office without notice or an opportunity to seek independent counsel. The trial court concluded that the agreement was valid because the couple lived together for six years before getting engaged, the wife knew the husband would not marry her without a prenuptial agreement, and the wife was not pressured or coerced into signing the agreement. We affirm.

In light of the fact—seemingly undisputed by the witnesses at trial—that the wife was well aware that the husband wanted a prenuptial agreement before marrying, the wife's principle issue on appeal was duress and/or coercion. The trial court found, and the court of appeals affirmed, that wife could have obtained counsel in the time between the initial visit to the attorney's office and the wedding. She elected not to do so. As the court held on this issue:

> The temporal proximity of the signing to the wedding can be significant because it may show that a party did not have an "opportunity to personally study the agreement or to seek advice." *Randolph*, 937 S.W.2d at 822. Thus, our courts have found this factor weighed against enforcement in cases where the agreement was presented and signed just days before the wedding. See id. at 817 (one day); *Grubb v. Grubb*, No. E2016-01851- COA-R3-CV, 2017 WL 2492085, at *12 (Tenn. Ct. App. June 9, 2017) (two days); *Ellis*, 2014 WL 6662466, at *1 (three days).
>
> In *Grubb v. Grubb*, we opined that, "[w]hile it is not a direct linear relationship, the more sophisticated the spouse is, the less time he or she may well need in order to be able to enter into the agreemen

> freely, knowledgeable, and in good faith without duress or undue influence." 2017 WL 2492085, at *12. Whether a party to a prenuptial agreement was represented by counsel or had the opportunity to consult with independent counsel is one of several factors to consider in determining whether the agreement was entered into voluntarily and knowledgeably. See *Randolph*, 937 S.W.2d at 822. "Though representation by independent counsel may be the best evidence that a party has entered into an antenuptial agreement voluntarily and knowledgeably, no state makes consultation with independent counsel an absolute requirement for validity." Id. (citation omitted)

Id.

2. More on Duress, Good Faith and Prenuptial Agreements

Law v. Law (Court of Appeals, April 26, 2022). Law, an opinion authored by Court of Appeals Judge Kristi Davis, is a treatise on Tennessee Prenuptial Agreements. In a case where the parties signed the prenuptial agreement the day before the wedding, and the wife told the court she had about two hours to look it over, the trial court found that there was no duress, and the Court of Appeals affirmed. There was no issue related to the disclosure of assets. And the Court of Appeals rejected the wife's argument that property which was otherwise protected as husband's separate property by the terms of the prenuptial agreement could not be transmuted into marital property by the parties' conduct. As the Court of Appeals held in analyzing this argument:

> Both Hunt and Wilson also clarify that this question [whether property subject to a prenuptial agreement can be transmuted] is determined not only through the statutory definitions of marital and separate property or general principles of transmutation, but by first looking to the terms of the prenuptial agreement itself. See Hunt, 389 S.W.3d at 761–62; see also Swift, 2005 WL 3543341, at *2 (noting that because the agreement at issue was enforceable, this Court's "task [was] to enforce the terms of the agreement in light of the facts in the record"); Reed v. Reed, No. M2003-02428-COA-R3- CV, 2004 WL 3044904, at *4 (Tenn. Ct. App. Dec. 30, 2004) ("[W]e will look first to that [prenuptial] agreement to decide to what extent the issues of property classification and division have

> been previously agreed upon."); Taylor v. Taylor, No. M1999-02398-COAR3-CV, 2003 WL 21302988, at *4 (Tenn. Ct. App. June 6, 2003) ("The cardinal rule of construction is that antenuptial agreements should be construed to give effect to the parties' intentions as reflected in the agreements themselves.") (citing Sanders v. Sanders, 288 - 16 - S.W.2d 473 (1955)); Tenn. Code Ann. § 36-3-501 (providing that trial courts are bound by valid prenuptial agreements when classifying property).
>
> We are also mindful that "prenuptial agreements are favored by public policy in Tennessee[,]" and "[c]ontracting parties' intent is embodied in their written agreements" Wilson, 929 S.W.2d at 370, 373. Second, to the extent the terms of a prenuptial agreement do not specifically address the disposition of an asset at issue, the question is then answered with reference to Tennessee law. See Wilson, 929 S.W.2d at 373 ("Prenuptial agreements should be construed with reference to the statutes governing the distribution of marital property. They should also be construed using the rules of construction applicable to contracts in general."). For example, in Wilson, the disposition of funds deducted from the husband's paychecks and then deposited into an account shielded by the prenuptial agreement were at issue; because the agreement did not provide that the parties' wages were separate property, we relied on Tennessee law in classifying those funds.

Id. In Law, the Court of Appeals did find that some assets were not protected as separate property based on the wording of the agreement, but held that the marital home was protected, even though the parties had resided together in the home. As the Court of Appeals noted,

> More fundamentally, were we to endorse Wife's argument in this case, it would suggest that a home listed as a separate asset in a valid, enforceable prenuptial agreement transmutes into marital property simply by virtue of a married couple residing in the home together. A home "'should not be classified as marital property simply because the parties have lived in it.'" Treadwell, 2017 WL 945940, at *7 (quoting Takeda v. Takeda, No. E2006-02499-COA-R3-CV, 2007 WL 4374036, at *3 (Tenn. Ct. App. Dec. 17, 2007)). Such a holding would effectively nullify any reason to list a separately held home in a prenuptial agreement, or even chill parties' plans to live together as an intact family in one home.

Id.

3. Prenuptial Agreement Unenforceable for Lack of Disclosures

In re Estate of Lester Stokes (Court of Appeals, February 17 2022). The answer to the appeal in this case can be guessed from the opening paragraph of the opinion:

> In December 2014, Appellant Martha Stokes and Lester Stokes ("Decedent") became engaged. The couple set their wedding date for June 17, 2017. On April 6, 2017, Decedent met with attorney Sara Barnett to discuss an antenuptial agreement. Ms. Barnett provided Decedent with two sample financial statement disclosure forms to be completed by Decedent and Appellant.
>
> Approximately two weeks before the wedding, Decedent presented Appellant with the sample disclosure forms and explained that the purpose of the forms and the antenuptial agreement was to protect their respective homes in the event of divorce. Decedent and Appellant completed the sample disclosure forms and included the following information in each of their disclosures: (1) their principal addresses;1 (2) the estimated value of their principal residences; (3) the mortgages encumbering the residences; and (4) their respective incomes.
>
> Notably, Decedent and Appellant left the remainder of the forms blank, including the sections related to bank accounts, stocks, and pension/retirement plans. Thereafter, Decedent returned the completed forms to Ms. Barnett for preparation of an antenuptial agreement. On review of the disclosures, Ms. Barnett expressed concern that the failure to list assets other than Decedent's and Appellant's principal homes could result in the antenuptial agreement being unenforceable. Decedent responded that the principal purpose of the agreement was to protect his home in the event of divorce.

Id. And, yes, you are correct: the lack of complete disclosures (no bank accounts, retirement accounts, or other assets) were disclosed. The fact that the parties had been together for five years prior to the marriage did not provide a cure (see Randolph) as there was insufficient evidence that wife was aware of the size of husband's estate separate and apart from the written disclosures attached to the agreement. Accordingly, the Court of Appeals overturned the enforcement of the agreement by the trial court.

XI. Relocation

1. Relocation, Short and to the Point

Nance v. Franklin (Court of Appeals, September 15, 2022). *Nance* is a case in which the Court of Appeals took little time to affirm the trial court's rejection of a request by mother to relocate the parties' minor child from Tennessee to Alabama. The court of appeals denied mother's request to dismiss the appeal based on the father's alleged failure to timely respond to the mother's notice of intent to relocate, and the decision to go ahead and evaluate the case despite the mother's failure to comply with Rule 6 of the Tennessee Rules of Civil Procedure. Those issues out of the way, the Court of Appeals went straight to the point, applying the factors found in the (relatively) new Parental Relocation Statute:

> Having received a timely petition in opposition to the relocation, the trial court was then required to determine whether relocation was in the best interest of the Child in accordance with the following factors:
>
> (A) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the nonrelocating parent, siblings, and other significant persons in the child's life;
>
> (B) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
>
> (C) The feasibility of preserving the relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;
>
> (D) The child's preference, if the child is twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

> (E) Whether there is an established pattern of conduct of the relocating parent, either to promote or thwart the relationship of the child and the nonrelocating parent;
>
> (F) Whether the relocation of the child will enhance the general quality of life for both the relocating parent and the child, including, but not limited to, financial or emotional benefit or educational opportunity;
>
> (G) The reasons of each parent for seeking or opposing the relocation; and
>
> (H) Any other factor affecting the best interest of the child, including those enumerated in § 36-6-106(a). Tenn. Code Ann. § 36-6-108(c)(1)–(2).

Id. In short order, the Court of Appeals found relocation was not appropriate:

> Here, the trial court provided a detailed order with its findings for each factor. Of particular interest to the court was the feasibility of preserving the Child's relationship with Father in the event of relocation given Mother and Stepfather's disdain for Father. The court further considered Mother's pattern of conduct toward Father in limiting or preventing his co-parenting time. Lastly, the court found that the relocation would not enhance the Child's general quality of life as evidenced by the Child's concern that the relocation would inhibit his relationship with Father.
>
> The Child has enjoyed equal visitation with the parties since February 2020. Based upon these findings, the trial court found that relocation was not in the best interest of the Child. The record supports the trial courts findings and ultimate determination that the relocation was not in the Child's best interest when Mother's assertions that the Child's quality of life would improve were speculative, at best. Accordingly, we affirm the decision of the trial court.

Id.

2. Relocation? Oops, Already Did That

Payne v. Payne (Court of Appeals, July 14, 2021). If you are looking for a case which holds that disagreements between parents don't automatically translate into an inability to communicate or co-parent; or one which holds that a child becoming 8 months older than when

the original parenting plan was entered does not support a change of circumstance related to age; or a case which states that, if you have already relocated when the original plan was adopted and therefore a relocation is not a change of circumstance, look no further. *Payne* is your case.

3. 50-Mile Radius and More

Chambers v. Chambers (Court of Appeals, February 4, 2021). Don't be fooled by the brevity of this opinion: it packs a lot of clarifying law into its 12 pages. One issue related to the whether the mother's move from one location to another triggered the Tennessee Relocation Statute because her new location, as found by the trial court, was more than 50 miles from the father. The court of appeals reversed on this issue, holding that the radial distance between the mother's home and the father's home was 39 miles, and the distance by car, as shown by Google Maps, was only 49 miles. The court held (1) that Google Maps can be relied upon by a court to determine distances, and (2) that the relocation statute distance is based on radial distance, not travel distance.

The court of appeals further found that the error concerning the distance was a harmless error, in that the trial court had properly modified the parenting plan to "break the tie" on the choice of the child's school. Not surprisingly, the mother wanted the child to attend a school near her, and the father wanted the child to attend a school near him. The trial court found that it was in the best interest of the child to attend a school near him, and the court of appeals affirmed. Among other things, the court of appeals found that the trial court's statement that it was familiar with the school chosen by father and thought it was a good quality private school, was not improper. As the court of appeals held,

> "Facts relating to human life, health and habits, management and conduct of businesses which are common knowledge may be judicially noticed." Benson v. H.G. Hill Stores, Inc., 699 S.W.2d 560, 563 (Tenn. Ct. App. 1985). "A judicially noticed fact must be

> 'one not subject to reasonable dispute, in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" In re Grace N., No. M2014-00803-COA-R3-JV, 2015 WL 2358630, at *6 (Tenn. Ct. App. 2015) (quoting Tenn. R. Evid. 201(b)).
>
> We disagree with Mother's characterization of the proof at trial and her view of the trial court's rationale behind its ruling, especially her assertion that "the only proof before the Trial Court was that the children of other well-known individuals in Sevier County attended [The King's Academy], the Father's opinion regarding The King's Academy, and the Trial Court's improperly imposed own opinion." We do not discern that the trial judge improperly allowed his personal view of The King's Academy to influence the court's decision regarding where the child would attend school.

Id. The court also rejected mother's argument that the trial court had wrongly disregarded the joint decision-making provision of the parenting plan, finding that where parties cannot agree, the court may intervene and "break the tie."

4. Relocation Permitted Under Amended Statute

Hall v. Hall (Court of Appeals, May 24, 2022). Hall is a case in which the mother's petition to relocate the parties' child to Ohio to join her new husband-to-be there was granted by the trial court and affirmed by the Court of Appeals, notwithstanding the more difficult standard for relocation under the Amended Parental Relocation statute (amended in 2018). One of the key factors in its decision was that the father had exercised on 49 days of parenting time in 2019 and 66 days of parenting time in 2020, due to his demanding work schedule. The new parenting plan imposed by the trial court and affirmed by the Court of Appeals awarded the father 97 days of parenting time—"an increase from the ninety-five days he had been awarded in the original PPP and more co-parenting time than he had exercised annually during the previous two years."

Id. Also of interest: this was a case in which both parents were complimentary of the other parent and there was very little conflict between them except as related to the relocation of the child, who was six years old at the time of the trial.

5. Relocation Permitted Under Old Statute Best Interest Test

In Re Autumn H. (Court of Appeals, March 29, 2022). Autumn H. is a case decided in 2022 under the old relocation statute, but under the best interest test set out in the old statute when the parties are spending substantially equal time with the child. Here, the mother was permitted to relocate the child to Canada, where the mother came from and was intent on going back to. Relocation under the best interest test is a difficult case to win if you are the petitioner seeking to relocate with your child, but we have had two such cases in 2022.

MERCIFULLY, THE END!