

**Tennessee Judicial Conference
Case Law Update - October 2021**

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2021 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 make 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.

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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. \$17,500 Per Month in Alimony In Futuro

Egan v. Egan (Court of Appeals, May 28, 2020). What can you say about a \$17,500 per month alimony *in futuro* award? Well, perhaps just what Judge Neil McBrayer had to say:

We discern no abuse of discretion in the type, amount, or duration of the alimony awarded. So we affirm the judgment of the trial court.

Id. Here, the court’s alimony award was primarily based on the husband’s income, calculated at \$134,000 per month (\$100,000 per month after taxes), and its finding that, “Although we agree with Husband that Wife had the capacity for self-sufficiency, the record supports the court’s finding that Wife lacked the capacity to achieve, with reasonable effort, an earning capacity that will permit her to enjoy the same standard of living expected to be available to Husband.” *Id.*

3. Standard for Imputation of Income for Child Support and Alimony

Blakemore v. Blakemore (Court of Appeals, June 25, 2020). *Blakemore* is a difficult case, with very little money, and a wide array of errors found by the court of appeals. The wife, who was 52 years old, had a bachelors’ degree and a master’s degree in social work, with a history of earning as much as \$80,000-\$100,000 per year up to 2009, and working part-time through 2013, when she left employment to care for the parties’ minor child. The husband was a 61-year-old retired firefighter and emergency medical technician who relied on his \$5,449 per month pension for income. Both parties had physical ailments. The court of appeals found that the trial court had erred in a number of ways, including incorrectly calculating husband’s income for child support purposes as \$5,290 per month, rather than \$5,449 per month, incorrectly imputing minimum wage income to wife, rather than imputing income “commensurate with her education and employment history,” incorrectly using husband’s income for purposes of transitional alimony at \$5,290 per month rather than \$5,449 per month, and imputing minimum wage to wife “when her education and employment history merited a higher income.”

4. And Another Standard for Imputation of Income...

Turk v. Turk (Court of Appeals, June 24, 2020). Here is a case in which the mother, once a high income earner (as in *Blakemore*) found herself working in a pet shop for approximately \$11 per hour. The trial court relied on her \$11 per hour income to set child

support owed by the father, but denied mother transitional or *in futuro* alimony. (There was a small amount of debt repayment ordered to father which the trial court characterized as alimony *in solido*.) The father appealed, arguing that the mother’s income should reflect her history of earnings. The court of appeals denied the appeal, quoting the trial court as follows:

“[Mother is] capable of being a high wage earner. [She] was terminated from her job at Lodan Vision due to no fault of her own. The court finds that there was nothing that she did that was inappropriate, it was simply that the position got eliminated. [Mother] has tried to get back into the pharmaceutical sales world without success at this point. She has tried to network and do other things to keep her employment up, but has not yet been successful in doing so at this point.

“She is ultimately working a position which is not financially rewarding, but the court is confident that she will be able to continue in her efforts to secure a better employment position than what she has now, if not surpassing the income she earned in the past. The court would consider this to be only a temporary hiccup in [Mother’s] employment and believes she will return to the relative earnings she has had in the past.”

We agree with the court’s assessment and corresponding denial of Father’s claim of voluntary underemployment. We, like the trial court, are confident that Mother will return to the workforce in a position commensurate with her experience given the court’s denial of any additional spousal support.

Id.

5. 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 Support¹

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

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...

contempt charge by the trial court, and remanding the case to the trial court for a new hearing 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.

III. Civil Procedure/Evidence

A. Civil Procedure

1. Statute of Limitations and Contempt

Proctor v. Proctor (Court of Appeals, May 27, 2020). The parties divorce. Husband is obligated to pay wife \$50,000 within five years of the date of the divorce decree. He fails to do so. Eleven years after the entry of the decree, wife files a contempt action against husband. The court finds the contempt action to be timely filed, and husband appeals.

The court of appeals reversed the trial court, finding that the 10 year statute of limitations on the enforcement of judgments applied, and the lawsuit was barred by that limitation. Wife's argument that the statute of limitations did not begin to run until five years after the divorce—when the obligation was due to be paid—was unavailing:

In *Shepard v. Lanier*, the Tennessee Supreme Court held that a cause of action on a judgment or decree accrues “upon the entry of the judgment in the [trial] court.” 241 S.W.2d 587, 590–91 (Tenn. 1951) (interpreting § 8601 of the 1932 Code of Tennessee, an earlier enactment of section 28-3-110(a)(2)).

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. Rule 60.02 Dismissal

Napier v. Napier (Court of Appeals, July 27, 2020). *Napier* is a well-reasoned case involving an appeal from the dismissal of a Rule 60.02 motion. Here, the parties were involved in litigation post-divorce. Mother filed several petitions seeking a judgment for back due child support, each time sending the petitions (and subsequent motions) to an address the father later argued was no longer his address. Of interest, father's claim was that the mother knew that he no longer lived at the address he had previously occupied, and sent the papers to that address anyway. Accordingly, he sought relief from a \$50,000 child support judgment on the basis of the fraud provisions of Tenn. R. Civ. Pro. 60.02. The court found that the father had the burden of proving fraud by clear and convincing evidence, and failed to do so. The court of appeals affirmed.

Of equal interest was the court of appeals affirmation of the ruling notwithstanding the fact that the husband was acting pro se for part of the litigation—a fact he later sought to use to his advantage. As the court of appeals stated,

“Parties who decide to represent themselves are entitled to equal treatment by the court. *Murray v. Miracle*, 457 S.W.3d 399, 402 (Tenn. Ct. App. 2014). The court should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. *Id.* However, the court must also be mindful of the boundary between fairness to the pro se litigant and unfairness to the pro se litigant's adversary. *Id.* While the court should give pro se litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs, it must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.” *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003). (citing *Lacy v. Mitchell*, 541 S.W.3d 55, 59 (Tenn. Ct. App. 2016).

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 -13- 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 knowingly 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. \$240,000 Question

St. John-Parker v. Parker (Court of Appeals, March 27, 2020). The court's summary highlights the issue in this case:

This is an appeal from a trial court's order holding an ex-husband in civil contempt on twelve counts and ordering him to pay \$240,507.70 in attorney fees and accounting fees incurred by the ex-wife in this case and a related bankruptcy proceeding. The ex-husband appeals. We affirm the judgment and remand for further proceedings.

Id. (*emphasis supplied*). As described in the summary, one of the issues on appeal was whether the former wife was entitled to recover attorneys' fees incurred by her in a bankruptcy court.

The answer: yes:

For purposes of awards pursuant to Tennessee Code Annotated section 36-5-103(c), appellate courts have recognized that an enforcement proceeding can take place before a different tribunal than the one that entered the original order of custody or support.

For instance, in *Shofner v. Shofner*, 232 S.W.3d 36, 36-37 (Tenn. Ct. App. 2007), the parties were divorced and the father had custody

pursuant to an order of the circuit court. They were involved in a “labyrinth of legal proceedings” thereafter, and the mother eventually “sought out a new forum to do battle over the children” by filing a petition for dependency and neglect in juvenile court. *Id.* at 38. The juvenile court dismissed the petition and found that the mother was “forum shopping” in a “thinly disguised effort to circumvent the actions of the circuit court.” *Id.* However, the juvenile court found no statutory basis to permit an award of attorney fees to the father. *Id.*

This Court reversed, finding that such an award was authorized by Tennessee Code Annotated section 36-5-103(c). *Id.* We explained that the dependency and neglect action was just “the latest in a series of bitterly contested domestic actions between [the parties].” *Id.* at 37. The dependency and neglect action was essentially a challenge to the circuit court’s custody order, which the father successfully resisted. *Id.* at 40. As such, he was “attempting to enforce” the circuit court’s custody decree, and an award of attorney fees was authorized under the statute. *Id.* We said, “The fact Mother chose a different forum in which to challenge a valid custody decree does not impair Father’s right pursuant to Tenn. Code Ann. § 36-5-103(c) to recover his attorney’s fees.” *Id.* at 40-41.

Thus, Shofner demonstrates that the attorney fees at issue do not necessarily have to be incurred before the same court that entered the custody or support order being enforced.

Id. The court of appeals cited other cases which stand for the same proposition, including *Stack v. Stack*, No. M2014-02439-COA-R3-CV, 2016 WL 4186839, at *4 (Tenn. Ct.App. Aug. 4, 2016) (affirming an award of attorney fees pursuant to Tennessee Code Annotated § 36-5-103(c) incurred in defending a Montana child support order); and *In re Conservatorship of Lovlace*, No. M2003-01274-COA-R3-CV, 2004 WL 1459409, at *8 (Tenn. Ct. App. June 28, 2004) (Court affirmed an award of attorney fees and awarded additional fees on appeal pursuant to section 36-5-103(c) where the issue of child support arose in the context of a conservatorship.)

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. Appeals from Juvenile Court

In re Easton W. (Court of Appeals, July 1, 2020). This case illustrates a potential trap for appellants from Juvenile Court, albeit a rarely sprung trap. Here, the father filed a petition styled as a "Petition for Dependency and Neglect" in juvenile court. The case was tried as a custody case, from which the mother appealed the result to circuit court. (Custody cases are appealed from juvenile court to the court of appeals; dependent and neglect actions are appealed from juvenile court to the circuit court.) After the circuit court accepted the appeal, the father filed a motion to alter or amend the juvenile court order to reflect that it was a custody case, not a dependent and neglect case. The circuit court granted the motion, and dismissed the appeal as having been filed in the wrong court. The court of appeals affirmed the dismissal, holding that the mother should have filed her appeal in the court of appeals. Wow!

10. Remember Concurrent Findings

Knop v. Knop (Court of Appeals, May 29, 2020). This writer has always had a blind spot in trying to understand the standard of review of a special master report adopted by a trial court. *Knop* answers that question:

At the outset, we note that the post-divorce issues in this matter were first heard by a special master, and the trial court adopted the Special Master's findings and conclusions *in toto* as the judgment of the

court. Although the parties correctly state in their briefs the standard of review regarding concurrent findings of fact by a special master and a trial court, there appears to be a misunderstanding as to the applicability of this standard under the facts of this case.

This Court has outlined the standard of review applied in cases where the trial court referred the matter on appeal to a special master:

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

Bradley v. Bradley, No. M2009-01234-COA-R3-V, 2010 WL 2712533, at *6 (Tenn. Ct. App. July 8, 2010). Under this standard, concurrent findings of fact by a special master and a trial court are conclusive and cannot be overturned on appeal.

However, a concurrent finding is not conclusive “where it is upon an issue not properly referred to a special master, where it is based upon an error of law or a mixed question of fact and law, or where it is not supported by any material evidence.” *Bradley*, 2010 WL 2712533, at *6 (citing *Manis*, 49 S.W.3d at 301). Accordingly, while concurrent findings of fact are binding on the reviewing court if supported by any material evidence, this rule does not apply to questions of law or mixed questions of law and fact. *Bubis v. Blackman*, 435 S.W.2d 492, 498 (Tenn. Ct. App. 1968).

Id. The court of appeals ultimately affirmed the trial court in *Knop*, but was careful to distinguish between factual findings and legal findings, or mixed questions of law and fact. For example, the court of appeals found that the finding that certain payments made by Husband “were not due and payable prior to June 8, 2017” is a factual one, while the finding that Husband “is not entitled to a credit” for such payments is a question of law; that the finding that Wife’s whole life insurance policy increased in cash value during the time Husband continued to pay the premiums is a factual one; however, whether Husband is entitled to a credit for the payment of the premiums or the increase in the policy’s cash value is a question of law; and that

determining when and if certain medical expenses were paid is a factual finding. However, determining how and whether to divide such expenses among the two parties based on the provisions of the Parenting Plan and the MDA—as well as those expenses incurred prior to the parties’ divorce or entering into the Parenting Plan and the MDA—is a question of law. These were just a few of the issues which the court of appeals felt empowered to review as legal issues rather than factual ones—the review of which was foreclosed by the concurrent findings of the master and the trial court.

11. Under Seal, Destruction, or No?

Bottorff v. Bottorff (Court of Appeals, May 27, 2020). The court of appeals’ summary of this case involving “under seal” records summarizes the litigation; additional discussion within the case is useful for anyone dealing with this issue at trial:

In this post-divorce custody modification action, the Davidson County Circuit Court (“trial court”) entered a protective order requiring the return and permanent destruction of documents, including copies, that were allegedly central to the mother’s separate professional malpractice action against the father’s testifying expert. The trial court subsequently denied the mother’s motion for relief from the protective order, wherein she sought access to the documents for her use in the professional malpractice action.

Although the mother filed a motion seeking to alter or amend the trial court’s order, the trial court also denied that motion. The mother has appealed. Following our thorough review of the record and applicable case law, we vacate the trial court’s order denying the mother’s motion to alter or amend as it pertains to the documents produced during discovery.

We remand this issue to the trial court for further hearing, as necessary, and determination of the issue based upon the appropriate factors. We reverse the trial court’s order denying the mother’s motion to alter or amend as it pertains to the trial transcript and exhibits. We deny the father’s request for an award of attorney’s fees on appeal.

Id.

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. Rule 60, on Overdrive

Adkins v. Adkins (Court of Appeals, December 22, 2020). The astute reader of these materials will recall that the *Adkins* case is a frequent flyer in this area. Here, the issue before the trial court was whether it had one or more "final" orders before it from which it could

B. Evidence

1. The Difference Between a Psychological Evaluation and a Custody Evaluation

Gilliam v. Ballew (Court of Appeals, May 21, 2020). In *Gilliam*, the trial court ordered the parties to undergo a psychological evaluation. The expert selected for the psychological evaluation instead conducted a "forensic custody evaluation." When the father objected to the introduction of the "forensic custody evaluation," the following exchange took place between the trial court and the mother's attorney:

Mother's Trial Counsel: "This release is for the sole purpose of facilitating a forensic psychological evaluation." Forensic evaluation is just that, a custody evaluation. It's the same thing. You go ask any—

Trial Court: Let me interrupt you. No, they're not.

Mother's Trial Counsel: Yes, they are.

Trial Court: Absolutely not. A forensic psychological evaluation of the children is not the same thing as a forensic custody evaluation where we have an expert come in and give an expert opinion regarding who is the best custodian for the children. They are not the same thing. A psychological evaluation, or a psychological

assessment of the children, would have an expert come in and talk about the psychological well-being of the children and what their current conditions are. It would not contain in it any expert opinions regarding custody.

Id. The trial court excluded the expert *and* the report, and the mother appealed. Affirmed. The court of appeals found that the decision whether or not to admit this evidence was a discretionary decision by the trial judge “within the range of acceptable alternatives.” The court of appeals also held that the mother had not shown how the trial court had abused its discretion in making its evidentiary ruling, although she described the complete bar of the psychologist’s testimony as “fatal to her case.”

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. Filing Deposition Transcripts is Not Enough

Cowan v. Cowan (Court of Appeals, April 24, 2020). The trial court found the husband in civil contempt for failure to abide by the parties’ Marital Dissolution Agreement and Final Decree of Court, and the court of appeals affirmed. What was interesting was this reminder from the court of appeals:

We note, Wife is correct in asserting the references in Husband’s appellate brief to the depositions of Ms. Hutchinson and Terrence McTigue, Senior Labor Relations Counsel of the Airline Pilots Association, are improper. There is no indication either deposition was introduced or read into evidence on October 22, 2018 or December 17, 2018. Accordingly, the contents of those depositions cannot be considered by this court. See *Allstate Ins. Co. v. Young*, 639 S.W.2d 916, 918–19 (Tenn. 1982) (stating an appellate court

“can only consider on appeal the evidence considered by the [trial court]”); *Nold v. Selmer Bank & Trust Co.*, 558 S.W.2d 442, 445 (Tenn. Ct. App. 1977) (holding “the mere filing of a discovery deposition with the clerk and master does not make the deposition a part of the record on review”).

Id.

5. Privileged Conversations

Pagliara v. Pagliara (Court of Appeals, June 29, 2020). *Pagliara* is a very important case, which just missed being an even more important one. Here, the wife met with counsel together with a friend who was present to provide her moral support. The trial court found, quoting the husband, “Ms. Ferrell’s presence during one or more of the meetings between Wife and Ms. Moses and Wife and Mr. Russ completely obliterates the attorney-client privilege for every time Wife and either of her attorneys discussed this subject matter of reporting Husband to the police.”

On appeal, the court of appeals found that the privilege was waived, but only to those discussions in which Ms. Ferrell participated—not to every conversation between counsel and the wife—a concept it described as a “subject matter privilege waiver.” In this case, because neither the wife nor her counsel could identify exactly which conversations included the friend, the court found a wide waiver. But the issue of a “subject matter” waiver was not decided, and left for another day. In any event, when a client desires to bring a friend or family member into the conversation, and you tell the client that doing so will destroy the privilege, tell the client twice or three times. And maintain precise records of which conversations and which parts of those conversations the third party attended.

In a companion case, *Pagliara v. Mose*, the trial court upheld the dismissal of a tort claim by husband which accused the wife’s counsel of misconduct in suggesting to her that she

report alleged criminal activity by the husband to the local police. The underlying claim was that the counsel advised wife that she needed to make the report “to get leverage” on the husband. The trial court and the court of appeals rejected that claim, finding only that the attorney acted appropriately in directing the wife to make her report to the police.

6. 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. Be Careful About Communications by Hamm Radio

Faucon v. Mgridichian (Court of Appeals, June 11, 2020). For those who were wondering, the prohibition against communicating with the protected party under an order of protection extends not only the phone, text and email, but also to communications over amateur radio, or Hamm radio, notwithstanding federal preemption of state laws concerning regulation of radio traffic.

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.

4. Criminal Contempts and 336 days Affirmed

Daley v. Daley (Court of Appeals, May 26, 2020). In the fourth appeal between the parties, the former wife sought unsuccessfully to overturn a nearly year-long jail term for repeated criminal contempts. She was unsuccessful. As the court of appeals summarized,

In sum, the [trial] court merged several counts and issued a conviction for 35 counts of criminal contempt. The court sentenced Mother to 10 days for each count, resulting in a total sentence of 350 days, which it suspended, pending her compliance with future orders of the court. However, the court lifted the suspension of the sentence imposed on June 4, 2012, and upheld on appeal in *Daly II*. The court ordered her to serve a total of 336 days, consisting of the 335 days of the sentence previously suspended and the one day in connection with her direct criminal contempt that occurred during the present trial. The court directed Mother to serve the first 168 days consecutively and the rest served over the course of 84 consecutive weekends. This appeal followed.

Id. The court of appeals rejected Ms. Daley’s claims that she was not adequately informed of her right to counsel or her right against self-incrimination, and found that “The record overwhelmingly establishes Mother’s refusal to follow the court’s orders in, at the very least, 35 instances.” The record also overwhelmingly establishes that the trial court was exceptionally patient through numerous proceedings, but even judicial patience wears thin over time.

V. Division of the Marital Estate

1. Transmutation and Martial Residence

Lewis v. Lewis (Court of Appeals, August 11, 2020). *Lewis* is a fascinating case on marital v. separate property, and the doctrine of transmutation. The court of appeals summary states as follows:

The sole issue in this appeal concerns the trial court's decision to classify residential property as the wife's separate asset. The trial court made its decision upon finding the wife purchased the property prior to the marriage, titled it in her name only, and paid the mortgage and expenses to maintain the property with money she earned during the marriage and with only occasional assistance from the husband. This appeal followed.

The husband contends the property should have been classified as a marital asset because the couple resided there as husband and wife for ten years; the money the wife earned during the marriage was marital property; and he made substantial contributions to maintaining the property and paying expenses. We have determined that the funds the wife used to pay the mortgage and expenses were marital assets because they were earned during the marriage. Moreover, the couple used the property as their marital residence during their ten-year marriage, and the husband provided some, albeit modest, assistance in maintaining the property. Accordingly, we reverse the decision of the trial court and hold that the property shall be classified as a marital asset.

Id. Interestingly, there was little effort at trial to focus on whether the increase in the value of the residence was marital, with the premarital value remaining separate. This may be because the residence was purchased shortly before the marriage, and thus its premarital value may have been negligible. Accordingly, the court of appeals set about to determine whether the residence had been transmuted from separate to marital:

“Common-law” transmutation is “founded upon principles of acquisition by gift [and] transforms the separate asset into a marital asset in its entirety,” [] while Tenn. Code Ann. § 36-4-121(b)(1)(B)(i) classifies only the “increase in the value” of a separate asset during the marriage as marital property “if each party

substantially contributed to its preservation and appreciation.” Stated another way, under the common-law doctrine of transmutation, “[a]n asset separately owned by one spouse will be classified as marital property if the parties themselves treated it as marital property.”

Id.(citations omitted). The court of appeals went on to note that the case was distinguishable from *Hayes v. Hayes* (which set out four factors related to transmutation of a residence from separate to marital property, two of which were not present in this case.) The trial court’s finding that Husband lacked credibility with regard to his testimony of his own contributions to the residence was accepted by the court of appeals, but it found that the wife’s own testimony established that the property had been transmuted from separate to marital property.

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. Missing Money? Not Anymore.

Dailey v. Dailey (July 13, 2020). You know the line of cases which hold that allegedly missing money that was previously kept under the mattress and is no longer under the mattress can’t be counted as part of the marital estate? Well, perhaps those cases are no longer the final say on such issues. *Dailey* does not involve missing money, but missing gold and silver. (I

have a collection of board games, and a number of them involve stolen jewelry instead of missing money, too.) In *Dailey*, the court held a hearing on the gold and silver. It found that the gold and silver existed, that it was stored in a room to which the husband had access and the wife did not, and that the husband was not a credible witness. The court found the value of the missing items to be \$600,000 and entered a judgment against the husband for \$300,000.

On appeal, the court of appeals rejected the husband's argument that "the gold at issue was missing when the divorce case was initiated and therefore did not exist to be classified as marital property subject to equitable distribution." (*Flannary v. Flannary*, 121 S.W.3d 647 (Tenn. 2003):

We determine this case to be distinguishable from *Flannary*. In *Flannary*, the trial court found that the money was not in existence when the divorce action began. *Id.* The trial court in *Flannary* further found that neither party knew what happened to the missing money. *Id.* Because the missing money was not owned by either party at the time of the divorce action, the Tennessee Supreme Court determined that the money was not marital property and was not subject to division as part of the marital estate.

Id. The appellate court went on to hold that, "Based on the evidence presented during trial and the Trial Court's finding that Husband was not credible, we find that Husband's appeal had little prospect of success. We, therefore, hold that this appeal was frivolous, and we award Wife her attorney's fees on appeal." The main decision is perhaps unsurprising, but I am surprised that the basis of finding that the appeal is frivolous is that the husband was found not to be credible by the trial court. Many, many trial decisions are based on credibility, appeals are filed, and fees are *not* awarded even where the trial court decision is upheld in part based on the credibility finding by the trial court.

3. Remember Revenue Ruling 59-60

Bates v. Bates (Court of Appeals, July 9, 2020). If you have been looking for a business valuation case which relies on Revenue Ruling 59-60, and has the added bonus of ensuring that shareholder receivable is taken into account as part of a business valuation, this is your case. Here, the court of appeals found that the trial court had incorrectly valued the husband's interest in a business by relying on the shareholder agreement signed by the parties setting a valuation in the event of the termination of the husband from the business—an event that never occurred. The court also found error in the trial court not including a \$900,000 shareholder receivable that the husband owed to the company at the time of the divorce. Of interest: the court did its own calculation as to the value of the husband's interest in the company, but remanded the case to the trial court to reconsider and take into account the \$900,000 owed by the husband to the company before dividing the assets and setting alimony.

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.) One 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).

10. Another Kitchen Sink Case

Kholghi v. Aliabadi (Court of Appeals, September 18, 2020). There is a lot to unpack in *Kholghi*, and it is a case the outcome of which is heavily reliant on specific facts. But here are some worthwhile take-aways from the appellate court’s decision affirming in all respects the decision of the trial court:

-- The trial court properly imputed \$1,500 per month in income to the wife for the purpose of setting alimony, notwithstanding wife’s difficulties in speaking English and her lack of formal education beyond high school;

-- Husband's payments to wife during the pendency of the marriage do not amount to a share of the division of the marital property, notwithstanding husband's argument that the pendente lite payments exceeded his reasonable ability to make those payments;

-- Husband's appeal from amounts found to be dissipation of marital property was unavailing, and he was assessed with a combination of dissipated assets based on extravagant spending and unrepaid shareholder loans;

-- Certain property owned by the wife in Iran was her separate property, and it was unnecessary to determine the actual value of the property in light of the difficulty in doing so;

-- Wife's motion to alter or amend the court's judgment regarding the amount of unpaid attorneys' fees incurred by wife was properly denied under Rule 59.04 ("In order to sustain a motion to alter or amend under Rule 59.04 based on newly discovered evidence, 'it must be shown that the new evidence was not known to the moving party prior to or during trial and that it could not have been known to him through exercise of reasonable diligence.'" *Kirk v. Kirk*, 447 S.W.3d 861, 869 (Tenn. Ct. App. 2013) (quoting *Seay v. City of Knoxville*, 654 S.W.2d 397, 399 (Tenn. Ct. App. 1983).)

As mentioned, this is a lengthy opinion reviewing a 45-page trial court memorandum order. There is a lot to learn here about alimony, dissipation, and division of property. Excellent work by both the trial judge and the appellate court.

11. 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. The last chapter of this case has yet to be written.

VI. Jurisdiction

1. A Standing Issue and Same Sex Parentage

Pippin v. Pippin (Court of Appeals, May 14, 2020). This is a case which has already traveled to the Tennessee Supreme Court, on an application for Rule 11 review, and been denied (October 7, 2020). Here, the biological mother filed a motion to dismiss the petitioner's request for parenting time with a minor child, arguing that the parties were never married, the child is the biological child of Respondent, and the child is not the biological child, adopted child or stepchild of Petitioner. The trial court found that Petitioner had no standing under Tennessee law to seek parenting time, and dismissed the petition. The court of appeals affirmed, with Judge Bennett dissenting. The Petitioner sought review by the Supreme Court, and the Supreme Court denied the application.

The *Obergefell* decision by the United States Supreme Court permitting same sex marriage was at the root of the dissent in this case. The parties at one time were romantic partners, unable to marry under then existing Tennessee law. They lived together, one proposed to the other, the other changed her last name to match her partner's last name, they executed a sworn domestic partnership affidavit in 2010 or 2011 to allow the respondent to obtain insurance through the petitioner's employer, they jointly purchased the semen to allow the respondent to be artificially inseminated, both parties were listed as parents on the child's birth certificate, and the petitioner was listed as a parent on school and other forms.

None of these actions, taken together or separately, was enough to establish the petitioner as a parent of the child. The court of appeals, in dismissing the case for lack of standing by the petitioner, stated that

The Legislature has expressly created rights relative to child custody and visitation for biological parents, potential adoptive parents, grandparents, stepparents, and parents of “children born of donated embryo transfer.” See Tenn. Code Ann. §§ 36-1-101 et seq. (adoption); 36-2-301 et seq. (biological fathers) 36-6-301 et seq. (grandparents and stepparents); 36-2-401 et seq. (children born of donated embryo transfer). It has not created the same such rights outside of these relationships. As Sandra does not fit into any of these categories, her claim falls outside the zone of interests protected or regulated by the statutes she references, rendering her without standing to pursue a parentage action or visitation with Child.

Id. The court of appeals also rejected the idea of a “de facto” parent, advanced by the petitioner, stating that “[W]e are unaware of and have not been cited to any prior controlling precedent that has utilized the concept of either de facto parenthood and/or in loco parentis to extend constitutional parental rights, including the right to visitation, to unmarried/unrelated persons in [the appellants’] position.” *Id.*, quoting *In re Thompson*, 11 S.W.3d 913, 915 (Tenn. Ct. App. 1999).

VII. Marriage

Not much new here....

VIII. Mediation

1. Contract Reformation or Rescission?

Moore v. Moore (May 15, 2020). *Moore* is an interesting and thoughtful decision in which the court of appeals reversed a decision to reform a mediated settlement agreement based on “mistake.” Here, the parties entered into a marital dissolution agreement which provided that each party would release claims to the other party’s retirement benefits. It turned out that the husband had a pension plan which did not permit changing the beneficiaries of the plan, and husband subsequently sought to reform the contract to exclude the wife, which the trial court found was proper. The court of appeals, however, in a careful examination of the law of reformation, mutual mistake, and contracts, held that the trial court had overstepped its authority in essential rewriting the contract and imposing additional burdens on the wife. As the court of appeals noted in a footnote,

From our review of the parties’ arguments, the “mistake” alleged by Husband is not specifically directed toward avoidance of the judgment under Rule 59.04, but avoidance of the parties’ contract under the doctrine of reformation, discussed in detail, *infra*. Indeed, neither party devotes much argument to the issue of what ground Husband was citing in support of his effort to alter or amend the trial court’s judgment. In our estimation, Husband’s motion comes perilously close to seeking to put on new evidence, as he is endeavoring to change the trial court’s decision based on evidence that was not previously presented. The problem, of course, is that, as we note later in this opinion, Husband’s evidence was not newly discovered.

A clear trend has not emerged in this Court as to whether the more stringent newly discovered evidence rule or the more lenient balancing test should be used when considering a motion to modify an otherwise final judgment under Rule 59.04. See *Simpson v. Simpson*, No. E2018-01686-COA-R3-CV, 2019 WL 2157937, at *10 (Tenn. Ct. App. May 17, 2019) (discussing the different approaches taken by this Court as to this issue). Again, both parties confine their arguments in terms of contract reformation, rather than

the question of whether the requirements for Rule 59.04 relief have been met.

Id.

The court of appeals emphasized that “the law favors holding parties to their contracts. However, ‘the law’s strong policy favoring the enforcement of contracts as written must occasionally give way[,]’ resulting in two doctrines that allow a party to alter or avoid a contract: rescission and reformation.” Because neither party requested a rescission of the contract, the court analyzed the appeal under the law of reformation. In doing so, it found that (1) the husband did not successfully prove that any mistake in the agreement was mutual; (2) the husband was charged with knowledge under this pension contract that he was not able to change the beneficiary; (3) there was no evidence that the wife had made any false statements on which the husband relied in entering into the agreement; (4) “We are not convinced, however, that Husband’s failure to read a contract that he freely entered into, either at the time of execution or when the divorce was contemplated, does not rise to the level of ‘gross negligence.’”; and (5) “it does not appear that the trial court’s chosen remedy was an available method of reformation. As previously discussed, courts ‘are not at liberty to make a new contract for parties[.]’” A lot to unpack here, but well worth the effort.

2. No, You Can’t Get Out of that Bad Agreement

Wheeler v. Wheeler (Court of Appeals, June 3, 2020). In *Wheeler*, the husband entered into a foolish marital dissolution agreement. Among other things, the agreement provided that the husband would be awarded most of the parties real estate and business assets, but he would not receive title to those properties until he had fully paid his transitional alimony obligations 10 years down the road. It also provided for a lump sum alimony in solido payment and monthly payments. Husband filed a timely Rule 60.02 motion to set aside the agreement based on his

lack of education and the unfairness of the agreement, which was rejected by the trial court. The court of appeals affirmed, finding (1) that husband did not adequately prove that his lack of education or stress resulted in a poor agreement, and (2) that he did not raise unconscionability at the trial level, and therefore could not raise it on appeal. The court of appeals also rejected wife's request for attorneys' fees on appeal, finding that she had not designated this as an issue on appeal. As the court of appeals noted,

To raise an issue as an appellee, a party must include the issue and argument in its brief. *Id.* When a brief fails to include an argument satisfying Tennessee Rule of Appellate Procedure 27(a)(7) or fails to designate an issue in accordance with Tennessee Rule of Appellate Procedure 27(a)(4), the issue may be waived.

Id.

3. 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.

4. Modification of Parenting Plans-Watch for Traps!

Abraham v. Abraham (Court of Appeals, May 27, 2020). In *Abraham*, the parties’ original parenting plan entered in 2004 contained a provision requiring father to contribute to a college account for the parties’ minor child. When the parenting plan was modified in 2011, this provision was omitted from the new plan, which provided that “[T]his plan...modifies an existing parenting plan dated February 4, 2004.” Accordingly, an action later filed by mother against father for failure to make contributions after 2011 was dismissed by the trial court, and affirmed on appeal. As the court of appeals stated, “The [trial court’s] holding is

supported by the evidence and is not illogical or unreasonable; the court did not err in so holding.” While certain other findings suggest that the parties’ relative financial situations had changed over the years, the key lesson is this: if you are going to file a modified parenting plan, and there are provisions in the original plan you want to keep, include them in the modified plan.

5. 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.

6. Grandparent Visitation Revisited

Horton v. Cooley (Court of Appeals, May 26, 2020). *Horton* is a well-reasoned grandparent visitation case with a twist: while the maternal grandparents had a falling out with

the mother (their daughter), their relationship with the father (their former son-in-law) flourished. As described by the court of appeals,

Because of the great deference that courts give to parental decisions, the court must first determine whether the custodial parent opposed or severely reduced visitation. *Clark v. Johnson*, No. E2017-01286-COA-R3-CV, 2018 WL 2411203, at *10 (Tenn. Ct. App. May 29, 2018); see also *Coleman*, 551 S.W.3d at 700. If this threshold element has not been established, then the court may not consider whether the child is at substantial risk of harm or whether visitation would be in the child's best interest. *Id.*

Conversely, if the threshold element has been established, the court must then determine, whether there is a danger of substantial harm to the child if the child does not have visitation with the grandparent. The foregoing is based on three factors set out in Tenn. Code Ann. § 36-6-306(b)(1). In conjunction with this analysis, the court must also determine if the relationship between the child and grandparent is significant based on three more factors set out in Tenn. Code Ann. § 36-6-306(b)(2).

[I]f the court finds that there is danger of substantial harm if the child does not have visitation with the grandparent, it must decide whether the visitation would be in the child's best interest based on seven factors under Tenn. Code Ann. § 36-6-307.

Id.

The trial court found that the grandparents' time with the child had not been severely reduced within the meaning of the statute, in that the grandparents continued to see the child on the father's time, at church and at meals. The court of appeals noted that the statute

"D]efines "severe reduction" as "reduction to no contact or token visitation as defined in § 36-1-102." Tenn. Code § 36-6-306(f). In turn, § 36-1-102 defines "token visitation" as "visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child." *Id.* § 102(1)(C).

Id. Further, the trial court found that the mother's demands that the grandparents accept her new husband and his children as part of the family were reasonable. The trial court further

found that there was no danger of substantial harm to the child because the child continued to see his or her grandparents on a regular basis.

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.

7. 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)).

8. “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.

9. Support for Disabled Child

Lillard v. Lillard (Court of Appeals, March 8, 2021). *Lillard* 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.

10. 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)).

11. 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.

12. 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.

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 agreement

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.

XI. Relocation

1. Relocation, Division of Property, and Alimony

Griffin v. Griffin (Court of Appeals, August 18, 2020). Trial court awarded mother primary parenting of the minor children despite concerns that her relocation to another part of the county would necessitate removal of the children from the school in which they had thrived. Father appealed. Court of Appeals affirmed, finding that the trial court's analysis found that, on balance, the best interest of the children was to be in the mother's primary care, and that the trial court did not abuse its discretion in making that finding.

Father did prevail on three issues on appeal. First, the court of appeals found that the trial court's division of property contained a formula error that left the parties with a 56/44 division of assets rather than a 51/49 division that the court intended. This was corrected by the court of appeals. Second, the court of appeals found that the trial court had incorrectly included the full amount of royalties earned by the husband as income for child support and alimony purposes, because the court awarded wife half of those royalties at trial. These issues were remanded for recalculation. Finally, the court of appeals affirmed the award of alimony *in futuro* after a 17 year marriage (which the court of appeals called "a marriage of reasonably long duration"). However, the court held that the trial court had failed to examine the reasonableness of the husband's expenses:

"We have previously held that a trial court abuses its discretion when 'order[ing] a spouse to pay alimony in an amount that would create a substantial deficit for the obligor spouse,' especially where there has been no indication that the obligor spouse's income and expenses were manipulated or exaggerated."

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.”

Mercifully, the end.