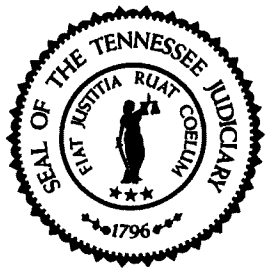

TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

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Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev.14 September 2011

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am currently a Partner with the Law Firm of Schell Binkley and Davies, 509 New Highway 96 West, Suite 201, Franklin, Tennessee 37064.

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

I was licensed to practice law in the State of Tennessee in 1978. My BPR Number is 5930.

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

Tennessee, BPR No. 5930
April 1978
Active

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

No.

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

April 1978 – September 2008: Michael W. Binkley Professional Corporation I have been self employed since the inception of my trial practice. I started my law practice essentially doing criminal defense work and evolved my practice into personal injury litigation, workers' compensation litigation and domestic litigation. (See below for more details) I shared office space with my father, Joe P. Binkley, Sr., and my brother Joe P. Binkley, Jr. both of whom were trial lawyers as well. We each individually practiced law separately from one another under our own individual professional corporations. Each of us was responsible for hiring and paying our own employees. We shared the receptionist by each of us paying 1/3 of her salary and each of us

paid 1/3 of the "overhead" expenses which included the monthly rent, supplies, etc. We also paid for our own personal medical insurance as well as our own personal malpractice insurance. We did not share gross business receipts or personal income. From time to time there were other lawyers who would share office space with us.

October 2008 – Present: Schell, Binkley and Davies: The arrangement I have with my current partners is essentially the same as I have had throughout my entire work life. The "Binkley" part of the firm name is actually, Michael W Binkley, P.C., as it has always been. All three (3) of us share the payment of the receptionist, the monthly rent and supplies, on a 1/3 basis a piece. Each lawyer is responsible for hiring and paying his own employees. We do not share gross receipts or personal income. The firm has three associates. My trial practice has evolved into essentially one area of the law, which is Domestic Relations litigation.

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

Not Applicable.

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

As question eight (8) explains below, I now limit my practice to domestic relations cases.

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

For the first six (6) to seven (7) months of my practice I received "spin off" cases from my father and brother in criminal defense work in State, Federal and Juvenile Court, as well as, very small personal injury cases and simple divorce cases. Because the "spin off" cases were meager, I placed my name on the criminal court rolls in the General Sessions Courts, Criminal Courts,

Juvenile Courts or anywhere else where someone needed help and I could make a living being a trial lawyer. I was appointed to represent indigent defendants usually because of conflicts that arose with the Public Defender's Office. I was appointed to extremely difficult cases involving murder, rape, armed robbery, assault, DUI and many other types of cases. At the same time, and after approximately eighteen (18) months, I started to gradually acquire some of my own business.

After approximately two (2) years into my practice, I set up my own business under the name of Michael W. Binkley, Professional Corporation. I used our receptionist as my secretary and paid 1/3 of her salary, 1/3 of the rent and 1/3 of the miscellaneous expenses. After approximately five (5) or six (6) years of practice I had accumulated a fair amount of criminal defense business on my own and I was practicing criminal law in State and Federal Court. I was also practicing divorce law, personal injury law and a small amount of workers' compensation law.

After approximately eight (8) years, I dropped all of my criminal practice and devoted full time to my personal injury litigation, workers' compensation litigation and domestic relations litigation. Before leaving my criminal defense practice, I was involved in several very difficult and highly publicized criminal cases and was co-counsel with prominent criminal defense attorneys in Nashville in many jury trials. My best estimation is that I represented at least ninety-five to one hundred twenty-five (95 – 125) criminal defendants in my practice of criminal defense work. My estimation is that I participated either individually or as co-counsel in approximately thirty to thirty-five (30-35) criminal jury trials to verdict.

My personal injury practice was quite busy and consisted mostly of motor vehicle collisions, however, I also had other cases in the areas of premises liability, products liability, governmental tort liability, truck accident litigation as well as medical malpractice and Jones Act litigation. The majority of my personal injury practice was in State Court. My personal injury practice began to fade after advertising by lawyers became prominent. Eventually, because of advertising, I was unable to acquire good personal injury cases that I once was able to attract since many personal injury lawyers had decided to advertise and I simply could not bring myself to advertise my legal services. I continued with some personal injury business, but my practice faded in this area, after approximately twenty (20) years. Over the period of time I handled personal injury cases, I handled approximately one hundred eighty to two hundred (180-200) personal injury cases and conducted jury trials to verdict in approximately fifteen (15) of those cases.

As my personal injury practice faded, my domestic practice was beginning to escalate and I was handling more cases involving complex financial issues and marital estates where valuation of businesses became a routine part of the cases I was handling. I continued with my workers' compensation practice until approximately seven (7) years ago when the workers' compensation laws changed and it became unprofitable to open a file and spend time, money and other resources on developing the cases. During the period of time that I handled workers' compensation cases, I estimate that I handled between one hundred fifty to two hundred (150-200) workers' compensation cases. I tried approximately forty percent (40%) of my workers' compensation cases and the rest were resolved through settlement.

Thereafter, I decided to concentrate exclusively on domestic relations litigation, usually involving cases that were financially complex. To this day I continue to practice primarily domestic relations law and handle approximately fifty (50) cases at one time.

During the very busy core years of my litigation practice, I was carrying and handling approximately ninety to one hundred (90-100) cases at a time, including personal injury cases, workers' compensation cases and domestic relations cases. I had come to a point in my practice where I hired two (2) paralegals; one (1) to handle all of my personal injury and workers' compensation business and one (1) paralegal to handle only my domestic relations business. I had another employee who was essentially managing my office, performing bookkeeping duties and other financial matters.

I have worked consistently twelve to fifteen (12-15) hours a day throughout the years of my practice. I have worked many weekends twelve to fifteen (12-15) hours as well. I have thoroughly and completely enjoyed the practice of law as a trial lawyer and I have enjoyed running my own business and maintaining a high degree of expertise, excellent service to clients while doing so with the highest degree of integrity. I have always had an extreme amount of pride in my law practice and have developed a reputation of being "detail orientated" and providing excellent legal advice as well as excellent representation thorough the phases of my trial practice, including written discovery, depositions, preparation for trial, actual trial and appeals in cases where it was appropriate and necessary. I spent many hours in my office as a practicing trial lawyer making sure that I was always thoroughly and completely prepared for each and every meeting with clients, each and every mediation, each and every deposition, and each and every trial, for I have always believed that thorough preparation is the key to a good result.

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

I was sole counsel in each one of the reported cases except for no.1, where I was co-counsel.

Some of the following cases established legal precedent in Tennessee or were cases that changed or clarified existing law, in Tennessee.

1. State v. Leaphart, 673 S.W.2d 870 (Tenn. Crim. App. 1983);

2. Harrington v. Harrington, 759 S.W.2d 664 (Tenn. App. 1988);

3. Hoyle v. Wilson, 746 S.W.2d 665 (Tenn. 1988);

4. Jones v. Jones, 784 S.W.2d 349 (Tenn. App. 1989);

5. Harris v. Harris, 832 S.W.2d 352 (Tenn. App. 1992);

6. Kincaid v. Kincaid, 912 S.W.2d 140 (Tenn. App. 1995);

7. Sheri Weiner (Kirshner) Rubin v. Howard Lee Kirshner, 948 S.W.2d 742 (Tenn. App. 1997);

8. Smith v. Smith, 984 S.W.2d 606 (Tenn. App. 1997);

9. Solima v. Solima, 7 S.W.3d 30 (Tenn. App. 1998);

10. Crabtree v. Crabtree, 16 S.W.3d 356 (Tenn. App. 2000);

11. Steen v. Steen, 61 S.W.3d 324 (Tenn. App. 2001);

12. Smith v. Smith, 93 S.W.3d 871 (Tenn. App. 2002);

13. Means v. Ashby, 130 S.W.3d 48 (Tenn. App. 2003);

14. Mimms v. Mimms, 234 S.W.3d 634 (Tenn. App. 2007);

15. Keyt v. Keyt, 244 S.W.3d 321 (Tenn. App. 2007);

16. Hampton v. Brady, 270 S.W.3d 61 (Tenn. App. 2007);and

17. Evans v. Young, 280 S.W.3d 815 (Tenn. App. 2008).

In addition, I have been sole counsel for one of the parties in each of the unreported cases listed below, except for no. 26 and 28 below, where I was co-counsel:

1. Anderson v. Anderson, 1989 WL 31651, Tenn.Ct.App., April 5, 1989
2. Evins v. Evins, 1989 WL 48794, Tenn.Ct.App., May 10, 1989
3. State v. Dunn, 1990 WL 40988, Tenn.Crim.App., April 11, 1990
4. Eich v. Eich, 1990 WL 192726, Tenn.Ct.App., December 5, 1990
5. State v. Browning, 1991 WL 194142, Tenn.Crim.App., October 2, 1991
6. Overton v. Overton, 1992 WL 1402, Tenn.Ct.App., January 8, 1992
7. Turnbo v. Turnbo, 1994 WL 44943, Tenn.Ct.App., February 16, 1994
8. Kincaid v. Kincaid, 1995 WL 276821, Tenn.Ct.App., May 12, 1995
9. Farmer v. Farmer, 1995 WL 458985, Tenn.Ct.App., August 4, 1995

10. Richter v. Richter, 1995 WL 513016, Tenn.Ct.App., August 30, 1995

11. Stevenson v. Stevenson, 1995 WL 681179, Tenn.Ct.App., November 17, 1995

12. Goodwin v. Wetz, 1996 WL 221861, Tenn.Ct.App., May 3, 1996

13. Perkerson v. Perkerson, 1996 WL 426807, Tenn.Ct.App., July 31, 1996

14. DeVault v. DeVault, 1996 WL 482968, Tenn.Ct.App., August 28, 1996

15. Mayfield v. Mayfield, 1997 WL 210826, Tenn.Ct.App., April 30, 1997

16. Turnbo v. Turnbo, 1997 WL 803604, Tenn.Ct.App., December 30, 1997

17. Stevenson v. Stevenson, 1998 WL 30238, Tenn.Ct.App., January 28, 1998

18. Sears v. Metropolitan Nashville Airport Authority, 1999 WL 536341, Tenn.Ct.App., July 27, 1999

19. Hale v. Hale, 1999 WL 667276, Tenn.Ct.App., August 24, 1999

20. Henderson v. Henderson, 2000 WL 1294320, Tenn.Ct.App., September 14, 2000

21. Burke v. Burke, 2001 WL 921770, Tenn.Ct.App., August 7, 2001

22. Sears v. Metropolitan Nashville Airport Authority, 2002 WL 870542, Tenn.Ct.App., May 7, 2002

23. Langley v. Langley, 2003 WL 22989026, Tenn.Ct.App., December 19, 2003

24. Griffith v. Griffith, 2004 WL 2663665, Tenn.Ct.App., November 22, 2004

25. Means v. Ashby, 2006 WL 1627280, Tenn.Ct.App., June 12, 2006

26. Smithson v. Smithson, 2006 WL 3827321, Tenn.Ct.App., December 28, 2006

27. Hodge v. Hodge, 2007 WL 3202769, Tenn.Ct.App., October 31, 2007

28. Small v. Small, 2010 WL 334637, Tenn.Ct.App., January 28, 2010

29. Keyt v. Keyt, 2010 WL 1957033, Tenn.Ct.App., May 14, 2010

30. Jones v. Jones, 2010 WL 2025403, Tenn.Ct.App., May 20, 2010

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed

description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have been asked numerous times to mediate personal injury and domestic cases and except for approximately six to seven (6-7) cases, I have simply had to decline mediation requests because I had no additional time in my practice to devote to mediation.

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

None.

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

I have practiced law and I have appeared in many courts throughout the State of Tennessee. I have appeared in courts in Memphis, Chattanooga, Knoxville, Cleveland and many other cities and counties throughout the State. I have had an opportunity to appear before many Judges over the years of my practice and I have, like many lawyers, noticed what I believe it takes to be a good Trial Judge. I think the most important feature of a good Trial Judge is to show respect for the parties and witnesses at all times. Treating the Court Officers, court personnel and others in the courtroom with absolute respect starts at the top with Judges and permeates throughout the courtroom and establishes what is expected, not only of the Judge, but also the litigants, witnesses and other who are all part of the everyday courtroom experience.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

None.

EDUCATION

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

1970 – 1974: Birmingham Southern College in Birmingham, Alabama. I received a Bachelor of Arts degree in History with an emphasis on Russian and German history. I was elected as treasurer of my fraternity and then as president of my fraternity my senior year. I also was elected to and served on the Panhellenic Council. I was a member the Social Regulations Board of the College.

1974 – 1977: Vanderbilt University School of Law. J.D. Degree, May 1977. I was named the class of '77 "Class-Agent" for Fundraising for the Law School for many years.

PERSONAL INFORMATION

15. State your age and date of birth.

60. My date of birth is August 13, 1951.

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

All of my life.

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

Approximately 25 years.

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

Williamson County.

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

Not applicable.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No.

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

No.

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable.

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

No.

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

No.

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

1979 - I was divorced from my first wife Betty Strother Binkley in 1979 after 4 years of marriage. We had no children. The divorce was uncontested and we signed a Marital Dissolution Agreement and it was filed in Davidson County Tennessee.

1984 - I was also sued in my professional capacity by a defendant whom I had originally sued in a personal injury case, where I represented a young girl and her parents who were renting property in Springfield, Tennessee. The defendant, who was the landlord, was sued by me on behalf of my clients after he poured sulfuric acid down a plumbing vent to unstop a commode.

Unknown to the young girl and her family, the sulfuric acid had seeped all over the bathroom floor and my primary client, the 7 year girl, slipped and fell into the acid burning her skin off of a large portion of her body and unfortunately disfiguring her for life. I had also filed a *lien lis pendes* against the property. The defendant tried unsuccessfully to remove the lien after a very lengthy hearing. Several days later, the defendant sued me, the trial Judge, Thomas Bowyers, the Springfield Circuit Court Clerk, and my clients claiming, among other things, that we all conspired against the defendant, which ultimately caused him to become impotent from stress, etc. The Defendant was represented by different attorneys who all eventually withdrew as attorney of record. The case lay dormant for years before it was finally settled for a very minimal "nuisance" value.

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

- Member Westminster Presbyterian Church, 1984 to present.
- Member Belle Meade Country Club, 1982 to present.

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

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

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

No.

ACHIEVEMENTS

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

- Nashville Bar Association – I have served for years on the Fee Dispute Committee and

the Domestic Relations Committee.

- Tennessee Bar Association – I have in the past served on a couple of committees with the TBA, but I have not been involved in committee work in the last 10 years.
- Williamson County Bar Association
- American Bar Association
- The Association of Trial Lawyers of America
- Tennessee Association for Justice
  - Member, Board of Governors, 1980-1982
- Nashville Bar Foundation
  - Fellow
- Tennessee Bar Foundation
  - Fellow
- Tennessee John Marshall Chapter of the American Inn of Court. Franklin , Tennessee.

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

1. *The Bar Register of Preeminent Lawyers* - I have been listed for years with *The Bar Register of Preeminent Lawyers* and I have been rated as an "AV Preeminent" lawyer for many years by my peers through Martindale-Hubbell (Martindale-Hubbell® AV-Rated®). This is the highest possible rating (5.0 out of 5.0) for both legal ability and ethical standards.

2. *Woodward/White's Best Lawyers in America®* - I have been listed for several years as one of *Woodward/White's Best Lawyers in America®* in the area of Divorce Law. The lawyers listed in Best Lawyers have no voice in deciding which practice areas they are listed. Lawyers are voted into practice areas entirely as a result of the votes they receive from their peers.

3. *Super Lawyers of the Mid-South®.* I have been chosen by my peers to be included in *Super Lawyers of the Mid-South.* The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. *Super Lawyers* selects attorneys using a multiphase rating process and evaluations are combined with third party research as to each candidate. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis.

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

Publication:

"The Use of Experts in the Valuation of Businesses in Divorce Cases," The Tennessee Trial Lawyer Magazine, May 1995.

This publication was an article designed to assist the divorce trial practitioner in understanding the different methodologies in valuing a business(es) in a divorce context based on the Tennessee

domestic laws. The article provided basic tips and bullet points on how to take a step by step approach to the valuation process with a qualified expert. The article also presented a set of interrogatories and request for production of documents on the issues of valuation of the business(es). The article also listed suggested questions for the opposing expert in a discovery deposition.

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

The following are seminars that I was invited to speak within the last five (5) years:

- "Critical Drafting Techniques for Marital Dissolution Agreements" Tennessee Trial Lawyers Association, April 5, 2007
- "Can You Avoid Drafting Mistakes in a Marital Dissolution Agreement?" Tennessee Association for Justice, April 3, 2008

The following represent seminars where I was invited to speak, as well:

- "Opening Statements in Personal Injury Trials" Tennessee Bar Association, November 19, 1993
- "Ask the Experts" Family Law, Tennessee Bar Association, March 3, 1994
- "Family Law – The Use of Experts in the Valuation of Businesses in Divorce Cases" Tennessee Trial Lawyers Association Annual Convention, June 11, 1994
- "Effective Family Practice in Tennessee – Commencing the Dissolution Process: Initial Considerations" National Business Institute, March 26, 1996
- "The People's Law School, Domestic Relations" Tennessee Trial Lawyers Association, June 1997
- "Child Custody and Time Sharing in Tennessee" June 29, 1999
- "Family Law in Tennessee, Valuation of Marital Businesses in Tennessee, Appreciation of Separate Property, Commingling and Transmutation of Property During the Marriage" Lorman Educational Services, August 24, 2000
- "Domestic Law in Tennessee" National Business Institute, August 29, 2002
- "Marital Property Distribution and Discovery" Second Annual Cumberland Family Law Seminar, September 16, 2002

- "Family Law in Tennessee, Alimony," Lorman Educational Services, November 20, 2003
- "Family Law in Tennessee, Alimony" Lorman Educational Services, November 2, 2004
- "Family Law in Tennessee, Alimony," Lorman Education Services, November 2, 2005

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

None.

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

No.

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

I have had seventeen (17) cases that have been reported cases in Tennessee. I have another thirty (30) cases that were prepared, filed and argued at the Court of Appeals level. Therefore, I have filed almost ninety (90) briefs or reply briefs at the Court of Appeals level and the Supreme Court level during my thirty-three (33) years of practice. I have also filed well over one hundred (100) pretrial briefs in divorce trials, workers' compensation trials, personal injury trials and various Motions to Suppress, etc. in Criminal Court during the years of my criminal practice.

Since I have been self-employed throughout my years of practice, I have prepared my own briefs and other pleadings, although at times, particularly with the many briefs that were filed with the Supreme Court, I would ask a fellow lawyer in my office or an attorney who was familiar with good brief writing to critique my work to make sure I was making sense. I have attached six (6) examples of my personal work product:

Tab A. *Frank A. Waters, Jr. v. Rebecca B. Waters*, Circuit Court for Williamson County, Tennessee, at Franklin. Mr. Waters' Pre-Trial Brief, by Michael W. Binkley, July 2010.

Tab B. *Nancy Chandler Small v. Daniel Wallace Small, Jr.*, Court of Appeals for the State of Tennessee for the Middle Section, at Nashville. Brief of the Appellee, Nancy Chandler Small, by Michael W. Binkley, August 2009.

Tab C. *Timothy Wade Keyt v. Nancy Suzanne Keyt*, Supreme Court for the State of Tennessee, at Nashville. Brief of the Appellant, Timothy Wade Keyt, by Michael W. Binkley, January, 2007.

Tab D. *Malcolm Mimms, Jr. v. Miriam Rose Perry Mimms*, Court of Appeals for the State of Tennessee, for the Middle Section, at Nashville. Brief of the Appellee, Miriam Rose Perry Mimms, by Michael W. Binkley, August, 2006.

Tab E. *Michael Sayers Stegall v. St. Thomas Hospital*, In the Third Circuit Court for Davidson County, Tennessee, at Nashville. Plaintiff's Pre-Trial Brief, by Michael W. Binkley, September, 2003.

Tab F. *Charolette M. Ivey v. Circuit County Stores, Inc and Travelors Indemnity Company of Illinois*, In the First Circuit Court for Davidson County, Tennessee, at Nashville. Plaintiff's Pre-Trial Brief, by Michael W. Binkley, July, 2003.

ESSAYS/PERSONAL STATEMENTS

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

The primary reason that I would like to be a Judge is my sense of obligation I feel to the community and to the public to offer my experience, expertise and hopefully my wisdom that I have acquired over the past thirty three (33) years of very active trial practice in numerous areas of the law. I can bring to the bench my experience in the "trenches" as a trial lawyer in several distinct areas of the law over many years of active practice in different jurisdictions in the State of Tennessee. I believe my experience as a seasoned trial lawyer, my legal skills, my personality, my temperament and my past diverse experiences in both my professional and personal life provide me with the ability to become an excellent Trial Judge. I am at a point in my legal career where I have looked back and recognized how truly lucky I have been throughout my practice to thoroughly enjoy helping many hundreds of clients over the years. I have a true sense of satisfaction and fulfillment when I help others and I want to bring the same desire and sentiment to the bench along with my many years of experience.

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

Throughout my practice I have provided pro bono services through legal services office in Nashville, Tennessee. I have been an avid supporter of the Legal Aid Society, of Middle Tennessee, the Nashville Pro Bono Program and I was designated as a Champion of Justice in the years 2005 and 2006. In 2005, I was selected to be on a committee to raise money for the Legal Aid Society of Middle Tennessee, as well as, the Nashville Pro Bono Program. Most importantly, I have always made it a practice when representing clients on an hourly basis to

make sure that the client is not left in a position where he or she does not have the necessary funds to pursue the resolution of the lawsuit. There have been dozens of cases where I have forgiven balances due and owing on fees, some of which were very large balances. I made it my practice in my business to make sure that my clients were not placed in a position of being taken advantage of by the opposing party being aware that my client was unable to pay for continuing legal services. As I have always told my clients, I will not allow the opposing side to use as leverage the fact that my client cannot pay the fees that are due and owing and therefore be dismissed by me. If at all possible, I have done whatever was necessary to make sure that my clients were provided the best legal services even though they could not continue to pay or finish paying bills that were due and owning.

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

The Judgeship I seek would allow me to be one of four Circuit Court Judges for the 21st Judicial District. The 21st Judicial District includes Hickman, Lewis, Perry and Williamson Counties. All of the Judges exercise both criminal and civil jurisdiction. On the civil side, the Judges in this district sit in both Chancery and Circuit Court.

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

I have been involved in several community service organizations and have volunteered my time and resources over the years in several organizations.

1. The EAR Foundation -The Ear Foundation focuses on integrating persons who are hearing impaired into mainstream society through public awareness and medical education. The Foundation administers the Meniere's Network, a national network of patient support groups that provides people with the opportunity to share experiences and coping strategies. I was on the Board of this Foundation for many years. I received the Morton B. Howell, Jr., Award for the Outstanding Board Member of the EAR Foundation in 1992 and was honored at the annual Ear Foundation Dinner the same year. I retired from the Board in 1998.

2. The Martha O'Bryan Center - As a member of the Board, we worked to address immediate and long-term needs to help vulnerable families, in East Nashville, more fully realize their potential through various programs in partnership with local churches. I served on the Board of Directors of the Martha O'Bryan Center for a period of 4 years before retiring from the Board, in approximately 1996. I was heavily involved in numerous projects of the Board during my tenure. I am still involved with the Center in helping to raise money for this organization.

3. Habitat for Humanity - "Habitat" is a nonprofit, ecumenical Christian housing organization building simple, decent, affordable housing in partnership with people in need. My work through Habitat came through my membership in Westminster Presbyterian Church. I have for years participated in assisting the "building out" of homes (I am no expert in this area and in fact, my skills in this area are below the skills of a common laborer) throughout middle Tennessee. I have also volunteered for other Habitat work sites as the request of some of my fellow trial lawyers. I thoroughly enjoy participating in this activity.

4. Divorce Workshops - I have also volunteered my time and resources to speak for various church groups through their Divorce Care Workshops.

I will continue to be involved in community service as I have always done.

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

I have been married to my wife, Sandy Binkley, for twenty six (26) years. We have two (2) wonderful, very giving and honorable daughters. My oldest daughter, Kris, has graduated from college and lives and works in Atlanta, Georgia. My youngest daughter, Beth is a senior at Princeton University. Our family is very close.

I have a twin sister, an older sister and an older brother. My parents were strong disciplinarians and believed in instilling a very strong work ethic and sense of responsibility and strong character in all areas of our lives. Some of the statements made by my parents still live with me today. I was always told that it was important to take care of those who are weaker than I and through no fault of their own are unable to help themselves. All four of us were taught that this was our obligation and our responsibility. I was taught that following this credo would provide a sense of self-worth and self-fulfillment. I have tried to "live" this advice through my personal and professional life. I have always been a sympathetic and very understanding person, but I have also vigorously helped those whom I have represented. I have no tolerance for those who take advantage of or abuse the very young or the very old.

My older brother, Joe, (Bink), who lives in Nashville, Tennessee, has always been a steady influence on me throughout my entire life. His influence over me, with his industrious work ethic and his "no excuses" desire to be the "best of the best," regardless of what he did and has had a huge influence on me throughout my life, even to this day.

My older sister, Lou Dimond lives in Nashville and has been an inspiration to all of the children in our family and continues to work hard and be a prosperous woman, in her own right.

My twin sister, Martha, who lives in Franklin, Tennessee, was diagnosed approximately seven (7) years ago with Amyloidosis. This very unusual disease attacks vital organs of the body by

killing off the tissue and rendering the organs useless. My sister lost both of her kidneys, her thyroid and has had difficulty with other organs as well. Approximately five (5) years ago she had to have a kidney transplant. I was tested to determine whether or not I would be an adequate donor for my twin sister. Miraculously, my sister and I were perfect matches and because of this fact the post transplant recovery would be much easier, because there would be little chance for rejection of my kidney. In October, 2005, I gave my sister one of my kidneys and she was able to live a fulfilling life until fairly recently when the Amylode once again attacked the transplanted kidney. I have realized through my sister's ordeal what it truly means to give of yourself.

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

I will always uphold the law regardless of my personal beliefs. If I am fortunate enough to be chosen to fill the current Trial Court vacancy, I will take an oath to uphold the law and I will honor my word to do so without reservation. A trial lawyer and a Judge have different roles in this regard. A trial lawyer must and should think "outside the box" and be a strong advocate for his client and try to present new and innovative ways to help his clients. A Trial Judge must follow the existing law and cannot simply "make new law" or be an advocate for any "cause" based on personal beliefs or exhibit a desire to use the bench to further a "personal agenda." I have had many examples during my practice that support my response. While being aware of my commitment to be innovative as a trial lawyer while representing my clients, I would always explain to the Trial Judge my full understanding of the courts role in following the existing case law while at the same time trying to give me the opportunity to present my views and ask the court to consider a different approach. A prime example of this was in the case of *Smith v. Smith,* 93 S.W.3d 871 (2002). Judge Jeffrey Bivins, the Trial Judge, understood my argument that the existing case law, although a plurality opinion, was essentially the opposite of my legal position, at trial. Judge Bivins said that my argument made very good sense but he was obligated to follow the existing law, which I fully understood and respected. I appealed the case and the Appellate Court reversed the Trial Judge, but I will always remember Judge Bivins' commitment to follow the existing law regardless of counsel's argument.

REFERENCES

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

A. Mr. Frank W. Wade 40 Burton Hills Blvd, Suite 170 Post Office Box 150229 Nashville, Tennessee 37215 Business: 615-383-9061 Mobile: 615-972-7298
B. Dr. John (Jack) Price 11 Annandale Nashville, Tennessee 37215 Business: 615-613-4175 Mobile: 615-271-7146
C. Mr. Phillip Robinson L & C Tower 401 Church Street, Suite 2400 Nashville, Tennessee 37219 Business: 615-467-1801
D. Dr. Jim Schleicher 2200 Hillsboro Road Nashville, Tennessee 37212 Business: 615-298-4808
E. Edward P. Schell 509 New Highway 96 West, Suite 201 Franklin, Tennessee 37064 Business: 615-550-2800 Mobile: 615-202-3902

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Circuit Court of the 21st Judicial District of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: 9/21, 2011.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

Mike W. Bird

Type or Printed Name

Signature

9/21/11

Date

5930

BPR #

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE AT FRANKLIN

FRANK A. WATERS, JR.
Plaintiff/Counter-Defendant

v. **Docket No. 08197**

REBECCA B. WATERS
Defendant/Counter-Plaintiff

MR. WATERS' PRE-TRIAL BRIEF

INTRODUCTION

This is a divorce case. Mr. Waters' Pre-Trial Brief is designed to, hopefully, assist the Court in understanding and reviewing Mr. Waters' proposal for the equitable division of the parties' marital assets, as well as the assignment of debt between the parties. Counsel for Mr. Waters will present his Proposed Division of Assets and Liabilities in this Pre-Trial Brief, as well as his proposal for the type of alimony, the length of alimony, and the amount of alimony. Counsel would state that although listing a line of cases on the issue of alimony may be helpful to the Court, what counsel believes is the most helpful to the Court is an analysis of the primary factors for alimony: need and ability to pay, as well as a review of the statutory factors as they apply to the facts of this particular case. In this fashion, counsel submits that the Court will have a better understanding of counsel's Proposed Division of Assets and Liabilities, and counsel's position on the issue of transitional alimony as it relates to this case.

BACKGROUND INFORMATION

In order to keep this Pre-Trial Brief "brief" and concise, a lot of the background information regarding this case will be listed for the Court in presenting to this Court the facts that will be adduced at trial under each of the relevant statutory factors for the award of alimony, pursuant to T.C.A. §35-5-121(i). However, the relevant non-financial information is as follows:

- Mrs. Waters was born March 29, 1954 and is currently 56 years of age. Mrs. Waters is in good health; however, she was diagnosed with diabetes in 1976, but the diabetes has not kept her from being employed or from enjoying her life.

- Mr. Waters was born February 13, 1952 and is currently 58 years of age. He has no serious health problems that prevent him from working.

- The parties were married on December 6, 1975, in Knoxville, Tennessee.

- The parties separated on November 21, 2008, in Franklin, Williamson County, Tennessee. Since the separation of the parties, Mr. Waters has continued to pay the bills and expenses and has continued to maintain the financial status quo, although he has had to incur additional debt in order to do so.

- Both parties have a college education. Both parties have a Bachelor of Science Degree. Mrs. Waters graduated *Cum Laude*. Both parties are Certified Public Accountants.

- Both parties have substantial employment experience, although Mr. Waters has been employed full-time during the course of the parties' marriage, and Mrs. Waters has been employed full-time, at various times during the marriage, and part-time during the marriage, as well.

The balance of the details of the parties' backgrounds will be listed under the Alimony section set out below.

PROCEDURAL BACKGROUND

Many pleadings have been filed in this case. It is believed by counsel that this case is relatively straight forward and easy to resolve by this Court. Counsel has annexed to this Pre-Trial Brief, as **Exhibit A**, his internal Pleadings Index, although counsel believes that reviewing all of the pleadings in chronological order on the attached Exhibit A, may be more burdensome than helpful to this Court. Nonetheless, the attachment is provided for the Court.

The pertinent pleading entries are as follows:

- **March 31, 2008:** Mr. Waters filed his Complaint for Divorce.

- **April 8, 2008:** Mr. Jack Thompson, attorney, accepted service for Mrs. Waters.

- For many months thereafter, Mr. Binkley and Mr. Thompson exchanged numerous notebooks full of information in the process of trying to settle this case prior to mediation.

- **September 23, 2008:** The parties had mediation, which was unsuccessful.

- **September 24, 2008:** An Answer to the Complaint for Divorce and Counter-Complaint for Divorce were filed by Mrs. Waters.

- **September 29, 2008:** The mediator reported the results of the mediation.

- **November 24, 2008:** The depositions of both parties were taken. (first round)

- **April 22, 2009:** Mr. Binkley filed a Statement of Issues, Income, Property and Expenses, pursuant to the Local Rules of Procedure, to obtain a trial date.

- **April 22, 2009:** Mr. Binkley filed a Motion to Set Case for Trial.

- **April 24, 2009:** Mr. Thompson filed Wife's Response to Husband's Motion to Set Case for Trial.

- **May 15, 2009:** An Agreed Order to Set Final Hearing on September 4, 2009 was entered by the Court.

- **July 20, 2009:** Mr. Thompson is relieved as attorney of record and Ms. Corley is substituted as counsel for Mrs. Waters.

- **August 24, 2009:** Ms. Corley filed a Motion to Continue Trial with said Motion being set for hearing on September 1, 2009.

- **August 25, 2009:** A Response to Motion to Continue Trial and Request to Implement the Agreement Between Former Counsel for Mrs. Waters and Counsel for Mr. Waters was filed with the Court.

- **August 27, 2009:** Ms. Corley filed Wife's Reply to Husband's Response to Wife's Motion to Continue and Request to Implement the Agreement Between Former Counsel for Mrs. Waters and Counsel for Mr. Waters.

- **September 16, 2009:** An Order was entered denying Wife's Motion to Continue Trial, with the agreement to reset the trial for November 25, 2009, at 9:00 a.m.

- **November 17, 2009:** An Agreed Order allowing the parties to amend the original Complaint for Divorce and Counter-Complaint for Divorce was entered by the Court.

- **November 17, 2009:** Mr. Waters filed his Amended Complaint for Divorce.

- **November 19, 2009:** Mrs. Waters filed her Amended Counter-Complaint for Divorce.

- **November 24, 2009:** Mr. Waters filed his Answer to Amendment to Wife's Counter-Complaint for Divorce and counsel for the parties advised that this case could not be heard on November 25, 2009, but would be reset to January 6, 2010.

- **November 25, 2009:** An Agreed Order Resetting Case for January 6, 2010, was entered by Judge Martin.

- **December 2, 2009:** An Agreed Order to Reset Final Hearing for January 6, 2010 was entered by Judge Easter.

- **January 26, 2010:** An Agreed Order Resetting Case to July 14, 2010 in Judge Beal's Court based on Judge Martin's Conflict was entered.

- **February 3, 2010:** Judge Beal recuses himself and Judge Bivins is appointed to hear case.

- **May 24, 2010:** Supplemental depositions were taken of both parties.

- **June 30, 2010:** Mrs. Waters filed her Answer to Husband's Amended Complaint for Divorce.

PROPOSED DIVISION OF ASSETS AND LIABILITIES

Below is Mr. Waters' Proposed Division of Assets and Liabilities. Throughout the proceedings in this case, Mrs. Waters has not made a commitment as to whether or not she wanted to keep the home, sell the home, or allow her equity to be purchased. Mrs. Waters simply would not respond to this issue during the entire divorce proceedings until this past Thursday, July 8, 2010, when Ms. Corley advised Mr. Binkley, in writing, as follows: "My client has decided that she probably cannot keep the house either financially or physically. She is now looking for a much smaller, one-story condo." Until last week, Mr. Waters had consistently provided Mrs. Waters with two options for the resolution of this case; the first option dealt with allocating the sales proceeds upon the sale of the home (during better economic times), after the payment of a 7% commission (6% sales commission and 1% closing costs = 7%), plus several thousands of dollars to bring the home to marketable condition, and the second option dealt with Mrs. Waters keeping the home and Mr. Waters refinancing the home.

Mr. Waters has an appraisal that will be introduced at the trial of this case whereby the home is valued at Three Hundred Thirty Five Thousand Dollars ($335,000.00). The appraisal was conducted, with knowledge of both parties by Mr. Don Turner, who prepared the appraisal on June 17, 2010. Based upon Mrs. Waters' very late decision about how she wanted to proceed with placing the home on the market for sale, Mr. Waters has had to hustle and scramble but he now has proposed a resolution to the disposition of the real estate by Mr. Waters refinancing the debt of the home, in his name alone, thereby relieving Mrs. Waters of any responsibility for the indebtedness and allowing her to proceed in the marketplace to purchase a new home, with no debt and **$209,291.00** cash to purchase a condominium. Mr. Waters has a written commitment from CapStar Bank that these monies will be provided to Mrs. Waters so she may purchase a very nice condominium, hopefully, with very little, if any, debt. The following distribution of the parties' assets and distribution of debt provides a clear, equal division of the parties' marital assets and allocation of debt. The values presented are based upon recent values as of **July 9, 2010**, with documentation to support each value, all of which has been forwarded to Ms. Corley. The following is Mr. Waters' proposal:

MR. WATERS' PROPOSED DIVISION OF MARITAL ASSETS

	ASSETS	FAIR MARKET VALUE	DEBT	EQUITY	HUSBAND	WIFE
1	162 Sturbridge Drive Franklin, TN Value: $335,000 Debt: 7/9/10 First Mortgage: $53,977 Second Mortgage $20,000 Combined: $73,977	$335,000.00	$73,977.00	$261,023.00	$51,732.00	$209,291.00
2	Seagrove Condominium 7.777% Interest	$33,000.00		$33,000.00	$33,000.00	
3	Personal Property 162 Sturbridge Drive Franklin, TN	$12,833.00		$12,833.00	$2,862.00	$9,971.00

	ASSETS	FAIR MARKET VALUE	DEBT	EQUITY	HUSBAND	WIFE
4	Personal Property 4431 Soper Avenue Nashville, TN	$20,000.00		$20,000.00	$20,000.00	
5	2005 BMW 325CI Frank A. Waters, Jr. Value: 7/9/10 KBB Private Party Fair Condition	$11,990.00		$11,990.00	$11,990.00	
6	1997 Toyota Camry Frank A. Waters, Jr. and Rebecca B. Waters Value: 7/9/10 KBB Private Party (Driven by parties' son, Mark Joseph Waters)					
7	2002 Honda Odyssey Frank A. Waters, Jr. and Rebecca B. Waters Value: 7/9/10 KBB Private Party Fair Condition	$4,760.00		$4,760.00		$4,760.00
8	FNBO Direct *6220 Rebecca B. Waters Value: 7/9/10	$5.00		$5.00		$5.00
9	Regions Bank *1402 Rebecca B. Waters Value: 7/9/10	$1.00		$1.00		$1.00
10	Fifth Third Bank *1095 Frank A. Waters, Jr. and Rebecca B. Waters Value: 7/9/10	$1,725.00		$1,725.00		$1,725.00
11	Vanguard Retirement Plan Roth IRA *8990 Rebecca Burns Waters Value: 7/9/10	$99,626.00		$99,626.00		$99,626.00
12	FSC Securities Corporation Roth IRA *4600 Rebecca B. Waters Value: 7/9/10	$44,723.00		$44,723.00		$44,723.00
13	Pinnacle National Bank *2950 The Waters Firm, PC, CPA Business Checking Account (Old Account) Value: 7/9/10	$903.00		$903.00	$903.00	

	ASSETS	FAIR MARKET VALUE	DEBT	EQUITY	HUSBAND	WIFE
14	Fifth Third Bank *1376 Frank A. Waters, Jr., CPA, Business Checking Account (Old Account) Value: 7/9/10	$59.00		$59.00	$59.00	
15	Pinnacle National Bank *1801 Frank A. Waters, Jr., CPA, Business Checking Account Value: 7/9/10	$269.00		$269.00	$269.00	
16	Fifth Third Bank *1350 Frank A. Waters, Jr. Financial Services Account Business Checking Account Value: 7/9/10	$0.00		$0.00	$0.00	
17	Pinnacle National Bank *1802 Frank A. Waters, Jr. Financial Services Account Business Checking Account Value: 7/9/10	$121.00		$121.00	$121.00	
18	Pinnacle National Bank *6462 Frank A. Waters, Jr. Personal Checking Value: 7/9/10	$1,722.00		$1,722.00	$1,722.00	
19	Schwab SEP *6495 Frank A. Waters, Jr. Value: 7/9/10	$188,743.00		$188,743.00	$188,743.00	
20	Schwab Roth IRA *5605 Frank A. Waters, Jr. Value: 7/9/10	$110,677.00		$110,677.00	$110,677.00	
21	Sterling Trust Roth IRA *3977 Frank A. Waters, Jr. Value: 7/9/10	$51,001.00		$51,001.00	$51,001.00	
22	Fifth Third Bank *3738 Rebecca B. Waters, Custodian, IRA for Mark Joseph Waters CD Maturity Date: 6/29/10 Value: 12/31/09					

	ASSETS	FAIR MARKET VALUE	DEBT	EQUITY	HUSBAND	WIFE
23	Vanguard UGMA/UTMA Account Rebecca B. Waters, Custodian for Mark J. Waters Value: 3/31/10					
24	Proctor & Gamble Stock Rebecca Waters, Custodian for Mark Waters, UTMA Value: 12/31/09					
25	T&W Partnership Business Interest Value: 7/9/10	$16,350.00		$16,350.00	$16,350.00	
26	Prudential Stock 12 Shares Frank A. Waters Value: 7/9/10	$672.00		$672.00	$672.00	
27	Prudential Stock 6 Shares Rebecca B. Waters Value: 7/9/10	$336.00		$336.00		$336.00
28	Pruco Life Insurance Company Policy *4688 Frank A. Waters, Jr.	$0.00		$0.00		
29	Conseco, Crown Life Policy *9072 Frank A. Waters, Jr. Value: 7/9/10	$8,887.00		$8,887.00		$8,887.00
30	Washington National Insurance Policy *0691 Rebecca B. Waters	$0.00		$0.00		$0.00
31	The Prudential Insurance Company of America Policy *9897 Rebecca B. Waters	$0.00		$0.00		$0.00
	ASSETS TOTALS	**$943,403.00**	**$73,977.00**	**$869,426.00**	**$490,101.00**	**$379,325.00**

MR. WATERS' PROPOSED DIVISION OF MARITAL DEBT

	LIABILITIES	TOTAL INDEBTEDNESS		HUSBAND	WIFE
1	Fifth Third Bank *6927 Business Line of Credit Frank B. Waters, Jr. Balance: 7/9/10	$50,000.00		$50,000.00	
2	Pinnacle Bank *2310 Business Line of Credit Frank A. Waters, Jr. Balance: 7/9/10	$38,000.00		$38,000.00	
3	American Express *21000 Frank A. Waters, Jr. Balance: 7/9/10	$2,042.00		$2,042.00	
4	Discover Card *9844 Frank A. Waters, Jr. Balance: 7/9/10	$394.00		$394.00	
5	Chase MasterCard *1091 Frank Waters, Jr. Balance: 7/9/10	$963.00		$963.00	
6	Amazon.com Card *0167 Frank A. Waters, Jr. Balance: 7/9/10	$1,137.00		$1,137.00	
7	Best Buy Card *2205 Frank A. Waters, Jr. Balance: 7/9/10	$4,910.00		$4,910.00	
8	GE Money Bank Card *2380 Frank A. Waters, Jr. Balance: 7/9/10	$2,800.00		$2,800.00	
9	CitiFinancial *8190 Frank A. Waters, Jr. Balance: 7/9/10	$1,800.00		$1,800.00	
10	Federal Income Taxes, 2009 Balance Due: 7/9/10 [1]	$9,220.00		$9,220.00	
11	MasterCard *? Rebecca Waters Balance 7/9/10: ?	$0.00			$0.00
12	Kohl's *8891Rebecca WatersBalance 4/21/10	$0.00			$0.00
13	Macy's *1290 Rebecca Waters Balance 6/4/10	$0.00			$0.00

14	Coldwater Creek *2076 Rebecca Waters Balance 6/23/10	$61.00			$61.00
	LIABILITIES TOTAL	**$111,327.00**	**$0.00**	**$111,266.00**	**$61.00**

[1]This number assumes Mrs. Waters will not file a joint 2009 tax return. If Mrs. Waters files jointly, the parties' tax liability will be $0.00.

Mrs. Waters	
Total Assets	$379,325.00
Total Debt	($61.00)
Net Total	**$379,264.00**
Mr. Waters	
Total Assets	$490,101.00
Total Debt	($111,266.00)
Net Total	**$378,835.00**

ALIMONY

It appears that Mr. Waters has some exposure to transitional alimony to help Mrs. Waters transcend back into the workforce on a full-time basis, which she is perfectly capable of doing.

With regard to "need" and "ability to pay", Mr. Waters will provide this Court his Income and Expense Statement that will show his meager ability to pay alimony, but he certainly realizes that he does have some exposure to a small amount of transitional alimony to Mrs. Waters for a reasonably short period of time.

Counsel would submit to the Court the following statutory factors and the facts that will be applied to these statutory factors to assist the Court in setting an amount of transitional alimony for Mrs. Waters. Pursuant to T.C.A. §36-5-121(i), the Court sets forth the following statutory factors:

(1) Relevant earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing, or retirement plans, and all other sources.

a. Relevant Earning Capacity:

Mr. Waters has worked as a Certified Public Accountant and Chief Financial Officer for various businesses until he became self-employed in 2002. Mr. Waters has earned the following income from 2005 to the present:

YEAR	ANNUAL INCOME
2005	$177,078.00[1]
2006	$119,750.00
2007	$102,252.00
2008	$97,729.00
2009	$168,592.00[2]
2010	$140,000.00[3]

Mrs. Waters' employment history is as follows:

	YEAR	EMPLOYER	TITLE/DUTIES	AMOUNT
1	1977-1981	State of Tennessee Agricultural Extension Service	Assistant to Office Agent	Unknown
2	1981- 1982	Greater Property Management (Windsor Towers)	Property Manager	Unknown
3	1982- 1984	Mrs. Waters works toward her CPA designation by taking courses at Nashville Tech and MTSU	Student	
4	1/1985 – 4/1985	Touche & Ross Accounting Services	Full-time internship while completing school, preparing tax returns and assisting in accounting.	Unknown
5	5/1985 - 10/1990	Hardaway Construction Company	Preparation of partnership returns for real estate limited partnerships of which Hardaway was a general partner; assisted CFO to keep books and records of real estate partnership, prepared 60-70 partnership returns.	Approximate ly $45,000.00

[1] Mr. Waters' 2005 income was a "spike" year due to a single securities transaction that generated approximately $60,000.0 in a "one time" commission.

[2] Mr. Waters' primary boost in income came from one client, in the approximate amount of $85,000.00. This client is no longer purchasing the same services from Mr. Waters in 2010.

[3] The 2010 income is estimated and annualized based upon the first six (6) months of income for 2010.

	YEAR	EMPLOYER	TITLE/DUTIES	AMOUNT
6	11/1990 – 3/1991	RCR Building Corporation	Named Commercial Controller of the business; dealt with job costing, dealing with vast properties, supervision of staff, and providing accounting and bookkeeping services. Additionally, Wife converted the business from one accounting system to another; set up new computer systems and was responsible for implementation of new accounting software systems	$50,000.00
7	3/1991 – 12/1991	Yeary, Howell, Overton & Michie, CPAs	Assisted in independent audits of various industries	Approximate ly $45,000.00
8	1/1992 – 12/1993	Mrs. Waters stayed at home		
9	1/1994 – 12/1994	Presbytery of Middle Tennessee	Office Manager; bookkeeper; accounting services.	$30,000.00
10	1/1995 – 3/2006	At the request of Melvin Spain, CPA, Mrs. Waters started working as the accounting manager for the account of Rebecca St. James, LLC	Accounting; tax consulting; bookkeeping services and billing through Waters' CPA firm.	$12,000.00 (this is the amount of money Mrs. Waters requested to receive for her services for "tax reasons."
11	4/2006 - 2008	Frank A. Waters, Jr.	Bookkeeping; CPA services for Baker & Baker Investments, LLC; Outdoor Ministry Network, LLC; Use of Quick Books; preparation of financial plans; preparation of various individual income tax returns; Form 1040, using Turbo Tax software; and other duties and responsibilities	$10,000.00 (this is the amount of money Mrs. Waters' requested to receive for her services for "tax reasons".)

b. Obligation, Needs and Financial Resources of Each Party:

The obligations and needs of the parties will be presented through their respective Income and Expense Statements. It is believed that Mrs. Waters has the capacity to earn, at minimum, **$75,000.00** per year as a Certified Public Accountant,

providing accounting services, bookkeeping services, and a wide variety of other services. Mr. Waters' average earnings are approximately **$134,000.00** per year.

c. Income from Pension, Profit Sharing, Retirement Plans, and Other Sources:

Mrs. Waters will have approximately $150,000.00 from which to draw at its current value, at a time when she is eligible to receive income from her retirement plans. Her retirement plans will continue to grow and provide her a nest egg upon retirement. Mr. Waters will have approximately $350,000.00 from which to draw at its current value, at a time when he is eligible to receive income from his retirement plans. His retirement plans will continue to grow and provide him a nest egg upon retirement.

(2) The relative education and training of each party;

Mrs. Waters is extremely bright, proficient, and is a Certified Public Accountant. Mrs. Waters graduated from Tennessee Technological University and received a Bachelor of Science Degree and graduated *(Cum Laude)* in June 1976. Mrs. Waters worked hard and passed her CPA exam without having a degree in accounting, which shows her high level of intelligence, and Mrs. Waters is perfectly capable of full-time employment, based upon her past educational background, work experience of being a Certified Public Accountant and Controller, as well as the preparation of business and personal tax returns, bookkeeping services, and being proficient in the use of current accounting and tax software.

Mr. Waters also received a Bachelor of Science Degree from Tennessee Technological University in 1975. He is also a Certified Public Accountant. He has a Series 7 and Series 66 License. He is employed as a Certified Public Accountant and provides financial services, accounting, bookkeeping, and other such services.

It does not appear that additional education and training under this section would be necessary for either party to improve their earning capacity to a "reasonable level".

(3) Duration of the marriage;

The parties were married December 6, 1975. The parties separated November 21, 2008. The parties will be divorced July 2010.

(4) Age and mental condition of each party;

Mr. Waters is 58 years of age and is in good mental condition. Mrs. Waters is 56 years of age and is in good mental health.

(5) ***Physical condition of each party, including, but not limited to physical disability or incapacity due to a chronic, disabling disease;***

Mr. Waters has the typical, physical issues that accompany his age and station in life, but he has no physical disabilities or incapacities that prevent him from being employed. Mrs. Waters is a diabetic, having been diagnosed shortly after the parties' marriage in 1976. Mrs. Waters' diabetes is under control and, as evidenced by her past work history, it does not prevent her from working or enjoying her life and physical activities. Mrs. Waters complains of intermittent muscular back pain.

(6) ***The extent to which it would be undesirable for a party to seek employment outside of the home because such party will be a custodian of the minor child of the marriage.***

This is not a consideration. The parties' son graduated from high school this past June 2010 and will be attending Middle Tennessee State University this fall.

(7) ***The separate assets of each party, both real and personal, tangible and intangible;***

The parties do not own any substantial separate assets.

(8) ***The provisions with regard to marital property as defined in T.C.A. §36-4-121;***

The parties will essentially receive an equitable, if not equal division of the assets in the parties' marital estate, based upon the undisputed value of all the assets and current liabilities listed in Mr. Waters' Proposed Division of Assets and Liabilities. Mrs. Waters will have very little, if any, ongoing debt to service. Mr. Waters, on the other hand, will have considerable personal and business debt with his business lines of credit and credit cards to service and pay, which have accumulated in the last several years, particularly since the separation of the parties, with Mr. Waters trying to maintain the financial status quo of the parties pending their divorce.

(9) ***The standard of living of the parties established during the marriage;***

The parties have lived very modestly during the course of their marriage. They have lived in a very modest home, have modest automobiles, and have not taken any extravagant trips, vacations, or have any high financial needs of any kind.

10. ***The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training, or increased earning power of the other party;***

Both parties assisted in raising their son with Mrs. Waters assisting, primarily, in the raising of the parties' son for a number of years. Mr. Waters paid for Mrs. Waters' education and training to become a Certified Public Accountant, which has greatly enhanced her earning power and earning capacity. Both parties also provided income to the joint marital estate during the marriage.

11. ***The relevant fault of the parties in cases where the Court, in its discretion, deems it appropriate to do so;***

It is believed that the parties will stipulate to grounds for divorce in this case, although at the filing of this Pre-Trial Brief, counsel for Mrs. Waters was "not sure" if her client would stipulate to grounds. Counsel has waited to file this Pre-Trial Brief to hear from counsel for the wife, but decided to go ahead and file this Pre-Trial Brief since he has not heard from counsel for the wife.

12. ***Such other factors, including tax consequences to each party as are necessary to consider the equity between the parties;***

The Court always considers the fact that the obligor will be paying any obligation with net income after reasonable expenses as a result of servicing debt and other such expenses.

ALIMONY - AMOUNT AND DURATION

Counsel for Mr. Waters submits that, taking into consideration Mrs. Waters' real need and Mr. Waters' ability to pay, plus considering the facts of this case, applied to the statutory factors for the award of alimony, Mrs. Waters is entitled to alimony.

The granting of rehabilitative alimony or transitional alimony and denial of periodic alimony in the form of alimony *in futuro* is becoming increasingly common in the Court of Appeals. *Garrett, Tennessee Practice, Volume 19, Tennessee Divorce, Alimony and Child Custody with Forms, Second Revised Edition, Chapter 13, Alimony, page 229 (2008).* Also see Bryant v. Bryant, 2010 WL 92539 (Jan. 11, 2010), annexed hereto as **Exhibit B**, wherein the

Court of Appeals recently reduced an award of rehabilitative alimony from five years (60 months) to two years (24 months).

This is a case of two people who are both professionals, who have college degrees, and both are Certified Public Accountants, with past employment experience. Both Mr. and Mrs. Waters have a good earning capacity, although, Mr. Waters' earning capacity is now somewhat higher because of the extent of his work history in the open market. There is no doubt that Mrs. Waters has the knowledge, skill, education, work experience, and capacity to earn a good living, assuming that she is motivated to do so.

Counsel for Mr. Waters acknowledges that this does fit the statutory scheme of transitional alimony for a short period of time to allow Mrs. Waters to transcend back into the workforce. This is not a case of rehabilitative alimony where, after a limited amount of time through additional training or education, Mrs. Waters is likely to increase her earning power. Transitional alimony is intended to be used to "close the gap" or "adjust to the realities of a divorce", but where rehabilitative alimony would not be appropriate. Audiffred v. Wertz (Tenn. Ct. App.)(Dec. 4, 2009).

The concept of rehabilitation is intended to allow a spouse to achieve, with reasonable effort, an earning capacity to have a standard of living comparable to that of the marriage or that of the other spouse after the divorce. Transitional alimony is payable for a determinant period of time and terminates upon the death of the payor and is non-modifiable. Therefore, Mr. Waters suggests that since Mrs. Waters is temporarily economically disadvantaged relative to Mr. Waters, pursuant to T.C.A. §36-5-121 (g), and since Mrs. Waters needs funds to help "bridge the gap" from the time of the divorce to a certain time in the future to soften the economic blow of divorce, as contemplated with transitional alimony, Mr. Waters suggests that Mrs. Waters receive $750.00 per month for a period of three (3) years or until Mrs. Waters' death or

remarriage, or Mr. Waters' death. The transitional alimony, pursuant to statute, will be non-modifiable, except by Order of the Court to the contrary, and shall receive the usual tax consequences and benefits under the IRS Code.

COBRA COVERAGE

Mrs. Waters is eligible to convert Mr. Waters' group medical coverage to an individual policy for herself under the Federal COBRA Statute, for a period of thirty-six (36) months. Counsel will introduce an exhibit at trial which will confirm Mrs. Waters' eligibility to convert the group policy to an individual policy under the Federal COBRA Statute, for a period of thirty-six (36) months, with the same exact coverage she is currently receiving, for approximately $250.00 per month.

ATTORNEY'S FEES

Each party should be responsible for the payment of their own attorney's fees. In the unlikely event that this Court deems it necessary for Mr. Waters to pay any portion of Mrs. Waters' attorney's fees, counsel for Mr. Waters would request a separate hearing on the reasonableness and necessity of the attorney's fees and would like to provide a defense to Mr. Waters being required to pay any of Mrs. Waters' attorney's fees.

COURT COSTS

It would appear to be reasonable to divide the Court costs in this cause between the parties.

GROUNDS FOR DIVORCE

As stated above, counsel has requested that the parties stipulate to grounds pursuant to T.C.A. §36-4-129, but he has not yet heard from counsel for Mrs. Waters as to whether or not she will agree to the stipulation. It is hopeful that some response would be made prior to today. Counsel for Mr. Waters has withheld listing the factual basis that will support Mr. Waters'

request for an absolute divorce on the assumption that grounds for divorce will be stipulated pursuant to T.C.A. §36-4-129.

Respectfully Submitted,

MICHAEL W. BINKLEY, #5930
Attorney for Frank A. Waters, Jr.
509 New Highway 96 West, Suite 201
Franklin, Tennessee 37064
(615) 550-2800

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished, via facsimile and U.S. Mail, to the following person, this _____ day of July, 2010.

Nancy K. Corley
424 Church Street, 29th Floor
Post Office Box 198525
Nashville, Tennessee 37219-8525

MICHAEL W. BINKLEY

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE AT FRANKLIN

FRANK A. WATERS, JR.
Plaintiff/Counter-Defendant

v. **Docket No. 08197**

REBECCA B. WATERS
Defendant/Counter-Plaintiff

MR. WATERS' PRE-TRIAL BRIEF

INTRODUCTION

This is a divorce case. Mr. Waters' Pre-Trial Brief is designed to, hopefully, assist the Court in understanding and reviewing Mr. Waters' proposal for the equitable division of the parties' marital assets, as well as the assignment of debt between the parties. Counsel for Mr. Waters will present his Proposed Division of Assets and Liabilities in this Pre-Trial Brief, as well as his proposal for the type of alimony, the length of alimony, and the amount of alimony. Counsel would state that although listing a line of cases on the issue of alimony may be helpful to the Court, what counsel believes is the most helpful to the Court is an analysis of the primary factors for alimony: need and ability to pay, as well as a review of the statutory factors as they apply to the facts of this particular case. In this fashion, counsel submits that the Court will have a better understanding of counsel's Proposed Division of Assets and Liabilities, and counsel's position on the issue of transitional alimony as it relates to this case.

BACKGROUND INFORMATION

In order to keep this Pre-Trial Brief "brief" and concise, a lot of the background information regarding this case will be listed for the Court in presenting to this Court the facts that will be adduced at trial under each of the relevant statutory factors for the award of alimony, pursuant to T.C.A. §35-5-121(i). However, the relevant non-financial information is as follows:

- Mrs. Waters was born March 29, 1954 and is currently 56 years of age. Mrs. Waters is in good health; however, she was diagnosed with diabetes in 1976, but the diabetes has not kept her from being employed or from enjoying her life.

- Mr. Waters was born February 13, 1952 and is currently 58 years of age. He has no serious health problems that prevent him from working.

- The parties were married on December 6, 1975, in Knoxville, Tennessee.

- The parties separated on November 21, 2008, in Franklin, Williamson County, Tennessee. Since the separation of the parties, Mr. Waters has continued to pay the bills and expenses and has continued to maintain the financial status quo, although he has had to incur additional debt in order to do so.

- Both parties have a college education. Both parties have a Bachelor of Science Degree. Mrs. Waters graduated *Cum Laude*. Both parties are Certified Public Accountants.

- Both parties have substantial employment experience, although Mr. Waters has been employed full-time during the course of the parties' marriage, and Mrs. Waters has been employed full-time, at various times during the marriage, and part-time during the marriage, as well.

The balance of the details of the parties' backgrounds will be listed under the Alimony section set out below.

PROCEDURAL BACKGROUND

Many pleadings have been filed in this case. It is believed by counsel that this case is relatively straight forward and easy to resolve by this Court. Counsel has annexed to this Pre-Trial Brief, as **Exhibit A**, his internal Pleadings Index, although counsel believes that reviewing all of the pleadings in chronological order on the attached Exhibit A, may be more burdensome than helpful to this Court. Nonetheless, the attachment is provided for the Court.

The pertinent pleading entries are as follows:

- **March 31, 2008:** Mr. Waters filed his Complaint for Divorce.

- **April 8, 2008:** Mr. Jack Thompson, attorney, accepted service for Mrs. Waters.

- For many months thereafter, Mr. Binkley and Mr. Thompson exchanged numerous notebooks full of information in the process of trying to settle this case prior to mediation.

- **September 23, 2008:** The parties had mediation, which was unsuccessful.

- **September 24, 2008:** An Answer to the Complaint for Divorce and Counter-Complaint for Divorce were filed by Mrs. Waters.

- **September 29, 2008:** The mediator reported the results of the mediation.

- **November 24, 2008:** The depositions of both parties were taken. (first round)

- **April 22, 2009:** Mr. Binkley filed a Statement of Issues, Income, Property and Expenses, pursuant to the Local Rules of Procedure, to obtain a trial date.

- **April 22, 2009:** Mr. Binkley filed a Motion to Set Case for Trial.

- **April 24, 2009:** Mr. Thompson filed Wife's Response to Husband's Motion to Set Case for Trial.

- **May 15, 2009:** An Agreed Order to Set Final Hearing on September 4, 2009 was entered by the Court.

- **July 20, 2009:** Mr. Thompson is relieved as attorney of record and Ms. Corley is substituted as counsel for Mrs. Waters.

- **August 24, 2009:** Ms. Corley filed a Motion to Continue Trial with said Motion being set for hearing on September 1, 2009.

- **August 25, 2009:** A Response to Motion to Continue Trial and Request to Implement the Agreement Between Former Counsel for Mrs. Waters and Counsel for Mr. Waters was filed with the Court.

- **August 27, 2009:** Ms. Corley filed Wife's Reply to Husband's Response to Wife's Motion to Continue and Request to Implement the Agreement Between Former Counsel for Mrs. Waters and Counsel for Mr. Waters.

- **September 16, 2009:** An Order was entered denying Wife's Motion to Continue Trial, with the agreement to reset the trial for November 25, 2009, at 9:00 a.m.

- **November 17, 2009:** An Agreed Order allowing the parties to amend the original Complaint for Divorce and Counter-Complaint for Divorce was entered by the Court.

- **November 17, 2009:** Mr. Waters filed his Amended Complaint for Divorce.

- **November 19, 2009:** Mrs. Waters filed her Amended Counter-Complaint for Divorce.

- **November 24, 2009:** Mr. Waters filed his Answer to Amendment to Wife's Counter-Complaint for Divorce and counsel for the parties advised that this case could not be heard on November 25, 2009, but would be reset to January 6, 2010.

- **November 25, 2009:** An Agreed Order Resetting Case for January 6, 2010, was entered by Judge Martin.

- **December 2, 2009:** An Agreed Order to Reset Final Hearing for January 6, 2010 was entered by Judge Easter.

- **January 26, 2010:** An Agreed Order Resetting Case to July 14, 2010 in Judge Beal's Court based on Judge Martin's Conflict was entered.

- **February 3, 2010:** Judge Beal recuses himself and Judge Bivins is appointed to hear case.

- **May 24, 2010:** Supplemental depositions were taken of both parties.

- **June 30, 2010:** Mrs. Waters filed her Answer to Husband's Amended Complaint for Divorce.

PROPOSED DIVISION OF ASSETS AND LIABILITIES

Below is Mr. Waters' Proposed Division of Assets and Liabilities. Throughout the proceedings in this case, Mrs. Waters has not made a commitment as to whether or not she wanted to keep the home, sell the home, or allow her equity to be purchased. Mrs. Waters simply would not respond to this issue during the entire divorce proceedings until this past Thursday, July 8, 2010, when Ms. Corley advised Mr. Binkley, in writing, as follows: "My client has decided that she probably cannot keep the house either financially or physically. She is now looking for a much smaller, one-story condo." Until last week, Mr. Waters had consistently provided Mrs. Waters with two options for the resolution of this case; the first option dealt with allocating the sales proceeds upon the sale of the home (during better economic times), after the payment of a 7% commission (6% sales commission and 1% closing costs = 7%), plus several thousands of dollars to bring the home to marketable condition, and the second option dealt with Mrs. Waters keeping the home and Mr. Waters refinancing the home.

Mr. Waters has an appraisal that will be introduced at the trial of this case whereby the home is valued at Three Hundred Thirty Five Thousand Dollars ($335,000.00). The appraisal was conducted, with knowledge of both parties by Mr. Don Turner, who prepared the appraisal on June 17, 2010. Based upon Mrs. Waters' very late decision about how she wanted to proceed with placing the home on the market for sale, Mr. Waters has had to hustle and scramble but he now has proposed a resolution to the disposition of the real estate by Mr. Waters refinancing the debt of the home, in his name alone, thereby relieving Mrs. Waters of any responsibility for the indebtedness and allowing her to proceed in the marketplace to purchase a new home, with no debt and **$209,291.00** cash to purchase a condominium. Mr. Waters has a written commitment from CapStar Bank that these monies will be provided to Mrs. Waters so she may purchase a very nice condominium, hopefully, with very little, if any, debt. The following distribution of the parties' assets and distribution of debt provides a clear, equal division of the parties' marital assets and allocation of debt. The values presented are based upon recent values as of **July 9, 2010**, with documentation to support each value, all of which has been forwarded to Ms. Corley. The following is Mr. Waters' proposal:

MR. WATERS' PROPOSED DIVISION OF MARITAL ASSETS

	ASSETS	FAIR MARKET VALUE	DEBT	EQUITY	HUSBAND	WIFE
1	162 Sturbridge Drive Franklin, TN Value: $335,000 Debt: 7/9/10 First Mortgage: $53,977 Second Mortgage $20,000 Combined: $73,977	$335,000.00	$73,977.00	$261,023.00	$51,732.00	$209,291.00
2	Seagrove Condominium 7.777% Interest	$33,000.00		$33,000.00	$33,000.00	
3	Personal Property 162 Sturbridge Drive Franklin, TN	$12,833.00		$12,833.00	$2,862.00	$9,971.00

	ASSETS	FAIR MARKET VALUE	DEBT	EQUITY	HUSBAND	WIFE
4	Personal Property 4431 Soper Avenue Nashville, TN	$20,000.00		$20,000.00	$20,000.00	
5	2005 BMW 325CI Frank A. Waters, Jr. Value: 7/9/10 KBB Private Party Fair Condition	$11,990.00		$11,990.00	$11,990.00	
6	1997 Toyota Camry Frank A. Waters, Jr. and Rebecca B. Waters Value: 7/9/10 KBB Private Party (Driven by parties' son, Mark Joseph Waters)					
7	2002 Honda Odyssey Frank A. Waters, Jr. and Rebecca B. Waters Value: 7/9/10 KBB Private Party Fair Condition	$4,760.00		$4,760.00		$4,760.00
8	FNBO Direct *6220 Rebecca B. Waters Value: 7/9/10	$5.00		$5.00		$5.00
9	Regions Bank *1402 Rebecca B. Waters Value: 7/9/10	$1.00		$1.00		$1.00
10	Fifth Third Bank *1095 Frank A. Waters, Jr. and Rebecca B. Waters Value: 7/9/10	$1,725.00		$1,725.00		$1,725.00
11	Vanguard Retirement Plan Roth IRA *8990 Rebecca Burns Waters Value: 7/9/10	$99,626.00		$99,626.00		$99,626.00
12	FSC Securities Corporation Roth IRA *4600 Rebecca B. Waters Value: 7/9/10	$44,723.00		$44,723.00		$44,723.00
13	Pinnacle National Bank *2950 The Waters Firm, PC, CPA Business Checking Account (Old Account) Value: 7/9/10	$903.00		$903.00	$903.00	

	ASSETS	FAIR MARKET VALUE	DEBT	EQUITY	HUSBAND	WIFE
14	Fifth Third Bank *1376 Frank A. Waters, Jr., CPA, Business Checking Account (Old Account) Value: 7/9/10	$59.00		$59.00	$59.00	
15	Pinnacle National Bank *1801 Frank A. Waters, Jr., CPA, Business Checking Account Value: 7/9/10	$269.00		$269.00	$269.00	
16	Fifth Third Bank *1350 Frank A. Waters, Jr. Financial Services Account Business Checking Account Value: 7/9/10	$0.00		$0.00	$0.00	
17	Pinnacle National Bank *1802 Frank A. Waters, Jr. Financial Services Account Business Checking Account Value: 7/9/10	$121.00		$121.00	$121.00	
18	Pinnacle National Bank *6462 Frank A. Waters, Jr. Personal Checking Value: 7/9/10	$1,722.00		$1,722.00	$1,722.00	
19	Schwab SEP *6495 Frank A. Waters, Jr. Value: 7/9/10	$188,743.00		$188,743.00	$188,743.00	
20	Schwab Roth IRA *5605 Frank A. Waters, Jr. Value: 7/9/10	$110,677.00		$110,677.00	$110,677.00	
21	Sterling Trust Roth IRA *3977 Frank A. Waters, Jr. Value: 7/9/10	$51,001.00		$51,001.00	$51,001.00	
22	Fifth Third Bank *3738 Rebecca B. Waters, Custodian, IRA for Mark Joseph Waters CD Maturity Date: 6/29/10 Value: 12/31/09					

	ASSETS	FAIR MARKET VALUE	DEBT	EQUITY	HUSBAND	WIFE
23	Vanguard UGMA/UTMA Account Rebecca B. Waters, Custodian for Mark J. Waters Value: 3/31/10					
24	Proctor & Gamble Stock Rebecca Waters, Custodian for Mark Waters, UTMA Value: 12/31/09					
25	T&W Partnership Business Interest Value: 7/9/10	$16,350.00		$16,350.00	$16,350.00	
26	Prudential Stock 12 Shares Frank A. Waters Value: 7/9/10	$672.00		$672.00	$672.00	
27	Prudential Stock 6 Shares Rebecca B. Waters Value: 7/9/10	$336.00		$336.00		$336.00
28	Pruco Life Insurance Company Policy *4688 Frank A. Waters, Jr.	$0.00		$0.00		
29	Conseco, Crown Life Policy *9072 Frank A. Waters, Jr. Value: 7/9/10	$8,887.00		$8,887.00		$8,887.00
30	Washington National Insurance Policy *0691 Rebecca B. Waters	$0.00		$0.00		$0.00
31	The Prudential Insurance Company of America Policy *9897 Rebecca B. Waters	$0.00		$0.00		$0.00
	ASSETS TOTALS	**$943,403.00**	**$73,977.00**	**$869,426.00**	**$490,101.00**	**$379,325.00**

MR. WATERS' PROPOSED DIVISION OF MARITAL DEBT

	LIABILITIES	TOTAL INDEBTEDNESS		HUSBAND	WIFE
1	Fifth Third Bank *6927 Business Line of Credit Frank B. Waters, Jr. Balance: 7/9/10	$50,000.00		$50,000.00	
2	Pinnacle Bank *2310 Business Line of Credit Frank A. Waters, Jr. Balance: 7/9/10	$38,000.00		$38,000.00	
3	American Express *21000 Frank A. Waters, Jr. Balance: 7/9/10	$2,042.00		$2,042.00	
4	Discover Card *9844 Frank A. Waters, Jr. Balance: 7/9/10	$394.00		$394.00	
5	Chase MasterCard *1091 Frank Waters, Jr. Balance: 7/9/10	$963.00		$963.00	
6	Amazon.com Card *0167 Frank A. Waters, Jr. Balance: 7/9/10	$1,137.00		$1,137.00	
7	Best Buy Card *2205 Frank A. Waters, Jr. Balance: 7/9/10	$4,910.00		$4,910.00	
8	GE Money Bank Card *2380 Frank A. Waters, Jr. Balance: 7/9/10	$2,800.00		$2,800.00	
9	CitiFinancial *8190 Frank A. Waters, Jr. Balance: 7/9/10	$1,800.00		$1,800.00	
10	Federal Income Taxes, 2009 Balance Due: 7/9/10 [1]	$9,220.00		$9,220.00	
11	MasterCard *? Rebecca Waters Balance 7/9/10: ?	$0.00			$0.00
12	Kohl's *8891Rebecca WatersBalance 4/21/10	$0.00			$0.00
13	Macy's *1290 Rebecca Waters Balance 6/4/10	$0.00			$0.00

14	Coldwater Creek *2076 Rebecca Waters Balance 6/23/10	$61.00			$61.00
	LIABILITIES TOTAL	**$111,327.00**	**$0.00**	**$111,266.00**	**$61.00**

[1]This number assumes Mrs. Waters will not file a joint 2009 tax return. If Mrs. Waters files jointly, the parties' tax liability will be $0.00.

Mrs. Waters	
Total Assets	$379,325.00
Total Debt	($61.00)
Net Total	**$379,264.00**
Mr. Waters	
Total Assets	$490,101.00
Total Debt	($111,266.00)
Net Total	**$378,835.00**

ALIMONY

It appears that Mr. Waters has some exposure to transitional alimony to help Mrs. Waters transcend back into the workforce on a full-time basis, which she is perfectly capable of doing.

With regard to "need" and "ability to pay", Mr. Waters will provide this Court his Income and Expense Statement that will show his meager ability to pay alimony, but he certainly realizes that he does have some exposure to a small amount of transitional alimony to Mrs. Waters for a reasonably short period of time.

Counsel would submit to the Court the following statutory factors and the facts that will be applied to these statutory factors to assist the Court in setting an amount of transitional alimony for Mrs. Waters. Pursuant to T.C.A. §36-5-121(i), the Court sets forth the following statutory factors:

(1) ***Relevant earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing, or retirement plans, and all other sources.***

a. Relevant Earning Capacity:

Mr. Waters has worked as a Certified Public Accountant and Chief Financial Officer for various businesses until he became self-employed in 2002. Mr. Waters has earned the following income from 2005 to the present:

YEAR	ANNUAL INCOME
2005	$177,078.00[1]
2006	$119,750.00
2007	$102,252.00
2008	$97,729.00
2009	$168,592.00[2]
2010	$140,000.00[3]

Mrs. Waters' employment history is as follows:

	YEAR	EMPLOYER	TITLE/DUTIES	AMOUNT
1	1977-1981	State of Tennessee Agricultural Extension Service	Assistant to Office Agent	Unknown
2	1981- 1982	Greater Property Management (Windsor Towers)	Property Manager	Unknown
3	1982- 1984	Mrs. Waters works toward her CPA designation by taking courses at Nashville Tech and MTSU	Student	
4	1/1985 – 4/1985	Touche & Ross Accounting Services	Full-time internship while completing school, preparing tax returns and assisting in accounting.	Unknown
5	5/1985 - 10/1990	Hardaway Construction Company	Preparation of partnership returns for real estate limited partnerships of which Hardaway was a general partner; assisted CFO to keep books and records of real estate partnership, prepared 60-70 partnership returns.	Approximate ly $45,000.00

[1] Mr. Waters' 2005 income was a "spike" year due to a single securities transaction that generated approximately $60,000.0 in a "one time" commission.

[2] Mr. Waters' primary boost in income came from one client, in the approximate amount of $85,000.00. This client is no longer purchasing the same services from Mr. Waters in 2010.

[3] The 2010 income is estimated and annualized based upon the first six (6) months of income for 2010.

	YEAR	EMPLOYER	TITLE/DUTIES	AMOUNT
6	11/1990 – 3/1991	RCR Building Corporation	Named Commercial Controller of the business; dealt with job costing, dealing with vast properties, supervision of staff, and providing accounting and bookkeeping services. Additionally, Wife converted the business from one accounting system to another; set up new computer systems and was responsible for implementation of new accounting software systems	$50,000.00
7	3/1991 – 12/1991	Yeary, Howell, Overton & Michie, CPAs	Assisted in independent audits of various industries	Approximate ly $45,000.00
8	1/1992 – 12/1993	Mrs. Waters stayed at home		
9	1/1994 – 12/1994	Presbytery of Middle Tennessee	Office Manager; bookkeeper; accounting services.	$30,000.00
10	1/1995 – 3/2006	At the request of Melvin Spain, CPA, Mrs. Waters started working as the accounting manager for the account of Rebecca St. James, LLC	Accounting; tax consulting; bookkeeping services and billing through Waters' CPA firm.	$12,000.00 (this is the amount of money Mrs. Waters requested to receive for her services for "tax reasons."
11	4/2006 - 2008	Frank A. Waters, Jr.	Bookkeeping; CPA services for Baker & Baker Investments, LLC; Outdoor Ministry Network, LLC; Use of Quick Books; preparation of financial plans; preparation of various individual income tax returns; Form 1040, using Turbo Tax software; and other duties and responsibilities	$10,000.00 (this is the amount of money Mrs. Waters' requested to receive for her services for "tax reasons".)

b. Obligation, Needs and Financial Resources of Each Party:

The obligations and needs of the parties will be presented through their respective Income and Expense Statements. It is believed that Mrs. Waters has the capacity to earn, at minimum, **$75,000.00** per year as a Certified Public Accountant,

providing accounting services, bookkeeping services, and a wide variety of other services. Mr. Waters' average earnings are approximately **$134,000.00** per year.

c. Income from Pension, Profit Sharing, Retirement Plans, and Other Sources:

Mrs. Waters will have approximately $150,000.00 from which to draw at its current value, at a time when she is eligible to receive income from her retirement plans. Her retirement plans will continue to grow and provide her a nest egg upon retirement. Mr. Waters will have approximately $350,000.00 from which to draw at its current value, at a time when he is eligible to receive income from his retirement plans. His retirement plans will continue to grow and provide him a nest egg upon retirement.

(2) The relative education and training of each party;

Mrs. Waters is extremely bright, proficient, and is a Certified Public Accountant. Mrs. Waters graduated from Tennessee Technological University and received a Bachelor of Science Degree and graduated *(Cum Laude)* in June 1976. Mrs. Waters worked hard and passed her CPA exam without having a degree in accounting, which shows her high level of intelligence, and Mrs. Waters is perfectly capable of full-time employment, based upon her past educational background, work experience of being a Certified Public Accountant and Controller, as well as the preparation of business and personal tax returns, bookkeeping services, and being proficient in the use of current accounting and tax software.

Mr. Waters also received a Bachelor of Science Degree from Tennessee Technological University in 1975. He is also a Certified Public Accountant. He has a Series 7 and Series 66 License. He is employed as a Certified Public Accountant and provides financial services, accounting, bookkeeping, and other such services.

It does not appear that additional education and training under this section would be necessary for either party to improve their earning capacity to a "reasonable level".

(3) Duration of the marriage;

The parties were married December 6, 1975. The parties separated November 21, 2008. The parties will be divorced July 2010.

(4) Age and mental condition of each party;

Mr. Waters is 58 years of age and is in good mental condition. Mrs. Waters is 56 years of age and is in good mental health.

(5) ***Physical condition of each party, including, but not limited to physical disability or incapacity due to a chronic, disabling disease;***

Mr. Waters has the typical, physical issues that accompany his age and station in life, but he has no physical disabilities or incapacities that prevent him from being employed. Mrs. Waters is a diabetic, having been diagnosed shortly after the parties' marriage in 1976. Mrs. Waters' diabetes is under control and, as evidenced by her past work history, it does not prevent her from working or enjoying her life and physical activities. Mrs. Waters complains of intermittent muscular back pain.

(6) ***The extent to which it would be undesirable for a party to seek employment outside of the home because such party will be a custodian of the minor child of the marriage.***

This is not a consideration. The parties' son graduated from high school this past June 2010 and will be attending Middle Tennessee State University this fall.

(7) ***The separate assets of each party, both real and personal, tangible and intangible;***

The parties do not own any substantial separate assets.

(8) ***The provisions with regard to marital property as defined in T.C.A. §36-4-121;***

The parties will essentially receive an equitable, if not equal division of the assets in the parties' marital estate, based upon the undisputed value of all the assets and current liabilities listed in Mr. Waters' Proposed Division of Assets and Liabilities. Mrs. Waters will have very little, if any, ongoing debt to service. Mr. Waters, on the other hand, will have considerable personal and business debt with his business lines of credit and credit cards to service and pay, which have accumulated in the last several years, particularly since the separation of the parties, with Mr. Waters trying to maintain the financial status quo of the parties pending their divorce.

(9) ***The standard of living of the parties established during the marriage;***

The parties have lived very modestly during the course of their marriage. They have lived in a very modest home, have modest automobiles, and have not taken any extravagant trips, vacations, or have any high financial needs of any kind.

10. ***The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training, or increased earning power of the other party;***

Both parties assisted in raising their son with Mrs. Waters assisting, primarily, in the raising of the parties' son for a number of years. Mr. Waters paid for Mrs. Waters' education and training to become a Certified Public Accountant, which has greatly enhanced her earning power and earning capacity. Both parties also provided income to the joint marital estate during the marriage.

11. ***The relevant fault of the parties in cases where the Court, in its discretion, deems it appropriate to do so;***

It is believed that the parties will stipulate to grounds for divorce in this case, although at the filing of this Pre-Trial Brief, counsel for Mrs. Waters was "not sure" if her client would stipulate to grounds. Counsel has waited to file this Pre-Trial Brief to hear from counsel for the wife, but decided to go ahead and file this Pre-Trial Brief since he has not heard from counsel for the wife.

12. ***Such other factors, including tax consequences to each party as are necessary to consider the equity between the parties;***

The Court always considers the fact that the obligor will be paying any obligation with net income after reasonable expenses as a result of servicing debt and other such expenses.

ALIMONY - AMOUNT AND DURATION

Counsel for Mr. Waters submits that, taking into consideration Mrs. Waters' real need and Mr. Waters' ability to pay, plus considering the facts of this case, applied to the statutory factors for the award of alimony, Mrs. Waters is entitled to alimony.

The granting of rehabilitative alimony or transitional alimony and denial of periodic alimony in the form of alimony *in futuro* is becoming increasingly common in the Court of Appeals. *Garrett, Tennessee Practice, Volume 19, Tennessee Divorce, Alimony and Child Custody with Forms, Second Revised Edition, Chapter 13, Alimony, page 229 (2008).* Also see Bryant v. Bryant, 2010 WL 92539 (Jan. 11, 2010), annexed hereto as **Exhibit B**, wherein the

Court of Appeals recently reduced an award of rehabilitative alimony from five years (60 months) to two years (24 months).

This is a case of two people who are both professionals, who have college degrees, and both are Certified Public Accountants, with past employment experience. Both Mr. and Mrs. Waters have a good earning capacity, although, Mr. Waters' earning capacity is now somewhat higher because of the extent of his work history in the open market. There is no doubt that Mrs. Waters has the knowledge, skill, education, work experience, and capacity to earn a good living, assuming that she is motivated to do so.

Counsel for Mr. Waters acknowledges that this does fit the statutory scheme of transitional alimony for a short period of time to allow Mrs. Waters to transcend back into the workforce. This is not a case of rehabilitative alimony where, after a limited amount of time through additional training or education, Mrs. Waters is likely to increase her earning power. Transitional alimony is intended to be used to "close the gap" or "adjust to the realities of a divorce", but where rehabilitative alimony would not be appropriate. Audiffred v. Wertz (Tenn. Ct. App.)(Dec. 4, 2009).

The concept of rehabilitation is intended to allow a spouse to achieve, with reasonable effort, an earning capacity to have a standard of living comparable to that of the marriage or that of the other spouse after the divorce. Transitional alimony is payable for a determinant period of time and terminates upon the death of the payor and is non-modifiable. Therefore, Mr. Waters suggests that since Mrs. Waters is temporarily economically disadvantaged relative to Mr. Waters, pursuant to T.C.A. §36-5-121 (g), and since Mrs. Waters needs funds to help "bridge the gap" from the time of the divorce to a certain time in the future to soften the economic blow of divorce, as contemplated with transitional alimony, Mr. Waters suggests that Mrs. Waters receive $750.00 per month for a period of three (3) years or until Mrs. Waters' death or

remarriage, or Mr. Waters' death. The transitional alimony, pursuant to statute, will be non-modifiable, except by Order of the Court to the contrary, and shall receive the usual tax consequences and benefits under the IRS Code.

COBRA COVERAGE

Mrs. Waters is eligible to convert Mr. Waters' group medical coverage to an individual policy for herself under the Federal COBRA Statute, for a period of thirty-six (36) months. Counsel will introduce an exhibit at trial which will confirm Mrs. Waters' eligibility to convert the group policy to an individual policy under the Federal COBRA Statute, for a period of thirty-six (36) months, with the same exact coverage she is currently receiving, for approximately $250.00 per month.

ATTORNEY'S FEES

Each party should be responsible for the payment of their own attorney's fees. In the unlikely event that this Court deems it necessary for Mr. Waters to pay any portion of Mrs. Waters' attorney's fees, counsel for Mr. Waters would request a separate hearing on the reasonableness and necessity of the attorney's fees and would like to provide a defense to Mr. Waters being required to pay any of Mrs. Waters' attorney's fees.

COURT COSTS

It would appear to be reasonable to divide the Court costs in this cause between the parties.

GROUNDS FOR DIVORCE

As stated above, counsel has requested that the parties stipulate to grounds pursuant to T.C.A. §36-4-129, but he has not yet heard from counsel for Mrs. Waters as to whether or not she will agree to the stipulation. It is hopeful that some response would be made prior to today. Counsel for Mr. Waters has withheld listing the factual basis that will support Mr. Waters'

request for an absolute divorce on the assumption that grounds for divorce will be stipulated pursuant to T.C.A. §36-4-129.

Respectfully Submitted,

MICHAEL W. BINKLEY, #5930
Attorney for Frank A. Waters, Jr.
509 New Highway 96 West, Suite 201
Franklin, Tennessee 37064
(615) 550-2800

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished, via facsimile and U.S. Mail, to the following person, this _____ day of July, 2010.

Nancy K. Corley
424 Church Street, 29th Floor
Post Office Box 198525
Nashville, Tennessee 37219-8525

MICHAEL W. BINKLEY

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
FOR THE MIDDLE SECTION
AT NASHVILLE

NANCY CHANDLER SMALL,
Plaintiff/Appellee,

v.

Davidson Circuit
No. 06D-564

DANIEL WALLACE SMALL, JR.
Defendant/Appellant.

CA No. M2009-00248-COA-R3-CV

ON APPEAL FROM THE EIGHTH CIRCUIT COURT
FOR DAVIDSON COUNTY
THE HONORABLE CAROL SOLOMAN, PRESIDING

BRIEF OF THE APPELLEE, NANCY CHANDLER SMALL

ORAL ARGUMENT REQUESTED

Michael W. Binkley
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Suite 204
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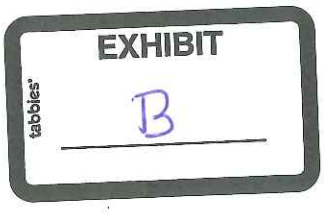

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ITS AWARD OF ALIMONY *IN FUTURO* AND ATTORNEY'S FEES.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN THE DIVISION OF MARITAL PROPERTY.

IV. WHETHER THE TRIAL COURT PROPERLY ENTERED THE FINAL DECREE *NUNC PRO TUNC*.

V. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FASHIONING THE PARENTING PLAN OR IN SETTING THE AMOUNT OF CHILD SUPPORT.

noting that he was "untruthful as to the time the adultery began". (Id. at 280). In fact, he was "untruthful on this and other issues" to such a degree that he could "not be believed under oath". (R. 280). Moreover, the court was "disturbed at the gross untruthfulness" of the Husband who "intentionally failed to list" on his Income and Expense Statement an additional Two Hundred Fifty Thousand Dollars ($250,000.00) that he received as income in 2008[6]. (R. 283).

The court found the Husband's earning capacity was Five Hundred Thousand Dollars ($500,000.00) a year and, to the extent that his actual income might be less, he was deemed voluntarily under-employed[7]. (R. 284). In regard to the Wife, the court stated that she had not worked out of the home for nineteen (19) years and concluded that, after refresher courses in nursing[8], her initial earning capacity would be Three Thousand Dollars ($3,000.00) a month. (R. 280, 293-294). The court awarded the Wife Eleven Thousand Dollars ($11,000.) a month as alimony until the house was sold and, thereafter, alimony *in*

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[6] "It was not until cross-examination of Mr. Small that the Court became aware of the fact that Mr. Small made an additional $150,000.00 for the first seven months of 2008, in addition to the salary he will receive ... from Stites & Harbison, PLLC. ... The Court took a short recess for Mr. Small to provide updated information for the Court to obtain the exact amount of money he had, in fact, generated from his private practice during the year 2008 ... After the recess the Court discovered ... that the additional amount was closer to $250,000.00 (not $150,000.00 as he had testified earlier), none of which was listed on his sworn Income and Expense Statement that he **swore** was true and correct during the course of his testimony and depositions." (R. 282) The Husband also did not list the additional $250,000.00 on his **sworn** proposed Parenting Plan, where he listed his income for child support purposes, showing only $150,000.00 a year as his income.

[7] The Husband did not seek **any** other employment opportunities other than Stites & Harbison, PLLC. (Tr. Vol. VIII at 97-98, L.22-25, 1-6).

futuro in the amount of Six Thousand Five Hundred Dollars ($6,500.00) a month[9] and her attorney's fees. (R. 293). Marital property was divided equally with each party receiving approximately Nine Hundred, Seventy Thousand Dollars ($970,000.00). (R. 290).

On November 25, 2008, the Husband filed a Motion to Alter and Amend the Findings of Fact and Conclusions of Law. (R. 384-388). He filed an Amended Motion to Alter and Amend on January 29, 2009, seeking to include several affidavits challenging Judge Soloman's Finding of Fact and Conclusions of Law. (R. 473-530). Judge Soloman struck these affidavits because they constituted new evidence that the Husband could have presented at trial. (Tr. Vol. IX at 45, L. 7-22; R. 629, para. 3, 5).

Several motions, including the Husband's Motion to Alter and Amend the Findings of Fact and Conclusions of Law and the Wife's Motion to Require the Husband to Meet His Financial Obligations, were set to be heard on January 30, 2009. (Tr. Vol. IX). Prior to that hearing, on the morning of January 30, 2009, Judge Soloman entered the Final Decree of Divorce that incorporated the court's Findings of Fact and Conclusions of Law. (R. 531-575). The court granted the Wife's Motion to Require the Husband to Meet His Financial Obligations by entering the Final Decree of Divorce *nunc pro tunc.* (Tr. Vol. IX at 11, L. 1-10; at 13, L. 8-18; R. 628-630). Judge Soloman stated that it was always the court's intent that the Husband continue to provide financial support to the Wife pending entry of the Final

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[8] The Husband was ordered to pay the cost of said refresher courses. (R. 293).

[9] The Wife shall receive Eleven Thousand Dollars ($11,000.00) a month until such time as the marital home is sold. (R. 293).

Decree of Divorce. (Id.). The Court denied the Husband's Motion to Alter and Amend, stating that he could file a Rule 59 Motion to have that matter heard. (R. 628-630). However, he could not rely upon new evidence in the form of affidavits. (Id.).

The Husband filed Notice of Appeal and Motion for Stay Pending Appeal on February 6, 2009. (R. 579-580; 582-627). He re-filed his Motion to Alter and Amend on February 26, 2009. (R. 659-713). Judge Soloman denied both motions following a hearing on February 27, 2009 and March 3, 2009, respectively. (Tr. Vol. XII; Supplemental Transcript, R. 1).

The appeal was docketed in this Court on April 21, 2009.

STATEMENT OF FACTS

The parties married in August 1987 when the Wife was thirty-six (36) years old and the Husband was thirty-four (34) years old. (R. 1). It was the Husband's third marriage and the Wife's first. (Id.). Having children was important for both parties and equally important was having a traditional family home with the Wife staying at home as mother and homemaker while the Husband supported the family. (Tr. Vol. VII at 39, L. 9-20; at 40, L. 6-11). They followed through on this agreement. Soon after the parties' marriage, the Wife was laid off as Director of Education at West Side Hospital. She abandoned her career at that time[10] because the parties realized that, if they were going to have children, they would have to start right away. (Tr. Vol. VII at 39, 13-25). The Wife had a miscarriage that first year. (Id.). In fact, in the first five years of marriage, the Wife had five pregnancies and five surgeries; two DNC's, 2 C-Sections, and a cerclage. (Tr. Vol. VII at 43, L. 4-13). Their son, Evan, was born in 1989 and their daughter, Lindsey, was born in 1992. (R. 1).

[10] However, the Wife had an outstanding commitment with Project Hope which she fulfilled while the parties followed their plan to have a family. (Tr. Vol. VII at 40, L. 1-25).

Throughout the course of the marriage, the Wife was the primary, if not exclusive, caretaker for both children, as well as homemaker and financial manager for the family. (Tr. Vol. VII at 41, L. 5 through 46, L. 12). Evan was a high maintenance baby and, as noted, she struggled through several unsuccessful pregnancies during this time. (Id.; Tr. Vol. VII at 43, L. 4-13). When the children began school, she was very involved in their activities; volunteering for classroom duties and committees, making costumes, driving for field trips, reading to the children, attending all of their activities, and providing transportation. (Id.). She was also the homemaker; cooking, doing laundry, and keeping the house in order. (Tr. Vol. VII at 48, L. 7 through 50, L. 15). As financial manager, she paid the family bills and carefully managed and budgeted for many years, in such a way that the Husband's Two Hundred Thousand Dollar ($200,000.00) pre-marital debt and a house mortgage were paid off. (Tr. Vol. VII at 50, L. 16 through 54, L. 10; at 57, L. 7-10). Additionally, she consistently supported the Husband in his business endeavors; entertaining clients and either accompanying the Husband to business events or taking care of the children so that he could attend. (Tr. Vol. VII at 60, L. 14 through 65, L. 13). In the last few years prior to the parties' separation in March, 2006, the Husband asked the Wife to attend less frequently, scheduling late afternoon or evening business meetings or going out for drinks with clients[11]. (Tr. Vol.

[11] One client was the Husband's ongoing mistress to whom he gave an Eighteen Hundred Dollar ($1,800.00) watch in 2004. (Tr. Vol. VIII at 63, L. 6-24; at 130, L. 1-16). He testified that the affair did not begin until July 2005 when he was recovering in the hospital from bypass surgery and that the watch was simply a gift for a "client", not a girlfriend. (Id.; Tr. Vol. VIII at 45-46, L. 5-25, 1-15). The court did not believe this statement: "I wish he would have told me the truth about

VII at 65, L. 13-16).

The Husband's principle role was as breadwinner for the family. In this regard, he was not very active at all in the children's lives as they were growing up. (Tr. Vol. VII at 49, L. 23-25). Although he attended parent-teacher conferences during his son's middle school years and participated in scouting, he became less involved during the high school years. (Tr. Vol. VII at 42, L. 13-22; at 46, L. 13 through 48, L. 6). Specifically, he regularly worked until nine or ten o'clock in the evening, and sometimes worked as late as one a.m. (Tr. Vol. VII at 49, L. 1-4; at 148, L. 15-22). When he came home from work, he was uninterested in the family events of the day, just wanting to be left alone to read his book or watch television. (Tr. Vol. VII at 145-146, L. 3-25, 1-8). Nor would he sleep with the Wife. (Id.). He preferred the couch. (Id.). As a result, sexual relations were rare. (Id.).

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the date the affair began. I don't believe him on his dates. ... In '04, he says this woman came on as a client, and he bought her an $1,800 watch. He had bought other clients shotguns, but an $1,800 personal watch. I mean, that is so different. How many clients come to the hospital to see their attorney? We are not fools. He was having the affair long before, but he chose to lie to me." (Tr. Vol. X at 38-39, L. 11-25, 1).

The Husband suffered a cardiac event requiring surgery in March 2005 from which he quickly recovered[12]. (Tr. Vol. VII at 130-131, L. 21-25, 1-19; at 132-133, L. 22-25, 1-22). He mentioned divorce to the Wife in November 2005. (Tr. Vol. VII at 149, L. 18-25). He told the Wife that he did not love her anymore and, when asked if "there (was) someone else", he responded "that's not how I do things". In fact, unknown to the Wife when he made this cryptic statement, he was having a relationship with a married woman. (Tr. Vol. VII at 152, L. 16-20). Since the Husband lied to the Wife about his ongoing affair, she "truly did not know what the problem was" and tried valiantly to save the marriage[13]. (Tr. Vol. VII at 154, L. 10-21). She urged the Husband, unsuccessfully, to go to counseling with her on several occasions. (Id.). The Wife did not discover that the Husband had, in fact, been having an ongoing affair during this marriage until January 3, 2008 when the Husband admitted the affair in his deposition despite the fact that he consistently lied to the Wife when questioned about this issue, stating, "That's not how I do things." (Tr. Vol. VII at 151, L. 9-13; R. 28).

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[12] The Husband earned more money in the two years following his cardiac event than he had in the last sixteen years, save one. (Ex. 25). He worked harder than he had ever worked before during this period. (Tr. Vol. VIII at 98, L.11-14).

[13] Despite the sexual estrangement of the parties, the Wife believed that they had a good relationship and a good marriage. (Tr. Vol. VII at 154, L. 2-8). Of course, the Wife wished that the Husband would sleep in their bed and that they would go to a movie or dinner once in a while. (Tr. Vol. VII at 145-146, L. 19-25, 1-7; at 148, L. 2-14).

The Husband left the marital home in March 2006 and eventually moved into the same apartment complex where his mistress resided. (Tr. Vol. VIII at 47, L. 19-21; at 131, L. 15-20). He did not make any arrangements with the Wife to see his teenage daughter, Lindsey, and in fact, sadly, spent almost no time with her for the rest of 2006 and **all** of 2007, even after being encouraged to do so by the Wife[14]. (Tr. Vol. VII at 72, L. 20 through 75, L. 17). However, totally inconsistent with his negligible time with his daughter for the two prior years, in the middle of trial in 2008, the Husband filed a Parenting Plan seeking equal time with his daughter, a "180 degree" change from his past behavior. (Tr. Vol. VIII at 143, L. 6-15; R. 112-122). Judge Soloman found the change "very suspect" and likely motivated by concerns about child support. (Tr. Vol. VIII at 133, L. 8-18).

Prior to the Husband leaving the home, he gave the Wife Fifteen Thousand Dollars ($15,000.00) a month to pay the bills and run the home. (Tr. Vol. VII at 55-56, L. 15-25, 1-6). After the Husband moved out of the home in March 2006, he reduced this to Eleven Thousand Dollars ($11,000.00) a month. (Id.). Despite the issuance of a restraining order prohibiting the transfer of assets, and unbeknown to the Wife, the Husband began the process of buying a new home until the Wife's attorney discovered the violation and informed the Husband's attorney that such a transfer of marital assets would violate the restraining order.

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[14] After leaving the marital home in March 2006, the Husband did not have an overnight visit with his daughter until June, and then again at Thanksgiving. (Tr. Vol. VII at 73, L. 10 through 75,L. 17). In 2007, **he had no overnight visits with his daughter**. (Id.). The son was away at school. (Id.).

(Tr. Vol. VIII at 141-142, L. 10-25, 1-9). Nonetheless, in violation of the court's Temporary Restraining Order, the Husband purchased a sports car for Fifteen Thousand Dollars ($15,000.00) in December 2007 and then sold it in April 2008 at a Seven Thousand Dollar ($7,000.00) loss. (Tr. Vol. VIII at 135-136, L. 20-25, 1-17; at 138, L. 12-13). In December 2008, he paid Forty Three Thousand Dollars ($43,000.00) cash for a brand new 2008 Lexus sedan. (Tr. Vol. VIII at 136, L. 18-22). A fourth violation of the restraining order occurred when the Husband encumbered a marital asset (i.e., a Certificate of Deposit) for Forty Thousand Dollars ($40,000.00). (Tr. Vol. VIII at 138-139, L. 23-25, 1-19). He used the funds to pay his son's college tuition, to repay himself a loan ($10,000.00) and for personal expenses ($5,000.00), in a year when the Husband made a tremendous income and had no need to borrow money or encumber marital assets, all in violation of the court's Temporary Restraining Order. (Id.).

In August 2007, the Wife had to file a motion compelling the Husband to resume the prior level of support when the Husband contributed only Five Thousand Dollars ($5,000.00). (R. 14-15). On January 23, 2009, the Wife had to file another motion to compel support when, following the announcement of Findings of Fact and Conclusions of Law, **the Husband made no support payments for four (4) months**[15]. (R. 465-466).

The Husband is a *cum laude* graduate of Harvard University and earned his law degree from Vanderbilt School of Law in 1978. (Tr. Vol. VIII at 91-92, L. 19-25, 1-7).

[15] The Husband earned $1.1 million in 2007. (Ex. 25).

Following his graduation in 1978, he obtained employment with Farris, Evans & Warfield[16] where he had clerked for two (2) years during law school. (Tr. Vol. VII at 241, L. 15-22). He worked at this firm for ten (10) years and developed expertise in the banking field. (Tr. Vol. VII at 241-242, L. 23-25, 1-2; at 243, L. 20-21). In fact, in 1985, he accepted a position as in-house counsel for one of his clients, a bank holding company, and stayed in that position for fourteen (14) months. (Id.).

After a stint with another law firm, Harwell, Martin & Stiegel, the Husband went into private practice in 1994, specializing in banking law and securities work. (Tr. Vol. VII at 242, L. 15 through 244, L. 2; at 53, L. 9-12). There are only four or five lawyers in the entire State who are qualified for this lucrative practice.[17] (Tr. Vol. VIII at 172, L. 17-21). The Husband "singled himself out as one of the premier attorneys" in the field and has an "excellent reputation."[18] (R. Vol. VIII at 201, L. 11-21). However, according to Jason Ricciardi, a close colleague and friend of the Husband, the Husband was less marketable after he suffered his cardiac event in 2005 because he was not with a large firm to back him

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[16] The law firm later changed names to Farris, Warfield & Kanaday. (Tr. Vol. II at 241, L. 21-22).

[17] The witness, Kathryn Edge, was disqualified from testifying about the Husband's loss of income or employment potential but was allowed to testify as to the type of work and the banking industry in which she and the Husband both practiced. (Tr. Vol. VIII at 175, L. 13-22; at 176, L. 19-21; at 177, L. 22-23).

[18] Objections were raised and sustained as to the witnesses testifying to the effect of the Sarbanes-Oxley Act on attorneys and his report on the Husband's practice but not as to the Husband's reputation in the banking community of which the witness was a close part. (Tr. Vol. VIII at 192, L. 13-20; at 195, L. 19-23; at 199, L. 3 through 202, L. 10).

up when necessary, although he continued to have and develop a very lucrative practice in this area. (Tr. Vol. VIII at 210, L. 23-25). In fact, in the three years prior to the divorce, after the Husband's surgery, the Husband experienced his best earnings years ever in his practice, contrary to Mr. Ricciardi's assertions.

In 2002, Congress passed the Sarbanes-Oxley Act. (Tr.Vol. VII at 244, L. 11 through 247, L. 12). The Act required new accounting practices, oversight practices, and additional filings for financial institutions. (Id.). The increase in the cost of doing business resulted in the privatization of some small banks[19] and mergers of other banks. (Tr. Vol. VIII at 173, L. 1-18). According to Kathryn Edge, a colleague and friend of the Husband, when small banks go private, the specialized lawyers such as the Husband make more money initially[20] because of the transitional work involved. (Tr. Vol. VIII at 179, L. 7-20). However, they eventually either make less money or lose the client to local counsel once the process is completed. (Id.). On the other hand, for those banks that remain public, there are increased fees. (Id.). Ms. Edge testified that the banking industry is in somewhat of a flux but she expects a recovery soon, "in the next year or two at the outside". (Tr. Vol. VIII at 172, L. 5-7; at 173, L. 1-7; at

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[19] Kathryn Edge testified that she knew of eight to ten banks that had gone private since 2002. (Tr. Vol. VIII at 178, L. 19-24).

[20] The Husband earned $1.1 million in 2007 and $427,000.00 in 2006. (Ex. 25). He received at least Two Hundred Fifty Thousand Dollars ($250,000.00) in accounts receivable from his solo practice in the first few months of 2008, which the court found that he intentionally failed to disclose until brought out on cross-examination. (Tr. Vol. VIII at 108-109, L. 17-25, 1-14; at 127, L. 13-18). Yet, he did not report this income on his **sworn** Income and Expense Statement and did not report this income on his **sworn** proposed Parenting Plan where he swore his income was only $150,000.00. (Id.)

182, L. 7-8). (Ms. Edge testified on July 17, 2008.)

The Husband testified that, beginning in the summer of 2007, he began "to see the writing on the wall" in regard to his solo practice. (Tr. Vol. VII at 249-250, L. 25, 1-20). He stated that he was losing clients through privatization and mergers. (Tr. Vol. VII at 247, L. 13 through 249, L. 8).

Beginning in 2004, the Husband had some very informal discussions with his former law firm, Farris, Warfield & Kanaday (now Stites & Harbison, PLLC), about returning to the firm. (Tr. Vol. VII at 249-250, L. 25, 1-17; Vol. VIII at 29, L. 6-15). However, later in July 2007, Stites & Harbison, PLLC negotiated a "letter of understanding" with the Husband that was signed on February 29, 2008 (one month after the Husband's request to continue the trial and two months before the resetting of the trial). (Ex.19; Tr. Vol. VIII at 18, L. 2-9). The Husband transferred his practice to Stites & Harbison, PLLC as an "at will" employee. (Ex. 20). Judge Soloman surmised that the Husband would develop a "huge banking industry" at Stites & Harbison, PLLC. (Tr. Vol. VIII at 177, L. 19-20). Inexplicably, the Husband made no attempts to seek a position with any other law firm, nor did he investigate any other employment opportunities that would yield a higher income, instead, he voluntarily accepted a ninety percent (90%) pay cut at Stites & Harbison, PLLC just prior to his divorce trial. (Tr. Vol. VIII at 97-98, L. 22-25, 1-6).

Under the letter of understanding, the Husband brought his entire staff with him; another lawyer, a secretary, and a law clerk. (Tr. Vol. VIII at 142, L. 10-25). Stites &

Harbison, PLLC agreed to pay each staff member's salary as well as the Husband's unexpired office and copier lease and his malpractice insurance. (Tr. Vol. VIII at 18-19, L. 4-25, 1-4). Although the Husband claims an annual "salary" of only One Hundred Fifty Thousand Dollars ($150,000.00)(Ex. 19), and contrary to his claims of dire straits in his law practice, he nonetheless collected a half million dollars ($500,000.00) in accounts receivables in the **last month** of the taxable year in 2007, between Two Hundred Fifty Thousand Dollars ($250,000.00) and Three Hundred Fifty Thousand Dollars ($350,000.00) in 2008 prior to signing on with Stites & Harbison, PLLC. (Tr. Vol. VIII at 106-107, L. 17-25, 1-4; at 108, L. 17-23; at 117, L. 16 through 119, L. 25; at 125-126, L. 21-25, 1-24). As noted, the Husband declared his income as One Hundred Fifty Thousand Dollars ($150,000.00) and intentionally failed to disclose an additional Two Hundred Fifty Thousand Dollars ($250,000.00) on his **sworn** Income and Expense Statement, as well as the income portion in his **sworn** proposed Parenting Plan. (Tr. Vol. VIII at 128, L. 1-9).

The Wife has not worked outside the home for nineteen (19) years. Prior to her marriage, she worked in the nursing profession and, at that time, was well trained. (Tr. Vol. VII at 33, L. 19 through 35, L. 3). She obtained a Masters Degree in Nursing from Vanderbilt in 1973 and worked in the intensive surgical care unit at Vanderbilt Hospital for a year. (Id.; Tr. Vol. VII at 35-36, L. 7-25, 1-18). After that, she accepted a position as critical nurse specialist for four or five years and was a full-time faculty member in the School of Nursing from 1979-1985. (Id.; Tr. Vol. VII at 36-37, L. 19-25, 1-13). From 1985

to 1987, she was the Director of Education at West Side Hospital, a non-management position. (Tr. Vol. VII at 37-38,L. 14-25, 1-6). However, she was laid off when a new nursing director reorganized the staff. (Id.). This conveniently coincided with her recent marriage and the decision between the Wife and the Husband to start a family immediately. (Tr. Vol. VII at 39, L. 9-25)

In 2006, the Wife reactivated her nursing license. (Tr. Vol. VII at 156, L. 1-5). However, the Wife does not want to return to work until her daughter, Lindsey, a freshman at Harpeth Hall, graduates. (Tr. Vol. VII at 159, L. 6-16). This is what the parties agreed at the time of their marriage. (Id.). Moreover, Lindsey is having problems. Her grades have declined significantly at Harpeth Hall[21] and, after being diagnosed with a form of autism, Asperger's Syndrome, she will be attending Currey Ingram Academy. (Tr. Vol. VII at 29-30, L. 24-25, 1; Vol. VIII at 16, L. 7-8; at 54, L. 13-25; at 56, L. 2-6). Judge Soloman noted that it will be very difficult for the Wife to "catch up" on twenty-one (21) years of advances in medicine and nursing, likening it to "going back to school all over again." (Tr. Vol. X at 48, L. 5-23).

In the Findings of Fact and Conclusions of Law (attached with the Final Decree of Divorce as Appendix A), the trial court found that the Husband was not a credible witness. He "was untruthful as to the time the adultery began" and was "untruthful (on) other issues.

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[21] Lindsey tested as gifted and was an A student during her years at Harding Road Academy. (Tr. Vol. VII at 29, L. 12-25, at 31, L. 4-21). She was diagnosed with Attention Deficit Disorder when she was in the 4th grade. (Id.).

In fact, (the court found) Mr. Small to be so untruthful as to not be believed under oath." (R. 280). Judge Soloman was also "disturbed at the gross untruthfulness presented in the (Husband's) sworn Income and Expense Statement and testimony" where the Husband "intentionally failed to list ... the additional income of $250,000 ...". (R. 283). She did not believe his explanation for this omission. (Id.). She questioned his character based on the fact that he violated the standard Restraining Order on four (4) different occasions. (R. 284).

The court further found that, despite earning substantial income during the course of his lengthy and financially lucrative legal career, "just prior to the divorce trial, Mr. Small voluntarily accepted a much lesser paying job as an employee of Stites & Harbison, PLLC law firm with a substantially reduced income of $150,000 a year as his salary." (Id.). Additionally, "it was only after the divorce was coming to trial" that the Husband considered reducing his practice based on his "medical condition." (R. 281). He had worked without "any physical limitations following his 2005 surgery" and "continued to vigorously maintain a thriving law practice". (Id.). "There was no legitimate reason ... for Mr. Small to voluntarily reduce his earning capacity from a high of $1.3 million in 2007 to what Mr. Small now says is his "earning capacity" of $150,000.00 a year. (Id.). After carefully reviewing all of the pertinent facts, including the Husband's years of expertise as an attorney in the banking industry, his substantial income, his educational background and many other factors, Judge Soloman found the Husband's earning capacity to be Five Hundred Thousand Dollars ($500,000.00) a year. (R. 283).

The trial court recognized that the Mother would require an intense refresher course in order to return to work, and expected her to do so within a year with an earning capacity of Three Thousand Dollars ($3,000.00) a month to start. (R. 293). The court awarded the Wife Six Thousand Five Hundred Dollars ($6,500.00) a month as alimony *in futuro* and ordered the Husband to pay for nursing refresher courses and related expenses as transitional alimony. (Id.). The Wife required all the funds that she was to receive in property division for her "security now and in later years" and thus awarded her attorney's fees in the amount of Ninety Eight Thousand One Hundred Twenty Five Dollars ($98,125.00) as alimony *in solido*. (Id.). Basing his income of Five Hundred Thousand Dollars ($500,000.00) a year, the court awarded child support in the amount of Two Thousand One Hundred Dollars ($2,100.00) a month for the parties' daughter. (R. 575).

The Husband filed a Rule 7 appeal and this Court modified the alimony obligation to Two Thousand One Hundred Dollars ($2,100.00) a month and stayed the award of attorney's fees pending appeal.

INTRODUCTION TO ARGUMENT

The standard of review for virtually all of the issues contained in this appeal is the abuse of discretion standard.

> The fact that these decisions are characterized as discretionary reflects the recognition that they involve a choice among acceptable alternatives. (citation omitted). It also indicates that **the appellate courts will not intervene with a trial court's decision simply because the trial court did not choose the alternative that the appellate court would have chosen**. (citation omitted).
>
> Discretionary decisions are not entirely immune for appellate scrutiny but are subjected to less rigorous appellate scrutiny. (citation omitted). Discretionary decisions must take applicable law into account and must be consistent with the facts before the court. (citation omitted). Thus, **appellate courts will set aside a trial court's discretionary decision only when the decision is based on a misapplication of the controlling legal principles or on a clearly erroneous assessment of the evidence**. (citation omitted).
>
> When reviewing a trial court's discretionary decision, **appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision**. (citation omitted). Appellate courts should permit a trial court's discretionary decision to stand if reasonable judicial minds can differ concerning its propriety. (citation omitted).

Overstreet v. Shoney's, Inc. 4 S.W.3d 694, 708-709 (Tenn. App. 1999)(emphasis supplied).

The over-arching question in this appeal is whether Judge Soloman made a clearly erroneous assessment of the evidence that led her to believe that the Husband could not be believed under oath. In considering this, the Court should look at the totality of

circumstances. The Husband earned $1.1 Million Dollars in 2007, the year that the Husband states he was "forced" to close his solo practice because of a change in the law that occurred in 2002, five years earlier. The uncontradicted evidence from the Husband's tax returns and his own testimony clearly shows that his best earning years occurred **after** the change in the law. In fact, he earned an average of Six Hundred Twenty Thousand Seven Hundred Twenty Eight Dollars ($620,728.00) during the three (3) years prior to the divorce. Yet, he said he was "lucky" to find a job earning One Hundred Fifty Thousand Dollars ($150,000.00) a year. (Tr. Vol. VIII at 98, L. 9-10).

Even though the Husband testified that he was losing Eight Hundred Thousand Dollars ($800,000.00) in business due to the change in the law (Tr. Vol. VIII at 31, L. 6-7), he attempted to purchase a very expensive new home, bought a Fifteen Thousand Dollar ($15,000.00) sports car, and paid Forty Three Thousand Dollars ($43,000.00) for a brand new Lexus sedan automobile at a time that he was purportedly winding down his failing law practice. In contrast to these expenditures, he reduced the Wife's support from Fifteen Thousand Dollars ($15,000.00) a month to Eleven Thousand Dollars ($11,000.00) a month after he left the marital home and depleted marital assets to pay for educational and business expenses that he normally paid from his income (i.e., encumbering Certificate of Deposit). During cross-examination of the Husband, he admitted that just prior to trial, he paid all of his bank loans and his credit card debts, but not his Wife's. (Tr. Vol. VIII at 145, L. 6-18). He made absolutely no effort to pay off any of the Wife's debt.

He explained his four (4) separate violations of the Temporary Restraining Order by saying that he did not think it applied to him and his purchases on the eve of his so-called failing law career. The Husband further explained that he did not think that the Two Hundred Fifty Thousand Dollars ($250,000.00) in income from his solo law practice received in 2008 needed to be listed on his **sworn** Income and Expense Statement. It was all just a mistake. The Husband also failed to list his additional income of Two Hundred Fifty Thousand Dollars ($250,000.00) on the income section of his **sworn** proposed Parenting Plan. The Husband chose only to list his salary of One Hundred Fifty Thousand Dollars ($150,000.00) from Stites & Harbison, PLLC. He was indifferent to his fifteen year old daughter until the eve of trial and then sought equal custodial time to reduce his child support obligation.

The Husband continued the trial date until he had signed a "letter of understanding" with his old law firm at an annual salary of One Hundred Fifty Thousand Dollars ($150,000.00), a ninety percent (90%) decrease from his 2007 income. Despite the knowledge and the fact that he had a Five Thousand Dollar ($5,000.00) a month mortgage to satisfy, college tuition for his son, tuition for his daughter at the most expensive private school in the city (Currey Ingram) which the Husband fully supported, and a Wife and child to support, as well as his other monthly obligations, he chose not to interview with any other law firm nor did he seek **any** other employment opportunity in any way whatsoever that may have yielded an income commensurate with his education, experience, and intelligence.

It is in this context, with the added appreciation and the reality that Judge Soloman had the benefit of observing the Husband on the witness stand, that this Court should consider whether it was reasonable for Judge Soloman to reject the Husband's testimony and conclude that he had intentionally reduced his income and that he had the capacity to earn Five Hundred Thousand Dollars ($500,000.00) a year.

ARGUMENT

I. JUDGE SOLOMAN'S CREDIBILITY ASSESSMENT IS WELL-GROUNDED IN THE RECORD AND SHOULD NOT BE SECOND-GUESSED BY THIS COURT

The Husband argues that "the lynchpin of the trial court's credibility determination was the conclusion that Mr. Small lied to the court on his income and expense statement." (Husband's Brief at p. 36). The Wife respectfully disagrees. Judge Soloman's assessment of the Husband's credibility was based on a myriad of factors, not only his failure to disclose Two Hundred Fifty Thousand Dollars ($250,000.00) that he received in 2008 on his **sworn** Income and Expense Statement, as well as his **sworn** proposed Parenting Plan, where he also listed only his $150,000.00 salary from Stites & Harbison, PLLC. While some of these other factors are clear from the record, a great deal of deference must be afforded to Judge Soloman's credibility assessment because **she observed first-hand the Husband's manner and demeanor in testifying**.

> Where the issues in a case turn upon the truthfulness of witnesses, the trial judge as trier of fact in a nonjury case has the opportunity to observe the witnesses and their manner and demeanor while testifying and is in a far better position than this

> Court to decide that issue. The weight, faith, and credit to be given any witness' testimony lies in the first instance with the trier of fact. The credibility accorded will be given great weight by the appellate court.

Scarbrough v. Scarbrough, 752 S.W.2d 94, 96 (Tenn. App. 1988).

As stated in Mitchell v. Archibald, 971 S.W.2d 25, 29 (Tenn. App. 1998):

> One of the most time-honored principles of appellate review is that trial courts are best situated to determine the credibility of the witnesses and to resolve factual disputes hinging on credibility determinations. (citations omitted). Accordingly, appellate courts routinely decline to second-guess a trial court's credibility determinations unless there is concrete, clear, and convincing evidence to the contrary. (citations omitted).

The Husband has the burden of showing that the evidence preponderates against the findings of the lower court. Capital City Bank v. Baker, 442 S.W.2d 259 (Tenn. App. 1969). On the issue of credibility, such evidence must be clear, concrete and convincing evidence, other than oral testimony that contradicts the trial court's findings. Tennessee Valley Kaolin Corp. v. Perry, 526 S.W.2d 488 (Tenn. App. 1974).

The Husband cannot meet this burden.

*There is no documentary evidence to contradict the trial judge's belief that the Husband lied about when his adulterous affair began. (Tr. Vol. X at 38-39, L. 20-25, 1).

*There is no documentary proof to contradict the trial judge's belief that the Husband lied when he claimed the Twenty Five Thousand Dollars ($25,000.00) received from Steve Maggart and used to purchase Bank of the South stock in the Husband's name was held in trust for Mr. Maggart's grandchild. (Tr. Vol. VIII at 143-144, L. 16-25, 1-24; R. 291).

*There is no documentary basis to support the Husband's contention that he did not know he was violating the Temporary Restraining Order by first trying to buy another home for himself, then purchasing a sports car for himself, then selling the sports car, then buying a brand new Lexus sedan with Forty Three Thousand Dollars ($43,000.00) cash, and then encumbering a marital Certificate of Deposit with a Forty Thousand Dollar ($40,000.00) lien, all in total disregard of the court's Temporary Restraining Order. (Tr. Vol. VIII at 136-137, L. 20-25, 1-7; at 138, L. 12-13).

*There is no documentary evidence to clearly and convincingly contradict the fact that the Husband lied in listing personal property in his possession[22]. (Tr. Vol. VIII at 150, L. 21 through 152, L. 19).

*There is no plausible excuse for the Husband's pretended ignorance as to the amount of accounts receivable he collected in the last month of the year of divorce stating first that he did not remember how much, then saying it was several hundred thousand dollars, and then agreeing that it could have been a half million dollars. (Tr. Vol. VIII at 106-107, L. 17-25, 1-5).

* There is no documentary proof to contradict Judge Soloman's conclusion that the grand piano was a gift to the Wife, contrary to the Husband's testimony, especially when the

[22] Husband made some vague mention of "some" of the items that Husband failed to disclose that might be contained in a generic description in the Husband's Interrogatory responses. (Tr. Vol. VIII at 162, 163, L. 14-25, 1-4). This is similar to his excuse for not disclosing his true income by explaining that he provided his bank statements and all deposits were on the statement. (Tr. Vol. X at 64, L.7-23).

Husband listed it as "Nancy's Piano" in his Interrogatories and in his list of short-term liabilities. (Tr. Vol. VIII at 149-150, L. 6-25,1-14, R. 290).

* There is no reasonable explanation for the Husband's actions as set forth in the Introduction to Argument.

Based upon her first-hand observation of the Husband, Judge Soloman found his explanation of why he failed to list the Two Hundred Fifty Thousand Dollars ($250,000.00) that he received in 2008 on his sworn Income and Expense Statement to be deceitful and his failure to disclose the same income on his sworn proposed Parenting Plan for the calculation of his child support obligation. (Tr. Vol. X at 65, L.3-8).

Based upon the foregoing, the Wife submits that Judge Soloman's assessment that the Husband cannot be believed under oath is fully and clearly supported by the record both in terms of his subterfuge and deceit at trial and actions pending the divorce that display a questionable character. There are important policy reasons for the time-honored deference to a trial judge's assessment of witness credibility.

> ... There are, however, other reasons for this principle. As the United States Supreme Court has observed:
>
> > The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to

> concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. Anderson v. City of Bessemer City, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

> The advisory committee note to Fed.R.Civ.P. 52(a), which requires that deference be given to the trial judge's opportunity to judge the credibility of witnesses, lists three important policy concerns behind the rule: (1) upholding the legitimacy of the trial courts to litigants; (2) preventing an avalanche of appeals by discouraging appellate retrial of factual issues, and (3) maintaining the allocation of judicial authority. The policy underpinnings of Fed.R.Civ.P. 52(a) advance the public's interests in stability and judicial economy, and we view them as equally important to Tennessee's citizens and courts.

Mitchell v. Archibald, 971 S.W.2d 25, 29 -30 (Tenn. App. 1998)

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD OF ALIMONY AND ATTORNEY'S FEES

Judge Soloman awarded the Wife alimony *in futuro* in the amount of Six Thousand Five Hundred Dollars ($6,500.00) a month, transitional alimony to pay for re-training in the nursing profession, and attorney's fees in the amount of Ninety Eight Thousand One Hundred Twenty Five Dollars ($98,125.00) as alimony *in solido.* (R. 680, para. 16-17; 683, para. 33). The Wife submits that the evidence fully supports the award of alimony under the unique facts of this case and that the trial court acted well within its discretion in making such award. In this regard, a court's decision regarding the award of alimony, its type and duration, is heavily fact-dependent and "(t)here are no hard and fast rules" that are applicable to the issue. Crain v. Crain, 925 S.W.2d 232, 233 (Tenn. App. 1996). Thus, the trial court's discretion is broad.

> Trial judges have broad discretion to determine whether spousal support is needed and, if so, its nature, amount, and duration. (citations omitted). Appellate courts are generally disinclined to second-guess a trial judge's spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes. (citations omitted).

Kinard v. Kinard, 986 S.W.2d 220, 234 (Tenn. App. 1998).

As set forth below and in the Statement of Facts, supra, the Husband has the ability to pay and the Wife clearly has the need for the level and type of support fashioned by the trial court. Additionally, the statutory factors set forth in T.C.A. § 36-5-121(I) support Judge Soloman's discretionary decision. Specifically, the Husband rejected the Wife's attempts to save the marriage and was clearly at fault in causing the divorce. (Tr. Vol. VII at 154, L. 2-21). The Wife was an equal, if not greater, contributor to the marriage as mother, homemaker, financial manager, and supporter of the Husband's career. (Tr. Vol. VII at 41, L. 5 through 46, L. 12; at 48, L. 7 through 54, L. 10; at 57, L. 7-10; at 60, L. 14 through 65, L. 13). She is fifty-eight (58) years old, out of the workforce for two decades, needs intensive re-training in her profession, and has developing medical problems that could have a serious impact upon her ability to work. (Tr. Vol. VII at 25, L. 13-14, at 236-237, L. 14-25, 1-21; at 32-33, L. 11-25, 1-18; Vol. X at 48, L. 19-23). She has nowhere near the earning capacity of the Husband or the ability to accumulate assets in the future.

A. Earning Capacity/Voluntary Underemployment

The Husband argues that the record does not support that trial court's finding that the Husband is voluntarily underemployed. (Husband's Brief at pp. 44-47). In a similar vein, he challenges the trial court's imputation of an earning capacity of Five Hundred Thousand Dollars ($500,000.00) a year for purposes of setting child support. (Husband's Brief at p. 63). These arguments rest upon one assumption that the trial court rejected; to wit, that the Husband was "forced" to take the job with Stites & Harbison, PLLC with a resulting annual

salary of One Hundred Fifty Thousand Dollars ($150,000.00). (Husband's Brief at p. 45). This "salary" is a ninety percent (90%) reduction from his 2008 income. (*R. 670). It represents a seventy-six percent (76%) reduction from his average income of Six Hundred Twenty-One Thousand Dollars ($621,000.00) for the three (3) years prior to trial. (Ex. 25).

Even in the absence of the trial court's fully supported finding that the Husband "cannot be believed under oath" (R. 669), the evidence supports Judge Soloman's finding as to the Husband's earning capacity and willful underemployment.

> Whether a party is willfully and voluntarily underemployed is a fact-intensive inquiry, and the trial court has considerable discretion in its determination. (citation omitted). In making its determination, the trial court must consider the party's past and present employment **and whether the party's choice to accept a lower paying job was reasonable and made in good faith**. (emphasis supplied)

DeWerff v. DeWerff, 2005 WL 2104736, 4 (Tenn. App.)

The Husband did not dispute the fact that he was one of only four or five attorneys in the entire State qualified to practice the lucrative field of law in which he specialized. (Tr. Vol. VIII at 172, L. 17-21). He did not dispute that he had earned an "excellent reputation" in the banking community. (Tr. Vol. VIII at 201,L. 11-21). He did not state that he was "closing" his practice and leaving the field in which he was described as "one of the premier attorneys". (Id.). Instead, he was **transferring** his practice and entire staff to a large law firm that cured the purported problem of being a sole practitioner in the post-Sarbanes-Oxley Act world. (Tr. Vol. VII at 248, L. 2-12). In this regard, he testified that the other attorneys

options? (Tr. Vol. VIII at 97-98, L. 22-25, 1-6; R. 670). The answer is: to artificially reduce his support obligations.

The child support guidelines offer specific criteria for determining whether an obligor is willfully underemployed. Such criteria are equally relevant to the alimony context. Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(2)(iii), provides, in relevant part:

(I) The parent's past and present employment;

(II) The parent's education, training, and ability to work;

* * *

(IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile),

In Walker v. Walker, 2005 WL 229847 (Tenn. App.), the Court made clear that the analysis for willful or voluntary underemployment is essentially the same for alimony and child support purposes.

> The courts have already confronted circumstances in which a divorced spouse seeks to avoid his or her obligations to pay either spousal support or child support or both by quitting work, liquidating a business, or taking a lower paying job. This strategy usually fails because a spouse's support obligation is not measured by his or her actual income but rather by his or her earning capacity. Tenn. Code Ann. § 36-5-101(d)(1)(E)(I) (spousal support); Tenn. Comp. R. & Regs. r. 1240-2-4-.03(3)(d) (Dec.2003) (child support).
>
> We have made it clear that willful and voluntary unemployment or underemployment will not provide a basis for modifying either spousal support or child support. (citation omitted). When called upon to determine whether a person is willfully and

> voluntarily unemployed or underemployed, the courts will consider the person's past and present employment and the reasons for the unemployment or the taking of a lower paying job. If a person's decision to accept a lower paying job is reasonable and made in good faith, the court will not find the person to be willfully and voluntarily underemployed. (citation omitted).

Walker v. Walker at *2 (Court of Appeals deferred to trial court's finding of underemployment where court where his explanation for taking a lower paying job "did not ring true").

The same can be said for the Husband's actions in the instant case where the Husband made no attempt at any time to interview for any other jobs, where his new employment conveniently coincided with the trial, and where he assumed obligations such as Currey Ingram Academy and made expenditures such as a $43,000.00 automobile that belied his protestations of a lucrative career. See, Demers v. Demers, 149 S.W.3d 61, 71-72 (Tenn. App.,2003)(record devoid of affirmative steps taken by obligor to find employment and thus evidence does not "preponderates against the trial court's determination that Father has the skills and experience to enable him to work in his field, but that he is not utilizing his abilities."). Compare, Wine v. Wine, 245 S.W.3d 389, 395 (Tenn. App. 2007)("Father introduced a detailed time line of his employment search activity from October 8, 2004 through March 21, 2005, which reveals that Father pursued employment and business opportunities with at least ten bed-and-breakfast type facilities, two "smoothie" companies, numerous golf courses, and various businesses accepting applications for managers or sales

positions, and produced details of specific meetings, telephone and e-mail conversations, and employment negotiations, which Mother failed to contradict or impeach"); Richardson v. Spanos, 189 S.W.3d 720, 726-727 (Tenn. App. 2005)(doctor not willfully underemployed where his contract was not renewed and he found work in emergency room at substantial cut in salary because of large pool of physicians seeking similar work; good faith shown by fact that doctor showed increasing income and he was asking for more shifts).

The Court's attention is directed to Owensby v. Davis, 2008 WL 3069777 (Tenn. App.), where the father held a law degree and a master's degree in Business Administration. He had been employed at a law firm earning forty-six thousand dollars a year prior to being terminated. At that point, he sought a reduction in his child support obligation. The Court found that his efforts to find a job were not "aggressive", stating that he interviewed with one firm and sent out letters with no follow-up. He eventually opened a solo law practice and earned approximately $24,400.00 a year. The Court of Appeals affirmed the lower court's decision that the father was under-employed and set his child support obligation according to his $46,000.00 salary. The Court specifically noted that there should be substantial deference to the trial court's decision, **especially when it is premised upon a credibility finding**.

> A party's child support obligation is not measured by his actual income; it is measured by his earning capacity as evidenced by his educational level and previous work experience. (citations and footnote omitted). When called upon to determine whether a parent is willfully and voluntarily unemployed or underemployed, the courts will consider the factors in Tenn.

> Comp. R. & Regs.1240-2-4-.04(3)(a)(2)(ii), as well as the person's past and present employment and reasons for the party's change in employment. (citations omitted).
>
> Determining whether a parent is willfully and voluntarily underemployed and what a parent's potential income would be are questions of fact that require careful consideration of all the attendant circumstances. (citations omitted). Thus, this court reviews a trial court's determination regarding willful and voluntary underemployment using Tenn. R.App. P. 13(d) and accords substantial deference to the trial court's decision, (citation omitted), especially when it is premised on the trial court's singular ability to ascertain the credibility of the witnesses. (citation omitted).

Owensby v. Davis, 2008 WL 3069777, *4 (Tenn. App.)

B. Economic Disadvantage

The second argument made by the Husband is that the Wife is not economically disadvantaged and that the court was bound to accept the testimony of the health care placement witness that the Wife could earn an annual salary of Eighty Eight Thousand Dollars ($88,000.00) immediately[23]. (Husband's Brief at pp. 47-49). On the contrary,

> Expert opinions, at least when dealing with highly complicated and scientific matters, are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are purely advisory in character and the trier of facts may place whatever weight it chooses upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the case or otherwise unreasonable. Even in those instances in which no opposing expert evidence is offered, the trier of facts is still bound to decide the issue upon its own fair judgment,

[23] Even if this was true, which it is not, the Wife would still be economically disadvantaged to a Husband who has earning capacity of over a half million dollars. See cases discussed infra.

> assisted by the expert testimony .... this is especially true when the opinion ... amounts to no more than prediction or speculation

Dickey v. McCord, 63 S.W.3d 714, 720 (Tenn. App. 2001).

Judge Soloman was not obligated to uncritically accept the opinion of Michele Jarrett, the health care placement expert. She surely considered this testimony but also considered that fact that the witness was under the impression that the Wife had management experience and had been a director of nursing. (Tr. Vol. VIII at 226-227,L. 2-21; Tr. Vol. VII at 37, L. 22-25). The witness had not interviewed the Wife, had no knowledge of her health, or family responsibilities. (Tr. Vol. VIII at 227, L. 2-9; at 228, L.3-25). In any event, the trial court found that the Wife would need extensive re-training over the next year since she had been out of the rapidly changing and ever evolving medical field for over twenty years, and, after such re-training, she could initially earn Three Thousand Dollars ($3,000.00) a month. (Tr. Vol. X at 48, L. 5-23; R. 680, para. 25). The trial judge was fully authorized to make this finding.

C. Type of Award

Lastly, the Husband argues that the type and amount of alimony awarded constituted an abuse of discretion. (Husband's Brief at pp. 49-54). Specifically, the Husband argues that Judge Soloman abused her discretion in awarding alimony *in futuro* rather than rehabilitative alimony. The Husband does not challenge, nor could he base upon the record, the following factual findings of the trial court:

* "(T)he parties agreed that Mrs. Small would stay at home and take care of the

parties' children and that Mr. Small would continue to work as a lawyer to generate income to pay the parties' bills and expenses".

*"Mrs. Small clearly subordinated her career for the benefit of the family ...".
*"(T)here is no competent proof that Mrs. Small can ever command the income Mr. Small has commanded in the past, as well as the present, ...".

*"Mrs. Small has suffered an economic detriment by subordinating her career over the past twenty years for the benefit of the parties' marriage and the minor children."

(R. 679-680).

Contrary to the Husband's argument that the award of alimony *in futuro* is "against public policy as contained in our statutes", an alimony *in futuro* award under the facts of this case is exactly what the Legislature intended. T.C.A. § 36-5-121(c) provides:

> (1) Spouses have traditionally strengthened the family unit through private arrangements whereby one (1) spouse focuses on nurturing the personal side of the marriage, including the care and nurturing of the children, while the other spouse focuses primarily on building the economic strength of the family unit. This arrangement often results in economic detriment to the spouse who subordinated such spouse's own personal career for the benefit of the marriage. It is the public policy of this state to encourage and support marriage, and to encourage family arrangements that provide for the rearing of healthy and productive children who will become healthy and productive citizens of our state.

> (2) The general assembly finds that the contributions to the marriage as homemaker or parent are of equal dignity and importance as economic contributions to the marriage. Further, where one (1) spouse suffers economic detriment for the benefit of the marriage, the general assembly finds that the economically disadvantaged spouse's standard of living after the divorce should be reasonably comparable to the standard of living enjoyed during the marriage or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

(emphasis supplied).

By no stretch of the imagination can it be said that the Wife will ever be able to enjoy a comparable standard of living that the Husband has and will achieve post-divorce. This is the measure by which the "feasibility" of being "rehabilitated" is defined. "To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties." T.C.A. § 36-5-121(d)(2).The Husband's argument that the Wife is not entitled to alimony *in futuro* rests upon two flawed assumptions; one factual and the other legal. Factually, the Husband insists that Judge Soloman had no choice but to find that **both** his income **and** his earning capacity are One Hundred Fifty Thousand Dollars ($150,000.00) a year. This is clearly incorrect as the Husband was making at least Four Hundred Thousand Dollars ($400,000.00) a year at the time of trial (i.e., salary plus accounts receivable), had never looked for other employment,

and did not adequately explain why he reduced his income by ninety-percent (90%). Judge Soloman found that he had either intentionally reduced his income or was voluntarily underemployed. The evidence does not preponderate otherwise. Legally, the Husband insists that Judge Soloman had no choice but to accept the testimony that the Wife could earn Eighty Eight Thousand Dollars ($88,000.00) a year. As noted, experts are intended to assist the fact-finder, not to dictate facts. See, Dickey v. McCord, supra. Accordingly, the award of alimony *in futuro* was not an abuse of discretion.

Although alimony decisions are heavily fact-dependent and each case is unique, case law on the issue can nonetheless provide some insight and guidance. Hawkins v. Hawkins, 883 S.W.2d 622, 628 (Tenn. App. 1994). In this regard, the Court's attention is directed to Williams v. Williams, 2005 WL 2205913 (Tenn. App.) where the husband earned $75,000.00 per year as a company manager while the 46 year old wife earned $30,000.00 per year as an elementary school teacher. Williams, at *14. The trial court declined to award alimony to the wife, essentially reasoning that she had received sufficient marital property – some $375,000 – to satisfy her needs. Id at *13. This Court, however, reversed that judgment. In so doing, the court determined that rehabilitation was impossible, reasoning that:

> As we have stated, the legislature has indicated its preference that, whenever possible, a spouse be rehabilitated by a grant of rehabilitative alimony. In this case, however, we do not find that rehabilitation is a viable alternative. Wife was forty-six years of age at the time of trial. She currently holds a bachelors degree in education and a secretarial degree. Should she remain in her

> chosen field of elementary education, there is no proof that an advanced degree would result in a significant increase in her level of income. If, on the other hand, she were to endeavor to obtain education or training in a different field of employment she would find herself, at the age of approximately fifty, competing for jobs in which she has had no prior experience.
>
> Based on the foregoing, it is our conclusion that Wife should be granted alimony in futuro in the amount of $750.00 per month from September 21, 2004, the date of the final judgment for divorce.

Id at *14.

Similarly, in Dowden v. Feibus, 2006 WL 140404 (Tenn. App.) the 56 year old husband, an attorney, earned $114,000.00 per year and the 43 year old wife, a legal secretary, earned $35,000.00 per year. Dowden, at *1,5. The marital estate was also substantial; each party received just over $200,000 in marital property. Id at *6. The trial court awarded the wife alimony *in futuro* of $1,000.00 per month and the husband appealed, arguing that the wife could be rehabilitated by going to law school, as she had spoken of doing in the past. Id at *9. This court affirmed, stating that:

> Husband argues, in part, that Wife is capable of rehabilitation, and, therefore, the Trial Court should have awarded rehabilitative alimony, not alimony in futuro. Husband bases his argument, in large part, on the fact that Wife testified that she wanted to attend law school. This evidence, however, is insufficient to prove that Wife is capable of rehabilitation. The fact that an individual, such as Wife, states that she would like to be a lawyer, or a doctor, or a teacher, or a PGA tour player, or any such profession is, in and of itself, no proof that that individual has the capabilities to do so. While the desire to be such a professional is a necessary requirement to achieving that goal, it is by no means the sole requirement. Here, no proof was introduced that Wife

> was capable of getting into law school or of completing the curriculum.

Id.

In Goodman v. Goodman, 2006 WL 47359 (Tenn. App.) the husband, a medical doctor, earned $300,000.00 per year and the wife, a nurse, earned $40,000.00 per year. Goodman, at *6. The marital estate was very large; each party received over $1,400,000.00 in marital property. Id at *1. The trial court awarded the wife alimony *in futuro* of $4,000.00 per month. This court affirmed that judgment, holding that in light of the statutory factors, the award was the only way in which the wife could enjoy a lifestyle reasonably commensurate with the parties' pre-divorce standard of living. Id at *6-7.

In Jekot v. Jekot, 232 S.W.3d 744 (Tenn. App. 2007), the parties had been married for thirty years. The Husband was a successful orthopedic surgeon. The trial court awarded the fifty-three (53) year old Wife $1.4 million in property division and transitional alimony beginning at $15,000.00 a month for a year $10,000.00 for the next two years, and $5,000.00 for the last two years. On appeal, the Court reversed the award of transitional alimony in favor of alimony *in futuro* in the amount of $9,000 a month.

> Wife has not utilized her career skills in twenty years. It is reasonable to assume that whatever experience she gained those many years ago would be of little or no advantage were she to seek employment today, and it will take some time for Wife to receive the additional education and training necessary to prepare her for a job offering meaningful remuneration. Further, at the time of trial, Wife was fifty-five (55) years of age, and we do not believe it is realistic to expect that she will be able to effectively compete for employment as she nears an age at which many

retire.

Id. at 753. See also, Carpenter v. Carpenter, 2008 WL 5424082 (Tenn. App. 2008)(both spouses were professionals although the Husband earned 4x the income than the wife; alimony *in futuro* award affirmed because "while Wife's income may be 'reasonably good,' it is far below that of Husband and would not support a standard of living reasonably close to that which the parties enjoyed during their long marriage."). Bratton v. Bratton, 136 S.W.3d 595 (Tenn. 2004)("the wife could not be rehabilitated to the standard of living which the parties had enjoyed during the marriage and concluded that considering 'all applicable factors,' an award of $10,500.00 a month in alimony *in futuro* would be appropriate."; Watson v. Watson, 2009 WL 1464132 (Tenn. App.)(alimony *in futuro* awarded in addition to six years of transitional alimony where Husband was partner in large law firm and wife had not worked as securities and commodities trader for 20 years).

In Jackson v. Jackson, 2007 WL 529928 (Tenn. App.), the parties had been married for twenty-eight (28) years. The wife, who was fifty-four (54) years old, had focused her efforts of being homemaker and mother for the parties' three children. She did not have a college degree and at the time of divorce was performing cleaning services. The husband had a Master's in Business Administration and had worked in the telecommunications industry before being terminated. The trial court found him to be underemployed and set his earning capacity at One Hundred Forty Five Thousand Dollars ($145,000.00) a year based upon his prior two years' income. The trial court noted that the husband "clearly has marketable skills

and the ability to earn a substantial income, and the considerable disparity in the parties' respective earning capacities is apparent." The trial court awarded transitional alimony and the Court of Appeals reversed.

The trial court did not explain its reasoning for limiting the alimony award to a period of five years, and the reasons are not apparent from the record. It is unclear from the record how Wife will support herself once the period of transitional alimony ends; the division of marital property is sufficient for Wife to acquire new housing, transportation, and other items necessary to transition from the marriage, but is insufficient to pay for Wife's living expenses after the alimony ends, or for her eventual retirement. The record includes no evidence from which it can reasonably be concluded that Wife will be able to achieve an earning capacity, now or in the future, that will afford her an appropriate standard of living relative to Husband, considering all the relevant statutory factors in T.C.A. § 36-5-121(I).

> The statutes provide that where one spouse has suffered economic detriment for the benefit of the marriage, the economically disadvantaged spouse's standard of living "should be reasonably comparable to the standard of living enjoyed during the marriage or to the post-divorce standard of living expected to be available to the other spouse." T.C.A. § 36-5-121(c)(2). Under the circumstances, we must conclude that there is no evidence in the record indicating that Wife is capable of earning an income sufficient to afford her a standard of living which is reasonable in comparison to the parties' standard of living during the marriage or Husband's likely post-divorce standard of living. Consequently, we must conclude that the trial court abused its discretion in ending the alimony payments after five years, and that Wife has demonstrated a need for alimony in futuro.

Jackson v. Jackson, 2007 WL 529928, *9 (Tenn. App.).

In contrast, the Husband offers the case of Riggs v. Riggs, 250 S.W.3d 453 (Tenn. App. 2007) for the insight it might provide. Although the award of alimony *in futuro* was reversed in that case, the facts are inapposite to the case at bar. In Riggs, the marital standard of living was maintained on the husband's salary of Seventy Thousand Dollars ($70,000.00). The wife had a real estate license and had started an organic candy store that "showed great promise". Both parties were at fault in causing the divorce. In the instant case, the Wife has not worked in the nursing profession for two decades. Even with the intense re-training contemplated by the trial court, she will never achieve the standard of living enjoyed during the marriage or the post-divorce standard of living of which the Husband is capable.

Because an award of alimony *in futuro* is supported by both the statutory factors and by instructive cases set forth above, Wife respectfully requests that this court affirm the trial court's judgment on that issue.

D. Amount of Award

Again, the Husband's argument that the trial court abused its discretion in awarding Eleven Thousand Dollars ($11,000.00) a month pending the sale of the marital home, followed by an *in futuro* award of Six Thousand Five Hundred Dollars ($6,500.00) a month, is dependent "on the erroneous finding imputing income to Mr. Small in the amount of $500,000". (Husband's Brief at p. 54). This factual issue has been addressed and will not be re-stated here. See, II. A. supra.

The Husband focuses solely upon his purported inability to pay and ignores the equally important criteria for alimony; the Wife's need. In this regard, the Wife's expense statement shows the need for Eleven Thousand Four Hundred Eighty Seven Dollars ($11,487.00) a month. (Ex. 1). Post-divorce expenses total Twelve Thousand Six Hundred Dollars ($12,600.00) a month. (Tr. Vol. VII at 71, L. 2-5). The Husband does not contest this level of need.

Of course, when the marital home is sold, the Wife's expense level will drop to Eight Thousand Twenty-One Dollars ($8,021.00) a month. (Tr. Vol. VII at 66, L. 6-11; R. 671). However, the Wife and child will have nowhere to live. If she uses the proceeds she will receive from the sale of the marital home to obtain a home for herself and Lindsey, this will deplete almost half of the property division awarded to her (i.e., total property division award of $971,895.00 less anticipated house proceeds of $407,850.00).

Alternatively, the Wife can use a smaller portion of her "nest egg" to place a down payment on a home and then utilize her eventual employment income to satisfy mortgage obligations. Only with the alimony *in futuro* award, monthly child support, her own income, and depletion of her nest egg will the Wife will be able to maintain some semblance of the marital standard of living. The cases cited in Section II.D. also support Judge Soloman's discretionary decision as to the amount of support awarded.

E. Award of Attorney's Fees

The Husband challenges the trial court's award of attorney's fees to the Wife in the

amount of Ninety Eight Thousand One Hundred Twenty Five Dollars ($98,125.00) because (1) he does not have the ability to pay, (2) the Wife does not have the need, and (3) because the Wife's attorney "inflam(ed) the trial court below and encourag(ed) the trial court to commit substantial errors". (Husband's Brief at pp. 70-71). The Wife submits that, for the same reasons that alimony *in futuro* was awarded, the award of attorney's fees is appropriate in this case.

> The decision whether to award attorneys' fees is within the sound discretion of the trial court and "will not be disturbed upon appeal unless the evidence preponderates against such a decision." (citation omitted). As with any alimony award, in deciding whether to award attorney's fees as alimony in solido, the trial court should consider the relevant factors enumerated in T.C.A. § 36-5-101(d). A spouse with adequate property and income is not entitled to an award of alimony to pay attorneys' fees and expenses. (citations omitted). These awards are appropriate only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, (citation omitted) or would be required to deplete his or her resources in order to pay these expenses. (citation omitted). Thus, where the wife has demonstrated that she is financially unable to procure counsel, and where the husband has the ability to pay, the court may properly order the husband to pay the wife's attorney's fees. (citations omitted)

Riggs v. Riggs, 250 S.W.3d 453, 459-460 (Tenn. App. 2007)(attorney's fees awarded where husband earned $70,000.00 a year and wife had no employment and no immediate ability to obtain employment and where payment of attorney's fees would deplete assets awarded to her). See also, Aaron v. Aaron, 909 S.W.2d 408, 411(Tenn. 1995)(the court's decision is entitled to great weight on appeal). Batson v. Batson, 769 S.W.2d at 849, 862 (Tenn. App.

1988)(appellate courts will not interfere with the trial court's decision unless there is a clear abuse of discretion).

The Court divided the marital property equally. (R. 534-539). Judge Soloman awarded the Husband property valued at Four Hundred Four Thousand Two Hundred Fifty Five Dollars ($404,255.00), not including the value of his law practice. (Id.). The Husband also owns separate property in Parkton, North Carolina. (R. 540). He has an earning capacity of Five Hundred Thousand Dollars ($500,000.00) a year, averaging over Six Hundred Thousand Dollars ($600,00.00) a year over the past three years. (Ex. 22).

The Wife is not currently employed and will not be employed for at least a year. At that time, it is expected that she will earn Thirty Six Thousand Dollars ($36,000.00) a year. Although she was awarded Nine Hundred Seventy One Thousand Eight Hundred Seventy Five Dollars ($971,875.00) in property division, almost half of that is potential proceeds from the marital home. (R. 534-539). Of course, she will have to purchase a suitable home for herself and her daughter. She also has approximately Two Hundred Twenty Two Thousand Dollars ($220,000.00) in a retirement account that was earned prior to her marriage. (R. 540).

One of the most frequently cited cases on the issue of attorney's fees in divorce litigation is Ligon v. Ligon, 556 S.W.2d 763 (Tenn. App. 1977) where the court stated:

> Ordinarily, if the wife is financially able to procure counsel, there is no occasion for fixing the amount of counsel's fees which should be a matter of contract between attorney and client.

> ...
>
> If, in the final decree, the wife is awarded alimony in solido adequate for her needs and attorney's fees, there is again no occasion for the Court to fix a fee. ... This principle does not, of course, deprive the Trial Judge of the discretion to fix attorney's fees in proper cases.
>
> Where ... the final decree does not provide funds out of which counsel may reasonably be paid, it is in order for the court to award the wife as additional alimony such amount as will reasonably enable her to pay reasonable compensation to her counsel.

Id. at 768.

The award of attorney's fees to defray a spouse's legal expenses in a divorce proceeding is appropriate where the spouse is disadvantaged and does not have sufficient resources. Thompson v. Thompson, 797 S.W.2d 599 (Tenn. App. 1990). Case law suggests that the determinative factors in the award of attorney's fees is whether or not the disadvantaged spouse was awarded sufficient non-essential assets in property division and whether the payment of such fees by the disadvantaged spouse would deplete the estate he or she requires to maintain some semblance of the marital standard of living. See, Lancaster v., Lancaster, 671 S.W.2d 501 (Tenn. App. 1984), Martin v. Martin, 733 S.W.2d 883, 886 (Tenn. App. 1987).

In the instant case, Judge Soloman found as follows:

> This Court finds that once the house is sold, Mrs. Small will need to buy a home for her and the child and have funds to rely on for years to come. The monies she receives from the division of property is needed for her security now and in later years. She is

almost of retirement age with no retirement put aside.[24]

(R. 294.)

The Wife submits that the evidence does not preponderate against this conclusion and that the award of attorney's fees was well within the discretion of the trial court.

[24] Judge Soloman was aware that the Wife did in fact have a retirement account from her years of employment prior to marriage. (R. 540).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE DIVISION OF MARITAL PROPERTY

The Husband concedes that "the trial court's division of property appears equitable on its face" in that it fashions an equal division of marital property. (Husband's Brief at p. 55). However, he argues that the division of marital property is fundamentally flawed because the marital assets are either "grossly overvalued, did not exist, or were not marital assets in the first place". (Id.). Based upon the Husband's calculation, the Husband received twenty-six percent (26%) of the marital assets and all of the marital debt and the Wife received seventy-four percent (74%) of the marital assets. (Id.). The Husband discusses the nonexistent, overvalued, or improperly classified assets separately. The Wife will do the same.

A. Value of Husband's Law Practice

The Husband complains that the trial court erred because it chose to value the Husband's law practice based upon the balance of Operating Account bank statement as of the date of the first day of trial on April 28, 2008 rather than the second day of trial on July 17, 2008. The balance in his operating account as of March 31, 2008 was Three Hundred Fourteen Thousand Nine Hundred Sixty Five Dollars ($314,965.00). (Ex. 42). His balance as of June 30, 2008 was Eight Thousand Seven Hundred Sixty One Dollars ($8,761.00). (Ex. 33, p. 4).

The Husband cites Dunlap v. Dunlap, 996 S.W.2d 803 (Tenn. 1999) for the proposition that "it is fundamental that (the statute) requires that marital property be valued 'as of the date as reasonably possible to the final divorce hearing date'." (Husband's Brief at p. 56).

Accordingly, the Husband argues that the statute establishes a fixed and arbitrary date for valuing marital assets thus depriving the trial court of discretion to choose a more appropriate date based upon the unique facts of the case. The trial court's discretion is not so circumscribed. In this regard, the Court's attention is directed to Brown v. Brown, 1990 WL 140912, *9 (Tenn. App.) where the husband contended that the court erred in valuing his law practice in May, five weeks earlier than the last day of trial. The Court rejected the husband's argument.

> Section 36-4-121(b)(1) does not mandate that marital property be valued as of the exact date of the divorce hearing. In Wallace v. Wallace, 733 S.W.2d 102 (Tenn. App. 1987), this Court held that the value of a marital asset is to be determined by considering all relevant evidence regarding value and "the trial court, in its discretion is free to place a value on a marital asset that is within the range of the evidence submitted." Id. at 107. The value of $125,000 placed on this asset of Husband is within the range of testimony offered by the parties and does not amount to an abuse of discretion by the court.

In the instant case, Judge Soloman believed that the Husband manipulated his income to avoid financial obligations to his Wife and child. As noted, the Husband collected a half million dollars ($500,000.00) in accounts receivable in December 2007[25], another Two Hundred Fifty Thousand Dollars ($250,000.00) in the first part of 2008 that he attempted to hide, not once, but four (4) times (i.e., on his **sworn** Income and Expense Statement and twice

[25] The Husband downplayed the amount in his testimony, stating first that he did not remember how much, then saying it was several hundred thousand dollars, and then agreeing that it could have been a half million dollars. (Tr. Vol. VIII at 106-107, L. 17-25, 1-5).

on cross-examination) and on the income portion of his **sworn** proposed Parenting Plan. (Tr. Vol. VIII at 106-107, L. 17-25, 1-5; at 116, L. 18-25; at 125-126, L. 21-25,1-23). There exists a very significant question as to whether the Husband truly "closed" his law practice as he contends with a ninety percent (90%) reduction in income or whether he merely transferred his law practice to a large firm so he could be more successful. Judge Soloman chose the Husband's March 31, 2008 Operating Account bank statement as the most reasonable source of information to value the Husband's law practice that he had intentionally "closed" so as to avoid his support obligations.

B. The 2002 Honda S20 CV

The Husband complains that Judge Soloman erred in crediting him with the value of a sports car that he purchased in April of 2007 and sold in April of 2008. (Husband's Brief at p. 59). What he fails to state is that this vehicle was purchased in violation of the Temporary Restraining Order with marital funds and sold at a loss of over Seven Thousand Dollars ($7,000.00). It is not apparent from the Husband's citation to the transcript whether or not he actually deposited the sale proceeds into his operating account although, whether he did or did not, is not particularly relevant. In any event, the Husband's evidence that he deposited the proceeds from the sale into his operating account derives from a post-trial affidavit with the self-serving statement: "The total sale proceeds ... that I received from selling the Honda... were deposited by me into my Community Bank and Trust account and used for family and

other expenses in the ordinary course." (R. 460, para. 4)[26].

C. The First Vision Bank Stock

The Husband states that the trial court awarded him the First Vision Bank stock, valued at Thirty Thousand Dollars ($30,000.00), and that this stock is included in another asset awarded to him; namely, the Morgan Keegan Profit Sharing Plan. (Husband's Brief at p. 59). In support of this contention, he again relies upon an affidavit that he submitted in support of his Motion to Alter and Amend, stating, "This stock is not a separate item but is part of the Morgan Keegan Profit Sharing Plan awarded to Mrs. Small." (R. 596)[27]. There is no competent evidence to support the Husband's contention.

D. Division of Marital Debts

The Husband argues that it was an abuse of discretion to require him to pay the Wife's credit card debt in the amount of Eighteen Thousand Seven Hundred Thirty Dollars ($18,730.00). (Husband's Brief at p. 60-61). In this regard, the Wife testified that, prior to the parties' separation in March 2006, the family budget required Fifteen Thousand Dollars ($15,000.00) a month. (Tr. Vol. VII at 54, L. 21 through 56, L. 6). After the separation, the Husband provided only Eleven Thousand Dollars ($11,000.00) a month, and sometimes not even that. (Id.; R. 14-15; 465-466). As a result, the Wife had to use her credit card for her and her daughter's expenses. (Tr. Vol. VII at 127-128, L. 11-25, 1-4). In contrast, the

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[26] The trial court ordered the post-trial affidavits submitted in support of the Motion to Alter and Amend stricken from the record. (R. 629, para. 3, 5).

[27] Ibid.

Husband paid off his own credit card debt prior to trial. (Tr. Vol. VIII at 145,L. 5-24).

The Husband also complained that Judge Soloman unfairly required him to satisfy the encumbrance ($38,998) that he placed upon a marital Certificate of Deposit. (Husband's Brief at p. 60-61). He testified that he used Fifteen Thousand Dollars ($15,000.00) of this to repay himself a "loan" and for personal expenses. (Tr. Vol. VIII at 136,L. 18-22). The remainder was used for tuition for the parties' son. (Id.). This was the Husband's fourth violation of the Temporary Restraining Order and, it would appear from his bank statements, that he had sufficient income to pay his son's tuition without encumbering this asset.

Trial courts have the same broad discretion in the allocation of marital debts and should apportion such debts equitably in much the same way that they divide marital assets. Mondelli v. Howard, 780 S.W.2d 769, 773 (Tenn. App. 1989). "When, after the equitable division of the marital assets there remains obligations of the parties, the court has the discretion to order the payment of the obligations in such manner that is just and equitable, considering the respective earning capacities of the spouses and the other relevant factors in the statute." Hanover v. Hanover, 775 S.W.2d 612, 614 (Tenn. App. 1989).

Clearly, the Wife lacks the financial means to pay her credit card debt. Contrary to the Husband's statement that both parties benefitted equally from encumbrance on the Certificate of Deposit, said encumbrance depleted the marital estate at a time when it was both customary and possible for the Husband to satisfy the tuition obligation from his income. There certainly was no benefit for the Wife in the Husband repaying himself a loan and using proceeds for

personal expenses.

E. The Shares of Bank of the South Stock

On this issue, the Husband argues that the trial court abused its discretion in not believing him when he stated that he held this stock in trust for his friend's grandchild. (Husband's Brief at p. 61-62). The Husband, an intelligent lawyer, has owned this stock since 2001 without any written documentation that it is held in trust. (Tr. Vol. VIII at 143, L. 16 through145, L. 5). Nor is there any notation on the check indicating its purpose. In fact, the Husband admits that the Twenty Five Thousand Dollars ($25,000.00) received from Mr. Maggart purportedly in trust was commingled with his personal funds. (Id.). Under these circumstances, and given the court's justifiable concerns about the Husband's credibility and character, the classification of the stock as marital property is not an abuse of discretion.

IV. THE TRIAL COURT PROPERLY ENTERED THE FINAL DECREE *NUNC PRO TUNC*

The Wife filed a Motion to Require Mr. Small to Meet His Financial Obligations on January 23, 2009. (R. 465-466). The Motion was filed because, since the end of trial in July, the Husband failed to provide the Wife with the support he had been providing for the past two and a half years. (Id.). In fact, the Wife and child had received a total of Two Thousand Two Hundred Dollars ($2,200.00) from September 2008 until January 23, 2009. (Id.). The mortgage on the marital home had not been paid in January. (Id.). The Husband opposed the Motion. (R. 467-472).

On the date that the Motion, and some other motions, were set to be heard, January 30, 2009, the trial judge announced that she had signed the Final Decree of Divorce on January 29, 2009 and that it had been entered on the morning of January 30, 2009. (Tr. Vol. IX at 4, L. 9-13). Upon learning that the Husband had failed to continue paying support to the Wife, Judge Soloman and the Wife's attorney had the following exchange:

> The Court: I thought I said in the findings of fact how much he was to pay.
>
> Mr. Binkley: You did.
>
> The Court: So do you need the order that I just signed back-dated, *nunc pro tunc* ?
>
> Mr. Binkley: I would like that ...
>
> The Court: Did we have a temporary order of support ?
>
> Mr. Binkley We did not. He voluntarily was doing that ...
>
> ...

Mr. Binkley: Now what he has done now is, number one, he's not paying the house note. Number two, he's not giving her the cash that he is supposed to be giving her. I have that all listed in my motion.

The Court: Uh-huh

Mr. Binkley: And the Currey Ingram bill is behind some, I believe $28,000 ... And he has refused to give this lady any money. That house is going to be in default and foreclosed if I don't look out ...

...

The Court: What do you want me to do ?

Mr. Binkley: What I want you to do is to enter the final decree *nunc pro tunc* back to the last day of trial.

The Court: Which was?

Mr. Binkley: I guess it would probably be more proper to enter it back to the findings of fact.

....

The Court: My intent was to never let her be without support.

(Tr. Vol. IX at 11, L. 5 through 13, L. 18).

In response to the Husband's opposition to the entry of judgment *nunc pro tunc*, the court stated: "(M)y intent was to protect this woman and not leave her destitute and with property in foreclosure. Now, if I have to, I will address my final order when it's appropriate when you file a motion 59, and we'll change it to give her more than I gave her to supplement the fact that he has sat there and deliberately disobeyed me." (Tr. Vol. IX at 27,L. 15-21).

After being intentionally goaded by the Wife's attorney, Judge Soloman added the *nunc*

pro tunc language at that very moment:

> The Court: Do you think that I was going to let her go five months without – six months without support when I awarded her $10,000 or whatever it was?
>
> Mr. Greene: Mr. Binkley's job was to take care of his client with respect to that.
>
> The Court: And he is right now because I *nunc pro tunc* it. I'm doing it right now in front of him, right now.

Judge Soloman denied the Wife's Motion to Alter and Amend the Findings of Fact and directed her new attorney to file a Rule 59 Motion since the Final Order had been signed. (Tr. Vol. IX at 22-23, L. 22-25, 1; at 45, L. 7-22).

At the February 27, 2009 hearing on the Husband's Motion to Alter and Amend, the *nunc pro tunc* date was changed:

> The Court: Okay, is that all?
>
> Mr. Binkley: No, ma'am, there is one other. This is I think an error on my part, and I apologize for this, the request for the order to be *nunc pro tunc* as to the financial obligations, I wanted that to go back to the day of the signing of the findings of fact and conclusions of law, which was October 29 --
>
> The Court; I probably cut you off about that, but you brought up the motion, and then I said I was going to rule in your favor. So what date did you want it back to?
>
> ...
>
> Mr. Binkley: Judge, let me say this. I think if this order is going to be entered *nunc pro tunc* and survive appeal, it probably needs to be entered as of the date of the findings of fact and conclusions of law.
>
> The Court: Okay.

(Tr. Vol. XI at 13-14, L. 11-25, 1-17).

In the instant case, the intent of the trial judge is clear - she intended for the Husband to continue supporting the Wife and to maintain the status quo, and force the Wife into financial destitution as suggested by the Husband. "All Courts have the right, and it is their duty, to make their records speak the truth, and a Court, therefore, in a proper case, of its own motion, may order a *nunc pro tunc* entry to be made, and no sound reason can be suggested why they should not exercise this right and discharge this duty, upon the suggestion of one whose rights are impaired by the failure of the record to state the truth. Littrell by Davis v. Littrell, 1988 WL 86522, *3 (Tenn. App.) See also, Bradley v. Bradley, 1990 WL 131404 (Tenn. App.) (Court of Appeals "remand this case to the Trial Court for entry of a *nunc pro tunc* judgment as to the divorce if he intended it to be effective as of the date of the hearing, and for division of property and such other proceedings, if any, as may be necessary."

The Court's attention is also directed to Rush v. Rush, 97 Tenn. 279, 37 S.W. 13 (1896). In Rush, the divorce decree was appropriately entered *nunc pro tunc* where the judge had noted on his memorandum "Divorce for Plaintiff" but the judgment had not been entered. In Vessels v. Vessels, 530 S.W.2d 71 (Tenn. 1975), the trial judge had written "divorce granted, property awarded" and then signed his name and the date on the cover of the court file. The husband died two hours before the final decree was signed and the trial judge denied a motion to enter the decree *nunc pro tunc*. The wife appealed.

The Court of Appeals reversed, stating:

> [although] there is no order specifically stating the decree of divorce is to be effective at a date other

> than the date the decree was filed with the clerk after being signed by the trial judge ... there is an order in the record clearly indicating the trial judge intended the divorce to be effective as of the date it was pronounced and that he believed he had done everything necessary to make the decree effective as of that date in entering "a notation on the file of the case that the divorce was granted...." (citations omitted).
>
> Based on the trial court's intent, this Court held that the trial court had effectively entered a divorce decree on June 21, 1974.

In contrast, a *nunc pro tunc* entry was not appropriate in Steele v. Steele, 757 S.W.2d 340 (Tenn. App. 1988) where the trial judge's intention was manifested only in a letter to the clerk, announcing his decision, and directing the clerk to forward the letter to the attorneys for preparation of an order. The letter was neither marked by the clerk as filed nor was there any indication as to when, if ever, the clerk received the letter. In the instant case, Judge Soloman clearly announced what her intent was at the time of signing the Findings of Fact and Conclusions of Law. She intended for the Wife to be supported as set forth in the Findings.

As stated in Jackson v. Jarratt, 52 S.W.2d 137 (Tenn. 1932).

> There are two classes of cases in which nunc pro tunc judgments are granted: (1) Where the judgment has previously been actually rendered, as here; and (2) where there has been delay in rendition of a judgment when the case has been otherwise heard and disposed of-as after a verdict. In the first class the scope of the nunc pro tunc order is confined to the thing previously done, the judgment actually rendered.

Id. at 139.

The instant case arguably falls within the first category and clearly falls within the

second. For the foregoing reasons, the Wife respectfully requests that the Court affirm Judge Soloman's entry of the Final Decree of Divorce *nunc pro tunc*.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FASHIONING THE PARENTING PLAN OR IN SETTING THE AMOUNT OF CHILD SUPPORT

A. Child Support

As noted in Section II.A., supra, the trial court found that the Husband was voluntarily underemployed and set his child support obligation based upon her conclusion that he could be earning Five Hundred Thousand Dollars ($500,000.00) a year. The Wife submits that the evidence does not preponderate against this conclusion in light of the fact that the Husband earned Four Hundred Twenty Seven Thousand Dollars ($427,000.00) in 2006, $1.1 million in 2007, and was earning his "salary" of One Hundred Fifty Thousand Dollars ($150,000.00) a year in 2008 plus additional income of at least Two Hundred Fifty Thousand Dollars ($250,000.00). The Husband accepted a ninety percent (90%) reduction in income without interviewing with a single other law firm or investigating other income-generating opportunities. (Tr. Vol. VIII at 97, L. 22-24). He did not abandon his lucrative law practice but had rather transferred his entire staff to a large firm thereby intentionally reducing his income at the expense of his Wife and daughter. (Tr. Vol. VIII at 142, L. 10-25). Based on the facts of this case, it defies belief and common sense that the Husband had "no choice" but to accept a ninety-percent (90%) reduction in his income and Judge Soloman correctly perceived this.

The Wife relies upon the case law cited in Section II.A. in support of this issue.

B. The Parenting Plan

The trial court awarded the Husband residential time with his daughter every other weekend from Friday evening until Monday morning and alternating overnights from Monday afternoon until Tuesday morning. (R. 702-703). The Husband argues that it was an abuse of discretion not to accept his parenting plan under which the parties would have approximately equal custodial time.

The standard of review in child custody cases is governed by Tenn. R. App. P. 13(d). Hass v. Knighton, 676 S.W.2d 554, 555 (Tenn. 1984). Thus, this Court must review the record *de novo* with a presumption of correctness unless the facts preponderate against the court's decision. (Id.). Moreover, the trial court is vested with wide discretion in child custody matters, Marmino v. Marmino, 238 S.W.2d 105, 107 (Tenn. App. 1950), and "the reviewing courts will not interfere (with the custody decision of the trial court) except upon a showing of erroneous exercise of that discretion". Mimms v. Mimms, 780 S.W.2d 739, (Tenn. App. 1989). It has been said that the abuse of discretion must be "palpable" to warrant interference by the reviewing court. Grant v. Grant, 286 S.W.2d 349 (Tenn. App. 1954).

The Husband left the marital home in March 2006 without discussing parenting time. (Tr. Vol. VII at 72, L. 18-24). At that time, his son, Evan, was in college and he did not see his daughter, Lindsey, until June, when she stayed overnight with him for two or three days. (Tr. Vol. VII at 73, L. 4-25). She and Evan stayed with him for two or three nights over Thanksgiving that year. (Id.). That was the extent of the overnights in 2006. In 2007, the Husband had no overnight time with his daughter. (Tr. Vol. VII at 75, L. 8-17).

Once the trial date was set, the Husband asked to have lunch with Lindsey every Sunday but was not consistent. (Tr. Vol. VII at 75, L. 22 through 78, L. 17). Similarly, about a month before trial, he asked to have Lindsey every Monday and Tuesday nights. (Id.). Lindsey spent only one night at the Father's home during that month. (Id.).

Based upon this record, Judge Soloman found the Husband's request for equal

custodial time to be "very suspect" and likely motivated by child support concerns rather than a *bona fide* desire to be with his daughter. (Tr. Vol. VIII at 133, L. 8-18). The trial court found that "by Mr. Small's own admission, he gave very little attention to the parties' youngest child in the last few years" and that it "is a little late for Mr. Small to try to begin establishing any type of relationship with her." (R. 544, para. 22-23). On the other hand, Judge Soloman believed it very important that the Husband spend time with Lindsey and, doubting that he would, provided for financial penalties if her misses any visitation. (R. 544-555, para. 26). There is no evidence that the parenting plan fashioned by the court was motivated by punitive consideration, especially considering that the court rejected the Wife's proposed parenting plan. Under the facts of this case, the Wife submits that Judge Soloman acted well within her discretion in fashioning a parenting plan whereby the Husband will be able to repair his relationship with his daughter.

VI. THE TRIAL COURT DID NOT ERR IN AWARDING THE DIVORCE TO THE WIFE BASED UPON ADULTERY AND INAPPROPRIATE MARITAL CONDUCT

The Husband argues that Judge Soloman erred in granting the divorce to the Wife based upon grounds of adultery because the marriage was "loveless for years prior to the filing of this proceeding" and "broken". (Husband's Brief at pp. 68-70). The Husband cites a Memorandum Opinion filed under Rule 10(b) of the Rules of the Court of Appeals which states that the Opinion "shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case." For this reason, the Wife will not discuss the

Hazlehurst v. Hazlehurst case (1993 WL 115674 (Tenn. App.) which nonetheless is clearly inapposite to the instant case.

While the Husband may believe that the marriage was irretrievably broken, the Wife did not think so. On the contrary, the Wife believed that the parties got along well together and made efforts to renew their intimacy. (Tr. Vol. VII at 154,L. 2-8; at 145-146,L. 19-25, 1-7; at 148, L. 2-14). The Wife testified that she "truly did not know what the problem was" and tried to save the marriage, not knowing that the Husband had consistently lied to her when asked "if there was another woman." (Tr. Vol. VII at 154,L. 10-21). The marriage was irretrievably broken when the Husband had an affair with a client and was not interested in saving the twenty-one (21) year marriage.

VII. THE TRIAL JUDGE SHOULD NOT BE RECUSED FROM FURTHER PROCEEDINGS IN THIS MATTER

The Wife submits that the Judge Soloman should not be recused from further proceedings in this cause. Admittedly, Judge Soloman questioned the Husband's character and denied his credibility. However, it is clear from the record that the Husband showed an utter contempt for the court's orders, the dignity of his Wife, the well-being of his child, not to mention the most important requirement of the Husband, to tell the truth, which he failed to do. His flagrant disregard of the Temporary Restraining Order, not once but four times, his attempt to hide his income and audacity to insist that it was an innocent mistake, his indifference to his daughter, and his arrogance in insisting that his earning capacity was at the lowest ebb for his entire career spanning over thirty years, and just in time for this divorce

trial, certainly had an effect on Judge Soloman's perception of him. Now that his attempt to manipulate the court and the legal system has backfired, the Husband seeks another chance to hoodwink a judge who is not familiar with his tactics. When the best efforts of the Husband's attorney to intentionally anger Judge Soloman into making an untoward comment during post-trial hearings failed (See, Tr. Vol. IX), the Husband suggests other reasons for recusal. Many of these reasons are based on the simple fact that Judge Soloman did not agree with his arguments (i.e., failing to disclose income was not intentional, errors in property division, granting Wife's post-trial motions). Another ground is that Judge Soloman threatened to place the Husband in jail if he did not comply with the court's orders. Judge Soloman stated that this "was not a threat", "it was a promise" because there would be chaos in the legal system people did not comply with court orders. (Tr. Vol. IX at 39,L. 13-25). Judge Soloman's feelings for the Husband were "not necessarily respect" but she was "not angry with him". (Tr. Vol. IX at 43, L. 1-5). The record supports the trial judge's assessment of the Husband and Judge Soloman's knowledge of the case will foster just decisions in the future.

VIII. THE WIFE IS ENTITLED TO HER ATTORNEY'S FEES INCURRED ON APPEAL

The Wife respectfully requests that the Court order the Husband to pay her attorney's fees incurred in the instant appeal. The record shows that the Wife will be required to deplete assets needed for her future security if she is responsible for attorney's fees on appeal. Moreover, the Wife did not make the decision to appeal this case. She was compelled, at significant expense, to defend the trial judge's decision.

The same criteria applicable to the award of attorney's fees at the trial court level is applicable to the award of attorney's fees incurred in representing the disadvantaged spouse on appeal. See, Wallace v. Wallace, 733 S.W.2d 102, 110 (Tenn. App. 1987). Clearly, the Husband has the ability to pay the Wife's attorney's fees on appeal and the Wife clearly has the need. Moreover, the Husband was at fault for causing the divorce.

There is no question that this Court is authorized to award her attorney's fees on appeal. "(Attorney's fees) may ... be fixed either by the appellate court, or the case may be remanded for the purpose of having fees determined." Taylor v. Taylor, 232 S.W.2d 445, 447 (Tenn. 1921), See also, Seaton v. Seaton, 516 S.W.2d 91, 93 (Tenn. 1974), Folk v. Folk, 357 S.W.2d 828 (Tenn. 1962). In Folk, the Supreme Court set forth the various factors which should be considered in determining whether or not attorney's fees should be awarded on appeal. Such factors suggest the appropriateness and necessity of such an award in the instant case.

* the ability of the appellant to pay -- this factor has been discussed.

*whether or not the appellant was successful on appeal - the Wife hopes and believes that this Court will reject the Husband's issues.

* whether or not the appeal was taken in good faith -- the Wife questions the Husband's good faith in bringing this appeal.

* whether there is a necessity for one spouse to pay the other's attorney's fees -- the Wife requires all assets that she received in the divorce for her future security. It is unlikely that she will be able to acquire any significant assets in the future. Under these circumstances,

there is a very real necessity for the Husband to pay the Wife's attorney fees on appeal.

CONCLUSION

Based on the foregoing, the Wife respectfully requests that the Court affirm the decision of the lower court and award her attorney's fees incurred in this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing, by U.S. mail, 1st class, postage prepaid to Jeffrey A. Greene and Gregory H. Oakley, 1 Burton Hills Blvd., Suite 330, Nashville, Tennessee on this 31st day of August, 2009.

Michael W. Binkley

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE
AT NASHVILLE

TIMOTHY WADE KEYT, Plaintiff/Appellant	)	
vs.	)	Putnam Chancery No. 02-174
NANCI SUZANNE KEYT, Defendant/Appellee.	)	S.Ct. No. M2005-00447-SC-R11-CV

ON APPEAL FROM
THE CHANCERY COURT FOR PUTNAM COUNTY, TENNESSEE,
AFFIRMED AS MODIFIED BY THE COURT OF APPEALS

BRIEF OF THE APPELLANT/PLAINTIFF, TIMOTHY WADE KEYT

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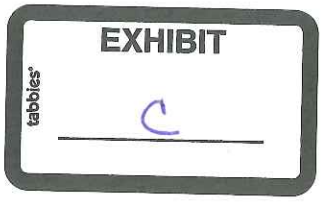

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Or, stated differently, WHETHER THE MERE PERFORMANCE OF JOB DUTIES BY A NON-MANAGERIAL EMPLOYEE IN A CORPORATION "SUBSTANTIALLY CONTRIBUTES" TO THE INCREASE IN VALUE OF HIS CORPORATE STOCK FOR PURPOSES OF T.C.A. §36-4-121(b) WHERE THE INCREASE IN VALUE IS DUE PRIMARILY TO THE SKILLS OF MANAGEMENT, MARKET FORCES, AND THE REMOVAL OF RESTRICTIONS PROHIBITING THE SALE OF THE EMPLOYEE'S STOCK.

II. WHETHER THE CHANCELLOR ABUSED HIS DISCRETION IN CALCULATING THE HUSBAND'S SEPARATE INTEREST IN THE FAMILY-OWNED CORPORATION BY SUBTRACTING THE "AMOUNT OF GIFT" STATED IN THE FATHER'S LAWFUL AND CORRECT STATE GIFT TAX RETURNS FOR HEAVILY-RESTRICTED STOCK CERTIFICATES, WHICH HE GIFTED TO THE HUSBAND OVER THE COURSE OF FOURTEEN (14) YEARS FOR ESTATE PLANNING PURPOSES FROM THE PURCHASE PRICE OF THE HUSBAND'S STOCK ON THE OPEN MARKET AFTER THE RESTRICTIONS HAVE BEEN REMOVED, ESPECIALLY WHERE UNCONTRADICTED EXPERT TESTIMONY ESTABLISHES THAT (1) TAX LAW ALLOWS THE DRASTIC DISCOUNT OF RESTRICTED STOCK FOR GIFT TAX PURPOSES, (2) THE VALUE PLACED UPON THE STOCK IN THE GIFT TAX RETURN DID NOT REFLECT THE TRUE VALUE OF THE STOCK AND (3) THE CORPORATION HAD ACTUALLY DECREASED IN VALUE DURING THE COURSE OF THE MARRIAGE.

STATEMENT OF THE CASE

The Appellant (hereinafter referred to as the "Husband") filed his Complaint for Divorce on May 30, 2002. (R. at 3-10). For grounds, the Husband alleged irreconcilable differences or, in the alternative, inappropriate marital conduct. (Id.). In addition to requesting joint custody of the parties' minor child, the Husband sought the award of his separate property comprised of his interest in a business known as Service Transport, Inc. (Id. at para. 8, 13).

The Appellee (hereinafter referred to as the "Wife") filed her Answer and Counter-Complaint for Divorce on April 4, 2003. (R. at 45-52). In her Answer, the Wife admitted the existence of irreconcilable differences and, in her Counter-Complaint for Divorce sought a divorce based upon the same grounds urged by the Husband. (Id.). In regard to the Husband's interest in Service Transport, Inc., the Wife alleged that the appreciation of the Husband's separately owned stock in Service Transport, Inc. during the course of the marriage was marital property. (Id. at para. 13).

The Husband answered the Counter-Complaint for Divorce on May 30, 2003. (R. at 56-58).

The case was tried on August 24, 2004. (Tr.). On January 6, 2005, the Chancellor entered his Memorandum Opinion, followed by entry of the Final Decree of Divorce on January 14, 2005. (R. at 94-99,100-110). (Memorandum Opinion and Final Decree of Divorce attached as Appendix A).

In said Decree, the Court granted the divorce to the Wife based upon inappropriate marital conduct and declared her to be primary residential parent for the minor child. (R. at 101, para. 1-2). Based upon the Husband's gross monthly income of Fourteen Thousand Four Hundred Twenty Three Dollars ($14,423.00), the Court noted that the Guideline support amount should be Two Thousand One Hundred Forty Three Dollars ($2,143.00), but deviated downward to One Thousand Eight Hundred Dollars ($1,800.00) per month based upon Husband's extra visitation time with his

son. (R. at 107, para. 9). The Wife was awarded One Thousand Five Hundred Dollars ($1,500.00) per month for the first year of divorce and Two Thousand Five Hundred Dollars ($2,500.00) per month thereafter as alimony *in futuro*. (R. at 107, para. 10).

In making a division of property, the Court classified the increase in the value of the Husband's interest in Service Transport, Inc., which amounted to One Million Nine Hundred Ninety Six Thousand Three Hundred Sixty Three Dollars ($1,996,363.00) as marital property. (R. at101, 103-104, para. 5-6). Included in this figure is Two Hundred Fifty Six Thousand Three Hundred Twenty Dollars ($256,320.00) additional sales proceeds which were being held in escrow. (R. at 106).

The Chancellor valued the total marital estate at Two Million Two Hundred Twenty One Eight Hundred Twenty Dollars ($2,221,820.00) and, considering the tax consequences to the Husband incurred upon the sale of his stock in Service Transport, Inc., deemed an award of 37.5% of the marital property to the Wife to be an equitable division. (R. at 106, para. 7). However, based upon an estimate of the capital gains tax liability of the Husband, the Wife received 45.4% of the marital estate. (R. at 119). (See, Rule 7 Table, infra).

The Husband filed his Notice of Appeal on February 11, 2005. (R. at 120).

On June 22, 2005, the Court of Appeals affirmed the decision of the Chancery Court with the exception of modifying the award of alimony *in futuro* to rehabilitative alimony. (Opinion attached at Appendix B).

This Court accepted the Husband's Application for Permission to Appeal on November 20, 2006.

STATEMENT OF FACTS

Introduction

Because the instant appeal centers upon the classification and valuation of the Husband's interest in the family trucking company, Service Transport, Inc., many facts and circumstances of the marriage are not particularly relevant. However, certain basic facts will assist in the Court's understanding of the controversy.

The Husband and Wife married on December 16, 1988. (Tr. at 86, L. 15-16). At the time of trial, the Husband was forty-eight (48) years old and the Wife was forty-five (45) years old. (Tr. at 86, L. 10; at 195, L. 8).

The Husband took seven (7) years to complete three (3) years of college. (Tr. at 86, L. 11-13, at 217, L. 12-14). The Husband's only work experience is working for his father in the family business, Service Transport, Inc. (Tr. at 88, L. 16-25).

The Wife has a high school education. (Tr. at 216, L. 21-22). Prior to the birth of the parties' only child in 1990, the Wife worked for Bilbrey Sign Company for two and one-half (2 ½) years and then worked for International Specialties for three (3) years where she sold specialized equipment. (Tr. at 228-229, L. 20-25, 1-25).

The Husband's father started his estate planning in 1984. (Tr. at 87, L. 4-24; Ex. 2). Specifically, he gifted stock, and on a few occasions a combination of stock and cash, to the Husband and other members of the family each year. (Ex. 2). He declared the "Value of (the) Gift" on the State Gift Tax Returns to be the maximum permitted by law; to wit, Twenty Thousand Dollars ($20,000.00). (Ex. 2; Tr. at 39, L. 11-21)(2001 State Gift Tax Return attached as Appendix C). In discovery, the Husband admitted that be "believe(d) the information contained in the Tennessee State Gift Tax Returns of his father ... is correct." (Ex. 5, p. 2). (Request for Admission and Response

attached as Appendix D).

The Chancellor granted the parties' divorce on August 24, 2004. (R. at 100-110).

The court held that the increase in value of the Husband's separately-owned, restricted stock in the family business was marital property. He calculated the increase by subtracting the total "Value of Gift" set forth in State Gift Tax Returns from 1988 to 2001 ($253,229.00 - R. at 101) from the purchase price of the unrestricted stocks on the open market in 2002 ($2,249,592.00)[1]. (R. at 104, 106).

The Court of Appeals affirmed the Chancellor's decision in regard to the classification and valuation of the Husband's Service Transport, Inc. stock. (Op.) (Attached as Appendix B). However, the Court reversed the award of alimony *in futuro*. As modified, the Wife received rehabilitative alimony of Two Thousand Five Hundred Dollars ($2,500.00) a month for eight (8) years, child support of One Thousand Eight Hundred Dollars ($1,800.00) a month, and 46% of the marital estate, valued at Eight Hundred Fifty Three Thousand Dollars ($853,000.00). (Id.; Rule 7 Table, supra). The Husband received One Million Twenty Thousand Nine Hundred Eighty One Dollars ($1,020,981.00). (Id.).

[1] The net proceeds received by the Husband for his 14.24% interest in the corporation are calculated as follows: Court's equity value for the Husband's stock of $1,030,139.00, the Husband's 14.24% interest in Dartmoor Realty, LLC of $709,904.00, the cash held in escrow of $256,320.00, and the value of stock gifted to the Husband of $253,229.00).

The Husband's Involvement In Service Transport, Inc. *Prior To Marriage*

The Husband's father and a partner started a trucking company, Service Transport, Inc. when the Husband was still a child. (Tr. at 86, L. 21-25; at 92, L. 17-18). In 1979, when the Husband was twenty three (23) years old, he began working for his father's company as a truck driver and mechanic. (Tr. at 88, L. 17-24). Prior to the parties' marriage in 1984, the Husband did "a little bit of everything". (Tr. at 89, L. 2-4). Specifically, he worked in Knoxville, Memphis, and Kingsport gaining experience in various aspects of the business. (Tr. at 89, L. 4-15). The Husband helped open freight terminals in Kingsport and Knoxville, drove trucks, answered the phone, and worked in the general office learning freight billing and general office duties. (Id.). For a six (6) month period, he was involved in sales. (Tr. at 89, L. 16).

The Husband's Involvement In Service Transport, Inc. *After Marriage*

At the time of the parties' marriage in 1988, the Husband was working in Nashville at the break bulk center where freight would arrive at night and be distributed for further shipping the next day (i.e. essentially working in a warehouse on a loading dock). (Tr. at 89-90, L. 14-25, 1-18). He commuted to Nashville from Cookeville each day because the Wife was required to reside in Cookeville pursuant to her divorce decree from her first marriage. (Id.). After about fourteen (14) months, this restriction was removed and the parties moved to the Nashville area. (Id.).

The parties moved back to Cookeville in 1996 or 1997 and the Husband purchased a home for his in-laws. (Id.; Tr. at 94, L. 19-25). In Cookeville, the Husband worked as an office clerk, answered the telephone, and filled in when people were sick. (Tr. at 91, L. 1-10). He did not solicit new business, did not participate in decisions regarding new terminals or locations, did not make decisions regarding the purchases of equipment, had nothing to do with establishing new routes, or deal with accounts receivables. (Tr. at 91-92, L. 11-25, 1-12). He "filled in for people who were out

... worked in the salvage department some ... whatever (dad and his partner) wanted me to do ...". (Tr. at 92, L. 14-18).

Based upon this evidence, the trial court determined that the Husband had substantially contributed in a real and significant way to the increase in the value of the corporation during the course of the marriage. (Op. At 6-9). The Court of Appeals affirmed. (Id.).

Husband's Ownership Interest In Service Transport, Inc.

The Husband's father began his estate planning in 1984, four years prior to the parties' marriage. (Tr. at 87, L. 4-12; Ex. 5, 2). Specifically, the Husband's father gifted shares of Service Transport, Inc. stock to the Husband and other members of the family . (Id.). He continued to make these annual gifts until 2001. (Id.). These stock certificates were severely restricted. For example, the Husband was prohibited from selling, transferring, or encumbering the stock in any way. (Tr. at 24, L. 8-20). He had no voting privileges or decision-making powers as a stockholder and the Husband's father retained all voting rights. (Id.; Ex. 3). In a word, the Husband's stocks were not marketable. (Id.; at 45, L. 2-16; at 46, L. 3-25).

Because of this and based upon accepted estate planning guidelines, the Husband's father declared the "Value of Gift" each year to be Twenty Thousand Dollars ($20,000.00), the maximum allowable by law without incurring tax consequences. (Ex. 2; Tr. 40, L. 15; at 45, L. 1-12; at 47, L. 3-6). According to the State Gift Tax Returns, the value of these gifts of minority-owned, restricted stock certificates for estate planning purposes ranged from Two Thousand Three Hundred Dollars ($2,300.00) to Ten Thousand Dollars ($10,000.00) a share between 1984 and 2001. (Ex. 2, 4). "But", according to the certified public accountant, "to say that these gift tax returns represent the actual value of the stock, no, you can't". (Tr. at 47, L. 4-6). "If you have stock and/or real estate that is not readily marketable and that you have a minority ownership interest in, then therefore for gift

tax purposes and for estate planning purposes, and more important in the event of death, you can drastically take discounts, both marketability and minority interest discounts on determining the value of the ownership interest, whether it be stock or whether it be real estate for purposes of paying the tax." (Tr. at 45, L. 2-12). The certified public accountant testified, "That is what my understanding was done in this (case)" and complemented the estate planner for doing "an excellent job". (Id., Tr. at 47, L. 3-4).

However, the Chancellor relied upon the Husband's "Admission" that the State Gift Tax Returns were correct. Viewing the issue as a matter of law, the court found that the total "Value of Gift"as declared on the State Gift Tax Return for restricted stock certificates gifted to the Husband between 1994 and 2001(i.e., $253,229.00) represented the market value of the corporation at the time the gift was made. (Tr. at 42, L. 16-25; R. at 194, 101; Ex. 2, 4). He declared this amount (i.e., $253,339.00) to be the Husband's separate property. (R. at 101) . In 2001 and for three (3) years prior to that, the Husband's father declared the **gift value** of each share of restricted stock transferred to the Husband to be Ten Thousand Dollars ($10,000.00) per share[2]. (Ex. 4, Ex. 2). **If** this share price reflected the actual market value of the corporation, the Husband's interest in Service Transport, Inc. amounted to approximately Five Hundred Thousand Dollars ($500,000.00) as he owned 49.96 shares of stock in the corporation. (Ex. 4). One year later, in 2002, the Husband's stock became unrestricted because his father decided to sell the company to Stacas Holdings, Inc. (Ex. 9). This decision catapulted the value of the Husband's hitherto restricted stock to a market

[2] The "Value of (the) Gift " of the minority-owned, restricted stock gifted to the Husband from the date of marriage to December 31, 2001 as stated in the State Gift Tax Returns reflects a stock price, for estate planning purposes, of $3,478.00 in 1989, which was one of the corporation's most profitable years, to $5,333.00 in 1996 when deregulation caused the corporation to lose its "intrastate authority" (i.e., monopoly rights to transport goods within the State), to $10,000.00 in 2001 when the corporation lost over $1,000,000.00. (Ex. 4; Tr. at 45, L. 19-23, at 47-48, L. 10-25, 1-6).

value of $2.25 million. (Id.; Rule 7 Table). Thus, the value of his restricted stock rocketed from $10,000.00 a share as stated as the "Value of Gift" on the State Gift Tax Return of 2001 to $45,000.00 a share after the restrictions were removed. (Ex. 4; Rule 7 Table). The Wife presented no evidence relating to the Husband's contributions to the corporation during 2001 which might explain this 450% increase in the value of the Husband's stock between 2001 and 2002.

The Chancellor, however, deemed it a matter of law that the Husband was bound by his Admission in a Request for Admission that he "believed" that the "information contained in the Tennessee Gift Tax Returns of his father", specifically the "Value of Gift" was "correct". (Tr. at 48, L. 9-17; Ex. 5, p.2 ques. 3; Tr. at 37-44). Therefore, the Chancellor based the value of the Husband's separate property interest in the corporation on the "Value of Gift" (i.e., $253,229.00) for the restricted and unmarketable stock certificates as stated in the State Gift Tax Returns. (R. at101). He then subtracted this separate property interest from the sales price for the stock certificates on the open market, **with the restrictions removed,** to determine the marital interest[3]. (R. at 101, 104; Ex. 5; Op. at 2-3). The Court of Appeals found that the "trial court was well within its discretion to determine that Husband was bound by his admission that the value of the stock at the time of gift was $253,299." (Op. at 3).

[3] For his interest in the corporation, the Husband received cash of $1,283,367.00, the right to escrowed funds of $356,320.00, and a 14.24% interest in certain realty valued at $709,904.00. (R. at 101, 104).

According to this calculation, the value of the Husband's stock increased by 450% in one (1) year; an increase in value to which the Chancellor held the Husband had substantially contributed. There is no dispute that the removal of the restrictions on Husband's stock in 2002, accomplished solely by the Husband's father's decision to sell the company, caused the value of the Husband's stock to increase from approximately Ten Thousand Dollars ($10,000.00) to Forty Five Thousand Dollars ($45,000.00) a share in one (1) year's time. (Tr. at 44, L. 23 through 47, L. 6).

Testimony of the Expert

The Certified Public Accountant (hereinafter referred to as "CPA") who handled the sale of the corporation in 2002 and who had examined the books and records of the corporation, testified that the Husband owned 14.24% of the corporation, all of which was gifted to him from his father. (Tr. at 16, L. 5-25, 1-16). He confirmed that the gifts were reflected in Gift Tax Returns beginning in 1984 and were transferred for estate planning purposes. (Id.). According to the CPA, the State Gift Tax Returns do not establish the true value of the stocks. (Tr. at 44, L. 14-21). He explained that, for gift tax purposes, the Internal Revenue Service allowed deep discounts in the value of stocks when said stocks contained restrictions which render them not easily marketable and when they are given to minority shareholders. (Tr. at 45, L 1 through 47, L. 6). The stocks gifted to the Husband had significant restrictions; to wit, the Husband was prohibited from selling, transferring or encumbering the stock in any way. (Tr. at 24, L. 8-20). Moreover, he had no voting privileges or decision-making powers as a stockholder. (Id.). The Husband's father retained all voting rights for Husband's stock. (Id.; Ex. 3). The CPA testified that, although the value of the restricted stock gifted to the Husband as stated on the State Gift Tax Return was correct for tax reporting purposes because of the restrictions, the stated value of the gift did not reflect the true value of the stock without restrictions. (Id.; at 44, L. 25 through 47, L. 6). Specifically, the value stated on the State

Gift Tax Return was a "drastically deflated" value based upon the fact that the stocks were not easily marketable because of the restrictions. (Id.).

In fact, the CPA testified, not only that the State Gift Tax Returns were not an accurate measure of the true value of the stock, but also that the value of the corporation itself had **not** appreciated during the course of the marriage. (Tr. at 47-48, L. 7-25, 1-6). In this regard, he noted that the corporation had lost almost One Million Dollars ($1,000,000.00) during its last year of operation. (Tr. at 45, L. 19-22, at 50, L. 2-9). Furthermore, the deregulation of the trucking industry had severely impacted the corporation's business. Specifically, in the mid- to late-nineties, the corporation lost its "intrastate authority", which was essentially a monopoly granted to a few Tennessee corporations to carry interstate cargo through Tennessee. (Tr. at 47-48, L. 7-25, 1-6; at 50, L. 2-9; at 96, L. 10 through 98, L. 9).

The Chancellor rejected the CPA's testimony that the value of minority-owned, restricted stock is routinely and lawfully "drastically reduced' when transferred for estate planning purposes. (Tr. at 45, L. 1 through 48, L. 4).

The Sale Of Husband's Interest On The Open Market

The sales contract for the sale of Service Transport, Inc. to Stacas Holdings, dated December 31, 2002, provides that the stock of the corporation would be sold for Eighteen Million Dollars ($18,000,000.00) less specified debts to be paid by the stockholders. (Tr. at 29-30, L. 11-25, 1-4). Further, certain real estate, comprised of truck terminals, would be transferred to the sellers (Dartmoor Realty, LLC), subject to certain debts. (Id.). For his 14.24% interest in Service Transport, Inc, the Husband received net cash proceeds of One Million Two Hundred Eighty Three Thousand Three Hundred Sixty Seven ($1,283,367.00), a 14.24% interest in Dartmoor Realty, LLC valued at Seven Hundred Nine Thousand Nine Hundred Four Dollars ($709,904.00), and a 14.24%

interest in an escrow account ($256,320.00) for a total of Two Million Two Hundred Forty Nine Thousand Five Hundred Ninety One Dollars ($2,249,591.00). (Tr. at 30, L. 11-17; R. at 100-101, 104, 106).

The Drastic "Increase" In The Value Of Husband's Stock

As noted, the "Value of Gift" stated on the 2001 State Gift Tax Return increased by 450% in one (1) year as reflected by the sales price of Service Transport, Inc. There is no dispute that this drastic increase in value of Service Transport, Inc. was occasioned by one and only one factor; the decision by the Husband's father and partner to sell the corporation to Stacas Holdings, Inc. Specifically, the decision to sell the corporation removed the restrictions on the Husband's stock which had heretofore made the stock unmarketable and virtually worthless. (Ex. 9, Tr. at 45, L. 3-16, at46, L. 17-25). The decision to sell the corporation, and only that decision, caused the share price in the corporation to reflect the open market value of the gifts as opposed to estate planning "value of (the) gift" estate planning purposes.

The Husband's Admission That The Gift Tax Returns Were "Correct"

The Wife offered no evidence pertaining to the value of the corporation at the time of marriage, or at times that the Husband received the annual gifts of stock. Rather, she relied exclusively upon the Husband's "Admission" in her Request for Admissions that he "believe(d) that the information contained in the Tennessee State Gift Tax Returns of his father ... is correct". (Ex. 5; Tr. at 22-23, L. 20-25, 1; at 37-41). The Chancellor apparently agreed, holding that the admission that a State Gift Tax Return which lawfully discounts the value of restricted stock in a corporation for estate planning purposes is the same as admitting the value of the unrestricted stock on the open market.

RULE 7 TABLE[4]

Asset	Husband's Value (Tr. 101-108; Ex.16)	Wife's Value (Ex. 18)	Court's Value (R. at 94-97, 119)	Award to
Marital Residence	$45,000	$42,432	$46,200	Wife
Old Qualls Rd. Property	$70,000	$70,000	$70,000	Wife
TRJ 401K Account	$197,000	$197,381	$197,381	Wife
1998 Houseboat	$55,000	$45,000	$56,200	Husband
1998 Tractor	$2,000	Not stated	$2,000	Husband
2003 Motorcycle	Not stated	$7,000	$5,000	Husband
Service Transport Stock*	Not Stated	$3,017,775	$1,030.139	$520,000 to Wife
Dartmoor Realty, LLC*	Not stated	See above	$709,904	Husband
B.M. Terminal	$105,000	$120,000	$105,000	Husband
Household Goods	Not Stated	$39,288	$40,000	50/50

Total Marital Property before tax on stock sale	$2,221,820	(R. at 98,106)
Total Marital Property after tax on stock sale	$1,874,562	(R. at 119)
Marital Property Awarded to Wife (after tax)	$ 853,581	(46%)
Marital Property Awarded to Husband (after tax)	$1,020,981	(54%)

*The parties have an additional $256,320.00 held in escrow from the sale of the corporation. (R. at 101). Upon distribution, the Wife is to receive 37.5% of the escrowed funds. (R. at 106).

[4] This Rule 7 table does not include property which the Husband purchased with the cash proceeds from the sale of Service Transport, Inc. because the inclusion of these assets would duplicate the cash proceeds received from the sale of Service Transport, Inc. stated in the Rule 7 Table. The assets which the Husband purchased with the proceeds from the sale of his stock are as follows: a lot adjacent to the marital home, a 2003 Harley Davidson motorcycle, a Criscraft boat, two Seadoos, a 2003 Chevy Pick-up, and a 1993 Corvette. (Tr. at 111, L. 21 through 115, L. 21).

ARGUMENT

Summary of Argument

1. There is no dispute that the fifty (50) shares of Service Transport, Inc. stock gifted to the Husband during the course of the marriage are separate property.

2. The appreciation in the value of this stock, regardless of how measured, is not marital property because the Husband, as mid-level, non-managerial employee, did not "substantially contribute" to its preservation or appreciation.

3. **If** the Court determines that the Husband "substantially contributed" to the appreciation of the corporate stock, the Chancellor abused his discretion in utilizing the "Value of Gift" stated on the State Gift Tax Return to determine the market value of the stocks and rejecting the uncontradicted testimony of the certified public accountant who explained that the value of minority-owned, restricted stock for gift tax purposes does not correlate with the actual value of the stock on the open market.

4. The Husband's admission that the "Value of Gift" stated in his father's State Gift Tax Returns was "correct" does not equate with an admission that the value of the minority-owned, restricted stock for gift tax purposes reflects the open market value of the corporation.

5. **If** the Court determines that the Chancellor was within his discretion in using the State Gift Tax Return as the measure of the Husband's separate property interest, there is no evidence that the Husband made any contribution during the year 2001 which caused the stock to rocket in value from $10,000.00 a share to $45,000.00 a share in one year.

6. In fact, the evidence preponderates in favor of the conclusion that the value of the Husband's interest in the corporation increased for one and only one reason; to wit, the removal of the restrictions on his stock certificates and the operation of market forces.

I. THE TRIAL COURT ERRED IN CLASSIFYING ANY PORTION OF THE HUSBAND'S INTEREST IN SERVICE TRANSPORT, INC. AS MARITAL PROPERTY BECAUSE THE HUSBAND DID NOT "SUBSTANTIALLY CONTRIBUTE" TO ITS PRESERVATION OR APPRECIATION.

In the instant appeal, there is no dispute that the stock which the Husband's father gave to him each year, as reflected in the State Gift Tax Return, is the Husband's separate property. The question arises: is the appreciation of that stock during the course of the marriage marital property? The statute provides that any increase in value of the stock during the parties' marriage would be marital property, provided **each** party substantially contributed to the preservation and appreciation of the stock. T.C.A. §36-4-121(b)(1)(B)(1996). In sum, the predicate for the analysis of a non-owner spouse's direct or indirect contribution to the preservation and appreciation of the other spouse's separate property is a finding that the owner of the separate property made a significant contribution to its increase in value. See, Clement v. Clement, 2004 WL 3396472 (Tenn. App.). If the owner of the separate property made no significant contribution to the preservation and appreciation of the separate property, the question of any contribution by the non-owning spouse is pretermitted. In order to be substantial, a spouse's contributions must be real and significant. Mahaffey v. Mahaffey, 775 S.W.2d 618, 623 (Tenn. App. 1989).

Assuming **arguendo** that the Husband's interest in Service Transport, Inc. increased from $253,229.00 to $2,200,000.00 during the course of the marriage and that stock in the corporation increased from $10,000.00 per share to $45,000.00 per share between 2001 and 2002, there is no evidence that the Husband was anything other than a normal employee of the corporation. Specifically, except for a six (6) month stint prior to marriage, he never worked in sales. (Tr. at 89, L.6-7; at 91, L. 11-16). Nor did he make decisions concerning new routes, negotiate new acquisitions, make purchasing decisions, or work in accounts receivable. (Tr. at 91-92, L. 18-25, 1-

12). The closest he got to management was sitting in for a freight manager when the manager was absent. (Tr. at 91, L. 1-3). He worked at the bulk freight center in Nashville, helped with the company's salvage operation which provided jobs for his in-laws, and filled in for people. (Tr. at 89, L. 14-19; at 92, L. 14-18; at 94, L. 5-18). There is no evidence whatsoever that he was an important cog in the corporate wheel. Rather, he was the son of the owner who was allowed to earn an income from the company. At best, the Husband's contribution to the corporation was no different than any other employee who worked for Service Transport, Inc. or any low or mid-level employee who owns stock in the corporation in which he or she is employed. There is no case law which holds that the contribution of an employee, who makes no management or business-planning decisions, is a "substantial" contributor to the increase in value of the corporation in the context of T.C.A. §36-4-121(b).

The Court's attention is directed to Clements v. Clements, 2004 WL 3396472 (Tenn. App.). In Clements, the husband worked for the family business, Guaranty Loan and Real Estate, and, unlike the Husband in the instant appeal, was in charge of one of the five major divisions of the corporation. His salary was commensurate with his responsibility – $645,000.00 a year.

Through gifts and inheritance, he received a 7.3% interest in Guaranty Loan as well as interests in a commercial real estate firm, an apartment complex, and an operating farm. All of these interests appreciated significantly during the course of the marriage. There was no dispute that the wife in Clement made extraordinary contributions to the marital partnership as homemaker and mother and that the husband was very neglectful of his duties as husband and father.

In Clement, the husband argued that the employees of the various business interests were responsible for the business' success and that he did not substantially contribute his own energies or expertise to the growth of the various ventures. The Clements court rejected both arguments.

> Mr. Clement claimed at trial that he had done nothing to contribute to the appreciation of his separate properties during the duration of the marriage. He pointed out that the actual day-to-day management of the properties was delegated to other individuals. The upshot of these assertions is that, if Mr. Clements did nothing to contribute to the appreciation or preservation of these separate properties, then Ms. Clements cannot be credited with helping to make such appreciation or preservation possible through her contributions as a homemaker. It strains credibility for Mr. Clement to suggest that he had little or no role in the preservation or appreciation of his separate assets during the marriage to Ms. Clements. While it may be true that many of the day-to-day responsibilities of managing the properties were delegated to other individuals, the record shows that Ms. Clements contributions as a homemaker freed Mr. Clements up to **oversee** his wide range of properties and investments unburdened by the day-to-day management of the home or many of the responsibilities involved in parenting their son Bowers. Mr. Clement himself acknowledged that much of the management of his separate properties was delegated to employees of Guaranty Loan, of which Mr. Clements was an owner. Furthermore, even while such employees may have done the bulk of the work, Mr. Clements did, at times, take an active role in managing the properties – for example, he rehabilitated about 160 apartment units owned by Guaranty; he participated in the firing of a farm manager of Parkin Farm, and he was consulted by Guaranty's employee Randy Catt whenever the farmers who leased Parkin Farm desired to make improvements on the property. Whether he chose to manage his property by delegating day-to-day responsibility to other individuals is not especially material to this analysis. **What is important is that Mr. Clements was ultimately responsible for managing his own properties and Ms. Clement's work as a homemaker allowed him to do just that.**

Id. at *11. (emphasis supplied).

The Husband in the instant case had no such responsibilities and no employees to whom to delegate any managerial responsibilities.

A similar case is Yates v. Yates, 1997 WL 736477 (Tenn. App.), where the husband received 10% of the stock in a family business, General Appliance and Furniture Company, prior to the parties' marriage. As such, the stock was separate property. However, during the course of the seventeen (17) year marriage, the stock appreciated in value and the question became – had the

husband significantly contributed to the stock's increase in value and, if so, did the wife make direct or indirect contributions to such appreciation.

In Yates, the husband, like the Husband in the instant case, had worked in the family business, General Appliance and Furniture Company, for a substantial period of time. Unlike the Husband in the instant case, the Yates spouse had climbed the corporate ladder and was General Appliance Director. The Yates spouse made an argument similar to the husband's argument in Clements. He argued that he had not contributed to the appreciation of the company stock and that his father was the driving force behind the corporation's growth. The Yates court rejected this argument, noting that, as General Appliance Director, the husband was responsible for managing the appliance division of the company, deciding what appliances to purchase each year, negotiating the purchase from suppliers, and selling the appliances to customers. Further, the trial court noted that, according to credible testimony, the husband's father's involvement in the company had "slacked off" in recent years.

The Court's attention is also directed to Brown v. Brown, 913 S.W.2d 163 (Tenn. App. 1994). In Brown, the husband worked in his father's concrete block business. During the course of the marriage, the father gifted one hundred sixty six (166) shares of stock in the corporation to the husband. The husband served as the corporation's secretary-treasurer and was responsible for production at the block plant and for maintenance of the corporation's vehicles and equipment. The court held that the husband had "substantially contributed" to the increased value of the corporation.

In comparison to the husbands' managerial roles in the businesses in Clements, Yates, and Brown, the Husband in the instant appeal did not even have a title. Nor did he have any special expertise or responsibility. He testified that his role in the corporation since the date of his marriage was "working in the break bulk center" in Nashville "where freight comes in at night and gets

distributed and goes out the next day", doing "whatever needed to be done", working in the terminal manager's place if he "was out sick", "work(ing) in the general office by "answer(ing) phones from other terminals about questions if they had problems", "filled in for people if they were out", "helped open a new store ... to sell salvage", and "worked in the salvage department some". (Tr. at 89, L. 14-19; at 91, L. 1-10; at 92, L. 14-18). "It was kind of whatever (my dad and his partner) wanted me to do, I would do it". (Id.).

The predicate showing that the working spouse substantially contributed to the growth of the family business was met in Yates, Clements, and Brown. In the instant case, there are insufficient facts to satisfy this important predicate requirement. See also, Sherrill v. Sherrill, 831 S.W.2d 292 (Tenn. App. 1991)(appreciation in separate property (stock) owned by husband prior to marriage did not become marital property where there was no inference in testimony that husband's employment by company in which he held stock had any positive influence upon increase in value of the stock).

The instant appeal presents an unusual case because most of the existing case law on this issue focuses upon the non-owning spouse's direct or indirect contribution to the other spouse's ability to devote his or her energy to the preservation and appreciation of separate property. In most of those cases, the significant contribution of the owner of the separate property is not disputed. See, Davis v. Davis, 2001 WL 914010 (Tenn. App.) (appreciation of husband's stock in closely-held company business form printing) held to be marital property where the wife, in addition to being homemaker and mother, worked for the company on two separate occasions for significant periods of time, accompanied the husband on business trips to purchase equipment, and attended conventions with husband); Powell v. Powell, 124 S.W.3d 100 (Tenn. App. 2003)(husband's check cashing stores opened prior to the parties marriage were marital property because evidence showed wife's "active involvement in the growing of the check cashing businesses"); Clements v. Clements, supra

(wife was not only primary caretaker for the parties' daughter and homemaker but also worked as manager of the video rental operation of the company, accompanied the husband on business trips, attended company dinners and meetings, and helped organize company functions). But see, Bates v. Bates, 2003 WL 21171555 (Tenn. App.)(wife awarded half of the appreciated value of marital home for significant contributions as stepmother, wife and homemaker although awarded no interest in husband's separate property (landscaping business) where her participation in the business was "not substantial").

Based upon Tennessee case law and common sense, the Husband argues that the evidence preponderates against the conclusion that he "substantially contributed" in a "real and significant" way to the purported appreciation in the value of Service Transport, Inc.

II. ALTERNATIVELY, THE CHANCELLOR ABUSED HIS DISCRETION IN FINDING THAT THE VALUE OF SERVICE TRANSPORT, INC. STOCK APPRECIATED DURING THE COURSE OF THE MARRIAGE BASED UPON THE "VALUE OF GIFT" STATED IN THE STATE GIFT TAX RETURNS WHICH WERE FILED FOR ESTATE PLANNING PURPOSES.

In the event that the Court finds that the Husband's job responsibilities were "real and significant" contributions to the purported increase in value of stock in Service Transport, Inc., the trial court abused its discretion in utilizing the value of the stock for gift tax purposes as the baseline to determine the extent of its appreciation upon its sale in the open market. In this regard, the trial court held that the value of the Service Transport, Inc. stock which the Husband owned at the time of the marriage and which was gifted to him during the course of the marriage was $253,229.00. (R. at 104). This figure was based upon the "Value of Gift" amount stated by the Husband's father on the State Gift Tax Return for estate planning purposes from 1984 through 2001. (Ex. 2). The court then calculated the increase in value of the stock by reference to the proceeds received by the Husband when the corporation was sold on December 31, 2002. (R. at 104). Thus, the appreciation of the stock was determined by comparing the gift tax value of restricted, minority interest stock for estate planning purposes with the fair market value of the unrestricted stock when it was sold on the open market. The Husband submits that there is no precedent for the valuation of stock by reference to gift tax returns. See, Blasingame v. American Materials, Inc. 645 S.W.2d 659, 666 (Tenn. 1983)(recognizing three non-exclusive methods for determining the value of a corporation). Moreover, to determine increase in value of stock by comparing the Gift Tax Value for restricted stock with the value of the unrestricted stock selling on the open market is clearly a flawed comparison. The measures for value are entirely different [5].

[5] It is interesting to note that **if** the Husband's argument is rejected and the court agrees that the Chancellor properly valued the Husband's separate property interest according to the "Value of Gift" stated in the State Gift Tax Returns, then the appreciation of the stock is due, not to the growth

Analysis of the testimony and the evidence in the record pertaining to the "Value of Gift" when the Husband received his interest in the corporation absolutely contradicts the notion that the value stated in the State Gift Tax Return represents the true value of the stock. In this regard, the CPA who had examined the books and records of the corporation and the State Gift Tax Returns testified that "from a tax standpoint and an evaluation standpoint for gift tax and for inheritance tax, the values that were used were in my opinion drastically deflated for gift tax purposes, but done based on the law that existed ...". (Tr. at 45-46, L. 23-25, 1-2).

> If you have stock and/or real estate that is not readily marketable and that you have a minority ownership interest in, then therefore for gift tax purposes and for estate planning purposes, and more importantly in the event of death, you can drastically take discounts, both marketability and minority interest discounts ... for the purpose of paying the tax. ... If you look at the stock agreement, Tim Keyt cannot sell this stock. He couldn't mortgage it. He couldn't vote it.
>
> ...
>
> (A) buyer would not pay much for it until the time that it was actually sold. But to say that the gift tax returns were the true value, in my opinion, to Tim's dad, they were a true value based on the planning process that he put in place. Whoever put that plan in place, in my opinion, did an excellent job. But to say that those gift tax returns represent the actual value of the stock, no, you can't.

(Tr. at 45,L. 2-14; at 46-47, L. 24-25, 1-6).(Emphasis supplied).

No cases were found in which the value of a stock was determined by reference to the value stated on a Gift Tax Return which is an estate planning tool. The inaccuracy of such a measurement is obvious from the valuations used in this case. For example, in 2001, the Husband's father "valued" the two (2) shares of stock gifted to the Husband at Twenty Thousand Dollars ($20,000.00)

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of the company (which lost $1,000,000.00 in 2001), but rather to the decision to sell the corporation. It is this decision to sell the company, not any organic increase in value of the corporation, which caused the 450% increase in the stock's "value". The Husband played no part in the decision to sell the corporation and thus did not contribute to the increase in value of the stock.

(i.e., $10,000.00 per share). (Ex. 2). In 2002, when the corporation had lost close to One Million Dollars ($1,000,000.00), the shares sold for approximately Forty Five Thousand Dollars ($45,000.00). (i.e., calculated differently: Husband's 49.9 shares comprised 14.24% of the corporation thus 100% of the stock would be 350 shares; $18,000,000.00 sales price divided by 350 shares equals $51,429.00 per share). (Tr. at 50, L. 1-9; Ex. 4). Another example of the inaccuracy of using the "Value of Gift" as a measurement of the true value of the stock amount is found in the year 1989 when the corporation "made a bunch of money" and yet the "Value of Gift" amount set as value of the stock was at one of its lowest points; i.e., $3,478.00 a share (i.e., 5.75 stocks gifted and valued at $20,000.00 equals $3,478.00 per share). (Ex. 2; Tr. at 45, L. 16-23). Clearly, the State Gift Tax Returns reflect value for estate and gift tax purposes only and do not accurately represent either the true value of the corporation or the true value of the stocks at the time they were gifted to the Husband as his separate property.

The Husband admitted only that the information stated on the State Gift Tax Return was correct. (Ex. 5). It was. It was perfectly legal. He was not asked to admit that the open market value of Service Transport, Inc, was correctly set forth in the State Gift Tax Returns. Nor was he required to clarify any possible confusion on the part that the Wife's attorney as to this issue. He was only required to admit or deny the Request for Admission, as written, which he did.

In the absence of any authority allowing the court to value the Husband's interest in the corporation according to the value set for estate planning purposes, the Wife asserts that the Husband is estopped from challenging the value because he admitted that the State Gift Tax Returns were "correct". (Tr. at 37-42). A reading of the Request for Admission clearly shows that the Husband was only admitting that "the information contained in the State Gift Tax Returns is correct". (Ex. 5, para. 3). As noted, the State Gift Tax Returns request the "Value of Gift", not the value of the stock, which is certainly more than a semantic distinction according to the CPA. (Tr. at 44, L. 14 through 47, L. 6). In fact, the CPA confirmed that the information stated in the State Gift Tax Returns was "correct" for the intended purpose; to wit, estate planning and taxation of gifts of restricted, minority interest stocks. (Id.). However, he was adamant in stating that "those gift tax returns (do not) represent the actual value of the stock ...". (Id.).

Moreover, answers supplied in discovery requests do not trigger the doctrine of judicial estoppel or foreclose the issue of valuation. Loveridge v. Loveridge, 1986 WL 5896 (Tenn. App.).

> Plaintiff also asserts that because the property valuation given in the defendant's financial statements, as well as his answers to the plaintiff's interrogatories, often differed from those given during the trial, this Court should invoke the doctrine of judicial estoppel. In other words, the plaintiff contends the defendant should be estopped from modifying or changing the property valuations he gave when he answered the plaintiff's interrogatories. Plaintiff cites us no authority, and we have been unable to find any, which would support our extending the doctrine of judicial estoppel to include interrogatory responses. A party's subsequent changing an answer to an interrogatory is essentially the same as a witness testifying differently on his direct and cross examination. In either case, the uncertainty and changeability of the person involved is simply another factor to which the trial court looks in determining the credibility of the person's testimony.

Id. at *3.

It should be noted that, if the Court accepts the Husband's argument that he did not admit the

value of the corporation by admitting the correctness of his father's State Gift Tax Returns and the uncontradicted testimony of the CPA that the "Value of Gift" amount cannot be used to establish the value of the real stock, then the only evidence in the record pertaining to the financial history of the corporation is that the value of the stock did not appreciate during the course of the marriage but rather decreased in value. (Tr. at 47-48, L. 7-25, 1-6).

> Based on the income of the company, and the fact that they lost nine hundred and something thousand dollars, I don't see (any) increase in the value. Along about the mid to late nineties ... Service Transport lost what we refer to as intrastate authority. ... It is my understanding that they had a franchise in the State of Tennessee that said that if a trucking company out of New York was going to come in and haul freight within the State of Tennessee, they couldn't without subcontracting someone like Service Transport . ... The State of Tennessee ... did away with that. So, in effect they lost their franchise, which drastically made the trucking industry far more competitive, which drastically decreased the value of their company because they did not have the monopoly anymore.
>
> Q. It is your professional opinion that there was not an increase in the value of that stock.
>
> A. That is correct.

Id.

Based upon the foregoing, the only competent evidence in the record is that the Husband's interest in the corporation decreased during the course of the marriage. In any event, his admission that his father's estate planning tool was correct does not equate with an admission that the value placed upon minority-owned, restricted stock for estate planning purposes is the same as the market value of that stock once the restrictions are removed.

In sum, the only credible evidence in the record establishes that the Husband's interest in Service Transport, Inc. did not appreciate during the course of the marriage. The trial court utilized an inappropriate measure of value when it utilized the "Value of Gift" amount stated in the State Gift

Tax Returns as the actual value of the Husband's interest in the corporation.

CONCLUSION

Based upon the foregoing, the Husband respectfully requests that the Court reverse the decision of the lower courts by classifying the proceeds received by the Husband from the sale of Service Transport, Inc. as his separate property based upon the fact that any increase in value in the corporation during the course of the marriage was unrelated to the Husband's employment with the company.

Alternatively, the Court is asked to reverse the decision of the lower courts that the Husband's admission that his father's State Gift Tax Returns were "correct" estopped him from establishing the market value of the corporation and the fact that the corporation's value had decreased rather than increased during the course of the marriage. The Husband attaches hereto as Appendix A the Rule 7 Table which he proposes as a correct listing and division of the marital property.

Respectfully submitted,

MICHAEL W. BINKLEY
B.P.R No. 5930
150 Second Avenue North, Suite 300
Nashville, Tennessee 37201-1920
(615) 244-8630

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, by U.S. mail, 1st class, postage prepaid, a true and exact copy of the foregoing to:

Mr. Rankin P. Bennett
3927 Cowan Road
Cookeville, TN 38506

on this 19th day of January, 2007.

MICHAEL W. BINKLEY

HUSBAND'S PROPOSED RULE 7 TABLE

Asset	Husband's Value (Tr. 101-108; Ex.16)	Wife's Value (Ex. 18)	Court's Value (R. at 94-97, 119)	Award to
Marital Residence	$45,000	$42,432	$46,200	Wife
Old Qualls Rd. Property	$70,000	$70,000	$70,000	Wife
TRJ 401K Account	$197,000	$197,381	$197,381	Wife
1998 Houseboat	$55,000		$56,200	Husband
1998 Tractor	$2,000		$2,000	Husband
2003 Motorcycle		$7,000	$5,000	Husband
B.M. Terminal			$105,000	Husband
Household Goods		$39,288	$40,000	50/50
TOTAL MARITAL PROPERTY			$521,781.00	
Awarded to Wife		$333,581.00		
Awarded to Husband		$188,200.00		

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
FOR THE MIDDLE SECTION
AT NASHVILLE

MALCOLM MIMMS, JR.,	)	
Plaintiff/Appellant,	)	
	)	**Davidson Circuit**
v.	)	**No. 03D-2757**
	)	
MIRIAM ROSE PERRY MIMMS,	)	**C.A. No. M2006-00711-COA-R3-CV**
Defendant/Appellee.	)	

ON APPEAL FROM THE FOURTH CIRCUIT COURT FOR DAVIDSON COUNTY, THE HONORABLE MURIEL ROBINSON, PRESIDING

BRIEF OF THE APPELLEE, MIRIAM ROSE PERRY MIMMS

MICHAEL W. BINKLEY
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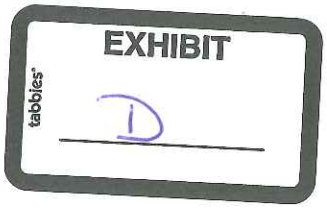

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REFERENCES

References to the Technical Record will be designated by the abbreviation "T.R." followed by the page number. References to the Trial Transcript (Transcript of Evidence) will be referred to by the abbreviation "Tr." followed by the page and line number where the reference can be found.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO REDUCE THE HUSBAND'S ALIMONY OBLIGATION BY 86% BASED UPON A TEMPORARY REDUCTION OF INCOME WHERE THE WIFE HAS NO INCOME, NO LIQUID ASSETS, MONTHLY EXPENSES OF OVER $10,000, AND THE HUSBAND HAS AN EARNING HISTORY OF OVER A HALF MILLION DOLLARS A YEAR AND CASH ASSETS OF OVER A HALF MILLION DOLLARS.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING THE HUSBAND TO PAY $4,000 FOR THE WIFE'S ATTORNEY'S FEES.

III. WHETHER THE WIFE IS ENTITLED TO THE AWARD OF ATTORNEY'S FEES INCURRED IN THIS APPEAL.

STATEMENT OF THE CASE

The parties were divorced on January 10, 2005. (T.R. 1-54). The Marital Dissolution Agreement equitably divided the marital assets and the parties agreed that the Appellee (hereinafter referred to as the "Wife") would receive rehabilitative alimony for eleven years. (Id.). However, at the time of the Marital Dissolution Agreement, the Appellant (hereinafter referred to as the "Husband") had lost his job and was receiving his base salary through August, 2005 as part of his severance package. (T.R. 12-13).

As a result, the Husband agreed to pay the Wife Seven Thousand Dollars ($7,000) per month through August, 2005 at which time the amount of rehabilitative alimony would be set by agreement, mediation, or judicial adjudication. (Id.). The Marital Dissolution Agreement provided that:

> The parties agree and acknowledge that if Mr. Mimms' income is less than he is currently receiving through his former employer, Mrs. Mimms shall not be allowed to use as a defense to any request for a decrease in his alimony obligation, in mediation or trial, that it was foreseeable or anticipated that Mr. Mimms may have a reduction in his income. ... At any time prior to or during mediation, Mr. Mimms may file a Petition to Modify his rehabilitative alimony obligation and the parties agree that Mr. Mimms shall have the same burden of proof as any other obligor with regard to requesting a modification in his rehabilitative alimony obligation and that Mrs. Mimms will have all defenses available to her, except those set out above.

(T.R. 12).

On July 19, 2005, the Husband filed a Petition to Modify Rehabilitative Alimony in which he stated that he would have no income as of August 31, 2005 and "none expected in the foreseeable future". (Supp. T.R. 1-5). The Wife answered the Petition on August 5,

2005. (T.R. 10-11).

On January 6, 2006, the Wife filed a Petition for Civil/Criminal Contempt against the Husband for, among other things, his failure to pay any rehabilitative alimony since September, 2005. (T.R. 60-70).

The trial court considered the Husband's Petition on January 12, 2006. (Tr.). On March 7, 2006, Judge Robinson filed her Order modifying the Husband's monthly rehabilitative alimony obligation from Seven Thousand Dollars ($7,000) per month to Five Thousand Dollars ($5,000) per month retroactive to September, 2005. (T.R. 84-88). The trial court found:

> The Court now determines that it was the intention of the parties that in the event of dispute, that the Court would fix the alimony obligation of Mr. Mimms based upon all statutory factors set forth in T.C.A. Sec. 36-5-101(d), especially taking into consideration the parties' standard of living, both during their marriage and subsequent to divorce, the need of Mrs. Mimms for financial assistance and the present ability of Mr. Mimms to provide financial assistance, taking into consideration his current assets and sources of income.

(T.R. 85).

The court accepted the Husband's Current Income and Expense Statement (T.R. 76-77) reflecting annual income of $120,000 but "anticipate(d) that with his knowledge and expertise as a nationally known music business attorney, Mr. Mimms has the potential to earn substantially more income as he re-establishes his private law practice." (T.R. 85). Moreover, the trial court took "into consideration the current assets of Mr. Mimms and his current standard of living", noting his net worth of approximately $1.2 million, cash assets of

over Five Hundred Thousand Dollars ($500,000), and the fact that he had purchased a new home and assumed a Four Thousand Dollar ($4,000) monthly mortgage obligation. As for the Wife, the Court found that she did not receive substantial liquid assets in the divorce, that the parties intended that each would enjoy the same post-divorce standard of living, and that the Wife "depended upon alimony, as she still does." (Id.).

The court awarded attorney's fees to the Wife in the amount of Four Thousand Dollars ($4,000). (T.R. 87).

The Husband filed Notice of Appeal on April 3, 2006.

STATEMENT OF FACTS

The parties married in 1984. (Tr. at 75, L. 13-24). When their first child was born in 1989, the Husband and Wife agreed that the Wife should quit her job and stay at home to care for the child. (Tr. at 78-79, L. 25, 1-10). The parties' second child was born in 1991. (Tr. at 75, L. 13-24). At the time of divorce, the children were ages sixteen (16) and fourteen (14) years old. (Id.). The eldest child, Emi, was a junior at Harpeth Hall and the younger child, Walker, was in eighth grade at Meigs Magnet School with plans to attend Hume-Fogg for high school. (Tr. at 75-76, L. 17-25, 1-6). The Wife is the primary residential parent for the children and the Husband has standard visitation. (Id.; T.R. 19).

Prior to the birth of Emi in 1989, the Wife worked as a secretary earning between Nineteen and Twenty-Four Thousand dollars ($19,000 - $24,000) per year. (Tr. at 77-78, L. 17-25, 1-24). She never completed college and has no licenses or certifications. (Tr. at 76, L. 19-24, at 79, L. 18-25). When the children got a little older, the Wife wanted to seek outside employment but the Husband persuaded her to stay at home. (Tr. at 79, L. 11-17). In addition to her homemaking and child-raising role, the Wife encouraged the Husband in his job. (Tr. at 80, L. 3-9). She testified that she assisted him in entertaining "all the time". (Id.).

At the time of divorce, the Wife was forty-nine (49) years old. (Tr. at 75, L. 7-8). She was enrolled as a full-time student with an accelerated schedule in the business program at Aquinas College. (Tr. at 84-85, L. 20-25, 1-25). She hopes to earn her Bachelor of Science Degree in the Fall of 2007 and go to graduate school to obtain an MBA. (Id.). The earliest

date that she can obtain her MBA degree is May of 2009. (Id.). Her schedule as a full-time student and her responsibilities as a mother requires that any employment which she seeks have flexible hours. (Tr. at 115-116, L. 18-25, 1-9; at 117-118, L. 17-25, 1-5). For example, she attempted to obtain a job as a legal secretary and as a part-time clerk at a jewelry store but was not able to work out the schedules. (Id.). The Wife does earn some income by selling Mary Kay cosmetics and has qualified to substitute teach in the Metro School system. (Id.).

The Husband graduated from Vanderbilt Law School in 1978 with the honor of Order of the Coif. (Tr. at 54, L. 15-21). Thereafter, he joined a large Nashville law firm where he specialized in entertainment law. (Tr. at 55, L. 4-20). By 1994, he had become dissatisfied with his position because partners in the firm resented his success. (Tr. at 55-56, L. 9-25, 1-7). In 1995, he accepted a position with a national law firm, Loeb & Loeb. (Id.). He was very successful in opening this prestigious firm's Nashville office. (Id.). Five years later, in 2000, he accepted a high level position as Executive Vice President with Gaylord Entertainment where he and his supervisor were responsible for all of the entertainment companies of Gaylord. (Tr. at 56-57, L. 8-25, 1-3). Within ninety (90) days, the Husband was offered and accepted the position of President of Word Entertainment, a subsidiary of Warner Music Group. (Tr. at 57, L. 4-6; at 9, L. 2-8). Among his many job duties, the Husband oversaw the operations of a group of record labels owned by Word, a large music publishing business, a large print music company, and the budgeting process. (Tr. at 57-58, L. 7-25, 1-14). His income was commensurate with his responsibilities; Four Hundred Fifty

Thousand Dollars ($450,000) per year plus car allowance, health insurance, and a discretionary bonus. (Tr. at 9, L. 9-16). In 2004, the Husband earned Seven Hundred Thousand Dollars ($700,000) as President of Word Entertainment. (Tr. at 10, L. 9-16).

As early as June of 2004, the Husband realized that his employment contract, which expired in January, 2005, would not be renewed. There had been "a regime change", the company had been sold, the contracts of his colleagues were not being renewed, and he had been told that one of the large distribution labels had made his termination a condition of its renewing its contract with Word. (Tr. at 124-127). Formal notification arrived in September of 2004 and the Husband negotiated a severance package whereby he would continue to receive his base salary until August 31, 2005. (Tr. at 10-11. L. 17-25, 1-5).

One month after this notification, the Husband purchased a Five Hundred Ten Thousand Dollar ($510,000) home, assuming a Four Thousand Dollar ($4,000) monthly, fifteen (15) year mortgage obligation. (Tr. at 51, L. 8-23). He made the down payment on the home in violation of the trial court's restraining order and expended Seventy Thousand Dollars ($70,000) on improvements to the home. (Id.; at 52-53, L. 21-25, 1-5). He has remarried and his new wife pays many of the household bills. (Tr. at 31, L. 14-25).

The Husband did not interview with any law firms in Nashville. (Tr. at 53-54, L. 24-25, 1-4). Nor did he look for any jobs outside of the music industry. (Tr. at 73-74, L. 23-235, 1). He made three inquiries regarding employment in the music business and then turned his attention to his prior specialty, entertainment law. (Tr. at 13-14, L. 2-25, 1-9). In this regard, two entertainment law firms, one in New York and one in Los Angeles, were

interested in the Husband opening a satellite office in Nashville as he had done for Loeb & Loeb. (Tr. at 14, L. 21 through 16, L. 15). He declined these offers because there were no income guarantees and he would receive only fifty percent (50%) of the income he generated. (Id.). Instead, he decided to open his own office where he would receive one hundred percent (100%) of the income he generated. (Id.; Tr. at 19, L. 19-21; at 20-21, L. 20-25, 1-3).

The Husband opened his law office on September 1, 2005. (Tr. At 21, L. 4-8). He has aggressively marketed his law practice, issuing press releases, taking a full page ad in the Music Row magazine, sending over six hundred (600) announcements to business leaders in the music community, and constantly networking at music social events. (Tr. at 21-22, L. 18-25, 1-4; at 24-24, L. 14-25, 1-3). Within just the first three (3) months of his having opened the doors to his office, the Husband had already received approximately Sixty Thousand Dollars ($60,000) from his legal practice ending December 31, 2005. (Ex. 2). Almost half of that amount was received during December. (Id.). It is not known what his accounts receivable are, although he listed eighteen (18) clients as of the end of November. (Ex. 3, p. 8). His practice has much room for expansion in that he is billing less than seventy (70) hours a month. (Ex. 3, p. 2). It is important to note that the trial court questioned the Husband's credibility in regard to his assertion that he was not making any money while at the same time there was no dispute that he was meeting all of his expenses, except alimony. (Tr. at 47-48, L. 24-25, 1-20). As noted by Judge Robinson, "we're going down the road of noncredibility here ... (t)hat does not make sense". (Id.).

In this regard, the Husband has had to liquidate only Eighty Eight Thousand Dollars ($88,000) of his assets (while the balance of his cash account has earned interest) even though he has been able to pay a Four Thousand Dollar ($4,000) monthly mortgage on a half million dollar home, make substantial improvements of that home in the amount of Seventy Thousand Dollars ($70,000), expend almost Fifty Thousand Dollars ($50,000) in opening his law practice, and remain current on all of his bills, except alimony. (T.R. 74 - AmSouth Money Market; Tr. at 61, L. 1-10; Tr. at 60, L. 3-9; at 50, L. 11-13, at 51, L. 20-23, Ex. 3). In the Marital Dissolution Agreement, the Husband received $1.3 million in marital assets. (Tr. at 62, L. 3-7). Of these assets, Six Hundred Nineteen Thousand Dollars ($619,000) were cash, not including his checking account. (Tr. at 61, L. 1-10; T.R. 74). At the time of trial, his cash account was in excess of a half million dollars, and his retirement accounts were valued at Two Hundred Ninety-Five Thousand Dollars ($295,000). (T.R. 74). He had home equity of One Hundred Ninety-Two Thousand Dollars ($192,000), a life insurance cash surrender value of Thirty-Four Thousand Dollars ($34,000), and automobiles valued at approximately Sixty Thousand Dollars ($60,000). (Id.). The Husband claims that he can only afford to pay the Wife One Thousand Dollars ($1,000) per month as rehabilitative alimony. (Tr. at 41 L. 17-21).

The Wife received virtually no liquid assets and less than seventeen percent (17%) of the retirement assets, or approximately Sixty-One Thousand Dollars ($61,000) in the Marital Dissolution Agreement. (T.R. 9, para. m; T.R. 74 - Warner Thrift Plan). Instead, she received the mortgage-free marital home and the mortgage-free vacation property in

Monteagle, Tennessee. (T.R. 3-5). As planned prior to divorce, the Wife sold the marital home. (Tr. at 81, L. 7-23). She purchased a smaller home for herself and her children for Four Hundred Twenty Thousand Dollars ($420,000) and realized a profit of One Hundred Ninety-Seven Thousand Dollars ($197,000). (Tr. at 82, L. 9-25). However, she spent Sixty Thousand Dollars ($60,000) on improvements. (Tr. at 107, L. 3-13).

The vacation home in Monteagle is approximately two thousand four hundred (2,400) square feet and requires about Five Hundred Dollars ($500) a month in upkeep. (Tr. at 121, L. 10-11; at 83-84, L. 8-25, 1-3). The Wife has rented it a couple of times but has grave concerns about damage being done by renters. (Tr. at 122, L. 15-25). Moreover, she uses the property several times a month. (Id.).

The Wife is a fifty percent (50%) beneficiary of the residue and remainder of her great aunt's estate. (Tr. at 100, L. 17-20). As of the date of trial, claims were being made of the estate and it had not yet been settled. (Id.; Tr. at 104-108, L. 8-25, 1-4). The Wife may receive as much as Three Hundred Thousand Dollars ($300,000) from the estate once it is settled. (Id.). This potential inheritance was anticipated prior to the parties' divorce. The parties knew about it long before the divorce and it was the subject of a deposition prior to the divorce. (Tr. at 89-90, L. 23-25, 1-25).

Since the divorce, the Wife's only income is alimony, child support, and a few hundred dollars from her sale of Mary Kay cosmetics. (Tr. at 87-88, L. 23-35, 1-23). The Wife depends on alimony each month to meet her expenses. (Tr. at 86-87, L. 16-25, 1-6). The Husband ceased paying alimony five months prior to trial and the Wife had been forced to

deplete assets from the divorce to meet expenses. (Id.). She has also received a Ten Thousand Dollar ($10,000) advance from her great aunt's estate. (Tr. at 89, L. 16-22).

The Wife's income and expense statement reflects monthly expenses of Thirteen Thousand Nine Hundred Eighty-Six Dollars ($13,986). (Ex. 8). The Wife's receipt of child support in the amount of Three Thousand Three Hundred Two Dollars ($3,302), plus the modified rehabilitative alimony award of Five Thousand Dollars ($5,000), leaves the Wife with a monthly deficit of over Five Thousand Six Hundred Eighty-Four Dollars ($5,684). The Wife will be required to draw down on the assets she received in the divorce even after the receipt of alimony from the Husband. (Tr. at 93, L. 13-19).

The trial court determined that the parties intended for the alimony obligation to be established according to the statutory factors, especially the parties' pre- and post-divorce standards of living, the needs of the Wife, and the ability of the Husband to pay, taking into consideration all his assets and sources of income. (T.R. 81). As stated by the trial court:

> There is no doubt that Mr. Mimms' income has decreased substantially following his termination as C.O.O. of the record company as compared with that which he now earns as a private practitioner attorney ... . However, the Court anticipates that with his knowledge and expertise as a nationally known music business attorney, Mr. Mimms has the potential to earn substantially more income as he reestablishes his private law practice.
>
> The Court also takes into consideration the current assets of Mr. Mimms and his current standard of living. According to his Statement of Assets and Liabilities filed on January 17, 2006, Mr. Mimms has assets totaling approximately $1,513,015 and liabilities totaling approximately $388,127, for a net worth of approximately $1,124,978 of which over $500,000 is in liquid cash assets. In addition, he has bought a new home and

assumed a mortgage obligation of over $4,000 per month, and he drives a 2001 Porsche automobile worth over $40,000 that is paid for.

Although Ms. Mimms received substantial real estate assets pursuant to the parties' Marital Dissolution Agreement, together with household furnishings and other personal property, she did not receive substantial liquid cash assets as Mr. Mimms did. This Court feels that it was the intention of the parties that the provisions of the Marital Dissolution Agreement would assume that each party would enjoy approximately the same post-divorce standard of living. To do this, Mrs. Mimms depended on alimony, as she still does. Taking all of the factors of this Opinion into consideration, together with the undisputed fact that Mr. Mimms has suffered at least a temporary substantial loss of income, this Court sets Mrs. Mimms alimony award at $5,000 per month retroactive to September, 2005.

(T.R. 81-82).

ARGUMENT

I. THE TRIAL JUDGE ACTED WITHIN HER DISCRETION IN REDUCING THE HUSBAND'S ALIMONY OBLIGATION FROM $7,000 PER MONTH TO $5,000 PER MONTH BASED UPON THE FACTORS SET FORTH IN T.C.A. 36-5-101(d).

A. Standard of Review

The principles governing this court's review are well settled. Initially, the trial court's conclusions of law are reviewed de novo with no presumption of correctness. Kendrick v. Shoemake, 90 S.W.2d 566, 569 (Tenn. 2002); Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn. 1995). The trial court's findings of fact are reviewed de novo with a presumption of correctness; they must be affirmed on appeal unless the evidence preponderates against them. Id; Tenn. R. App. P. 13(d).

With regard to spousal support in particular, trial courts exercise substantial discretion in fashioning these awards. Burlew v. Burlew, 40 S.W.3d 465 (Tenn. 2001); Wilson v. Moore, 929 S.W.2d 367 (Tenn. App. 1996). These decisions must be affirmed unless they are unsupported by evidence or are contrary to public policies reflected in statutes governing spousal support. Id. Because modification of an alimony award is "factually driven and calls for a careful balancing of numerous factors," Cranford v. Cranford, 772 S.W.2d 48, 50 (Tenn. App. 1989), a trial court's decision modifying support payments is given "wide latitude" within its range of discretion. Sannella v. Sannella, 993 S.W.2d 73, 76 (Tenn. App. 1999). In factually driven issues such as alimony, the credibility of witnesses is critical and it must be remembered that only the trial court has the ability to hear the witnesses testify orally

and to observe their demeanor. In re Estate of Walton, 950 S.W.2d 956, 959 (Tenn. 2000); B & G Constr., Inc. v. Polk, 37 S.W.3d 462, 465 (Tenn. App. 1997). Credibility was at issue in the instant appeal. (Tr. at 47-48, L. 24-25, 1-5).

The abuse of discretion standard has been stated in various ways:

> "Abuse of discretion" may be defined generally as a naked exercise of power by a court of law committed capriciously and arbitrarily without authority of law. Webster's ... defines the word "capricious" to mean "marked or guided by caprice: given to changes of interest or attitude according to whims or passing fancies: not guided by steady judgment, intent or purpose." Webster's also defines the word "arbitrary" to mean "arising from unrestrained exercise of will, caprice or personal preference."

Mose v. Mose, 1996 WL 76321 *4 (Tenn. App. 1996).

The abuse of discretion standard requires us to consider the following:

> (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. *See BIF v. Service Constr. Co.,* No. 87-136-II, 1988 WL 72409, at *2 (Tenn.Ct.App.) July 13, 1988) (No Tenn. R.App.) P. 11 application filed). *Id.* We will set aside a discretionary decision if it rests on inadequate evidentiary foundation or if it is contrary to the law, however; we will not substitute our judgment for that of the trial court simply because we might have chosen another alternative. *Id.*

Troglen v. Troglen 2005 WL 990567, *3 -4 (Tenn. App.).

Under these standards, the Wife submits that Judge Robinson's decision lies well within her discretion and should be affirmed by this Court. A review of the factors set forth in Tenn. Code Ann. Section 36-5-101(d) fully supports this assertion.

A. the relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources relative earning capacity

The Husband's earning capacity, measured by the last five years, is at least Four

Hundred Fifty Thousand Dollars ($450,000) per year. (Tr. At 9, L. 9-16; at 56-57, L. 18-25, 1-5). Although his actual earned income at the present time has been significantly reduced, the trial court found that "with his knowledge and expertise as a nationally known music business attorney, Mr. Mimms has the potential to earn substantially more income as he reestablishes his private law practice." (T.R. 81). The Husband's employment history substantiates this conclusion. For example, he was immediately successful in the entertainment law field after graduating from law school; so much so that it engendered resentment from other members of the firm. (Tr. At 55-56, L. 9-25, 1-7). He established a Nashville office for a nationally known entertainment business law firm, Loeb & Loeb. (Id.). He accepted a very high level position as Executive Vice President at Gaylord Entertainment and was almost immediately offered an even better position as President of Word Entertainment where he earned Seven Hundred Thousand Dollars ($700,000) in 2004. (Tr. at 56-57, L. 8-25, 1-6; at 9, L. 2-8). At the present time, the Husband is establishing his own music business law practice, not unlike the task he undertook for Loeb & Loeb, with great success. He now has the added advantage of being a very well known and highly respected attorney in the Nashville music community. If history is any predictor of the future, the Husband will, once again, quickly become one of the top music business attorneys in Nashville.

At present, and for the foreseeable future, the Wife's earning capacity is negligible. She is a full-time student working toward a business degree and plans to obtain an MBA immediately thereafter. (Tr. at 84-85, L. 20-25, 1-25). The earliest that she will be able to

accomplish this educational goal is the Spring of 2009 at the age of 52. (Id.). The Wife is also the primary custodian of the parties' two minor children. (T.R. 19). The youngest child will not graduate from high school for four more years in 2010. (Tr. at 75-76, L. 17-25, 1-6). Assuming that the Wife obtains her MBA, the record does not reflect what her earning capacity might be. However, it will certainly be insignificant compared to the Husband's.

What the record does reflect is the gross inaccuracy of the Husband's assertion that the Wife "is an experienced legal secretary having worked in the past for ... a prominent Nashville law firm, earning Forty-Thousand Dollars ($40,000) plus benefits". (Husband's Brief at pp. 9-10). Husband's citations do not support this allegation. Rather, the record reflects that the Wife worked as a legal secretary for less than five (5) years and never earned more than Twenty-Four Thousand Dollars ($24,000) a year. (Tr. at 77-78, L. 17-25, 1-24). She **never** earned Forty Thousand Dollars ($40,000) a year and she is unable to seek gainful employment at this time because of her rehabilitative efforts and her child caring duties. In any event, the disparity between the earning capacities of the parties is enormous and will never be breached.

obligations and needs

The needs and financial obligations of the Husband and the Wife are approximately equal. (Ex. 5, Ex. 8). Specifically, the Husband claims expenses, excluding alimony, in the amount of Eleven Thousand Four Hundred Seventeen Dollars ($11,417) and the Wife claims expenses for herself and her children of Thirteen Thousand Nine Hundred Eighty-Six Dollars ($13,986). (Id.).

The Wife has a deficit of over Ten Thousand Dollars ($10,000) per month. (Ex. 8). Assuming that the trial court's decision is sustained, the Wife will be required to deplete the assets awarded to her in the amount of at least Five Thousand Dollars ($5,000) per month; an amount which will decrease after she completes her rehabilitative efforts and is able to obtain gainful employment.

Based upon his **stated** income, the Husband has a monthly deficit of only Nine Hundred and Twenty-Nine Dollars ($929). (Ex. 5; T.R. 76). Assuming that the trial court's decision is sustained, the Husband's deficit will increase by Five Thousand Dollars ($5,000) and he will have to temporarily withdraw Six Thousand Dollars ($6,000) per month from his cash assets; an amount which will steadily decrease as his income increases. This sum approximates the amount of property the Wife will have to liquidate on a monthly basis to meet her needs until she finishes her education.

In order to meet his financial needs and obligations since the divorce, the Husband has used only Eighty-Eight Thousand Dollars ($88,000) from his AmSouth money market account to satisfy expenses for his new home (i.e., $4,000 a month plus $70,000 in improvements), start his law practice ($46,000), pay his child support obligations, and pay alimony through August, 2005. (Tr. at 61, L. 8-10; Ex. 3, p. 1; at 51, L. 13-23; at 59-60, L. 22-25, 1-11). The Husband suggests that he used the AmSouth account plus an additional One Hundred Thirty Thousand Dollars ($130,000) which he had saved during his last year of employment to meet his obligations. (Husband's Brief at p. 7). Again, this is **incorrect**. A review of the record shows that the money he saved during the last year of his employment

was the AmSouth account which was "accounted for within the context of the Marital Dissolution Agreement"; i.e., the AmSouth account. (Tr. at 32, L. 15-23).

It is important to note that under the terms of the Marital Dissolution Agreement, the Husband's child support obligation for the parties' oldest child will end in May 2007. At that time, child support will be reduced to support the youngest child only. In addition, 2006-2007 is the last school year for which Husband will have a private school tuition obligation for the parties' oldest child, Emi. (T.R. 12).

financial resources of each party

Contrary to Husband's assertion, the record does not indicate that the Husband received less in property division than the Wife. (Husband's Brief at p. 15). In fact, the only evidence in the record is to the effect that the Wife received slightly less than the Husband. (Tr. at 94, L. 19-22).

The Husband has Five Hundred Forty-Nine Thousand Dollars ($549,000) in money market accounts and Two Hundred Ninety-Five Thousand Dollars ($295,000) in retirement accounts. (T.R. 74). He also has equity in his home, cash value life insurance, and personal property valued at approximately Ninety-Four Thousand Dollars ($94,000).

The Wife has Sixty-One Thousand Dollars ($61,000) in retirement (T.R. 57) and hopefully will receive an inheritance from her great-aunt to supplement this retirement nest egg. She has less than One Hundred Forty Thousand Dollars ($140,000) in liquid assets. In this regard, the Wife netted approximately Two Hundred Thousand Dollars ($200,000) when she sold the marital home and purchased a less expensive property as contemplated by the

parties prior to the divorce. (Tr. at 82, L. 9-25). She spent Sixty Thousand Dollars ($60,000) on improvements to the new home and needed to withdraw additional funds to make ends meet when the Husband ceased paying alimony. (Tr. at 107, L. 3-13).

Similar to the gross overstatement of the Wife's earning capacity, the Husband over-states the extent of the Wife's liquid assets as being Two Hundred Thousand Dollars ($200,000) when, in fact, they are less than One Hundred Forty Thousand Dollars ($140,000)(net profit from sale of marital home less cost of improvements). (Husband's Brief at p. 11). He also mis-states her testimony to the effect that she received $1.6 million in property division when in fact she testified that she received $1.2 million. (Husband's Brief at p. 8, 11; Tr. at 94, L. 10-24). In any event, Judge Robinson saw the ingenuity in ascribing liquid assets to the Wife for the purpose of eliminating the Husband's alimony obligation:

> What you are doing is, is you're trying to convert her estate to liquid assets to meet his financial obligation and that won't work. You can't give somebody something and then tell them to live off it while you take away your other obligations.
> ...
>
> I mean, it's obvious that she has assets. She sold it. She replaced it with a house that was cheaper. You can go on all day long with this, but it's really an irrelevant argument because you don't pauperize somebody by giving them a settlement and then making them spend it because you don't want to meet your own obligation.

(Tr. at 95-96, L. 24-25, 1-14).

The Husband makes much of the Wife's anticipated inheritance from her great aunt which he states, without any citation to the record, that she "is now currently receiving

payments on an inheritance ... which was neither in existence nor anticipated in the Marital Dissolution Agreement". (Husband's Brief at p. 23). Again, this statement is entirely incorrect. In fact, the estate has not been settled, the financially-strapped Wife has received one advance of Ten Thousand Dollars, and both parties were fully aware of the potential future inheritance at the time they signed the Marital Dissolution Agreement. (Tr. at 89-90, L. 23-25, 1-25; at 104-105, L. 8-25, 1-4; at 89, L. 16-22). In this regard, the parties agreed that the Wife needed Seven Thousand Dollars ($7,000) per month in rehabilitative alimony with full knowledge that she would be receiving an inheritance and would be downsizing from the marital home. Again, it should be noted that the Wife has virtually no retirement funds and must rely upon the inheritance and the equity in her real estate to make ends meet during her working life and retirement.

In regard to the "sumptuous Monteagle, Tennessee vacation residence" (Husband's Brief at p. 8), the only description of the property in the record is that it is two thousand four hundred (2,400) square feet residence with furnishings valued at Five Thousand Dollars ($5,000). (Tr. at 121, L. 10-11; T.R. 31). The Wife has "seen with my own eyes what happens when other people are (renting) your house and they are not taking care of things." (Tr. at 122, L. 6-25). Although she stated that she believed that units in that area rented for between One Hundred Dollars and Two Hundred Seventy-Five Dollars ($100-$275) a night "depending", she was "a little bit wary of when people rent property of what happens to it.". (Id.). In any event, she spends considerable time at Monteagle herself. (Tr. at 122, L. 15-25).

B. the relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level

The Husband is a "nationally known music business attorney" with twenty-seven years in the field. (T.R. 81, Tr. at 54, L. 15 through 58, L. 14). He has worked in law firms, successfully opened a Nashville office for a well known national music business law firm, and held top corporate positions, including President and Executive Vice President of major music and entertainment companies. (Id.). The Husband requires no additional training to maintain his meteoric rise in the music business field.

The Wife lacks a college degree and she has not worked outside of the home for seventeen years. (Tr. at 76, L. 19 through 79, L. 25). Her experience is secretarial only. (Id.). She has no licenses or certifications. (Id.). With sufficient alimony, she will be able to obtain her college degree, pursue an MBA, and enter the workforce, hopefully by the age of 53. (Tr. at 86, L. 1 through 88, L. 23). Even with an MBA, it will take a long time, if ever, for a fifty-plus-year-old woman to reach a salary level where she can achieve some semblance of the marital standard of living.

C. the duration of the marriage

This was a long term marriage; almost twenty-one years. (Tr. at 77, L. 13).

D. the age and mental condition of each party

The Wife was forty-nine years old at the time of divorce. (Tr. at 75, L. 8). The Husband's age is not stated in the record but is stated as being fifty-two in Husband's Brief. Neither party complains of any mental problems.

E. the physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease

Neither party complains of any significant health problems.

F. the extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage

Even if the Wife's accelerated course schedule at Aquinas College permitted steady, full-time employment outside of the home, her duties to her two minor children would preclude it. In this regard, the Wife is primary custodian for her two children, ages fourteen (14) and seventeen (17). She must provide transportation for her younger child who attends a Magnet School and honors the commitment she and her former Husband made for their children:

> I've made a commitment to them and I meet my obligations to them. I am there for them. I'm there when my son gets home from school. I take him to school in the morning. I take the children to the doctor when they need it. My son was home sick from school yesterday and I was home with him, those sorts of things.

(Tr. at 117-118, L. 17-25, 1-5).

G. the separate assets of each party, both real and personal, tangible and intangible

Except for the Wife's potential inheritance, which has been discussed supra, neither party has any separate assets. Without this potential inheritance, the Wife has virtually no retirement fund and scant means of accumulating retirement through employment, given her age and education.

H. the provisions made with regard to the marital property as defined in 36-4-121

The parties received roughly equal portions of the marital property valued at

approximately $1.3 million each. (Tr. at 62, L. 3-7; at 94, L. 16-24). Based upon this division and the foreseeability of the Wife's sale of the marital residence and inheritance, the parties determined that the Wife would require Seven Thousand Dollars ($7,000) a month in rehabilitative alimony.

I. The standard of living of the parties established during the marriage

The marital standard of living was commensurate with the Husband's salary although the parties were obviously good money managers as evidenced by the fact that they had paid off the mortgages on two residences. Again, the Marital Dissolution Agreement reflects the parties' implicit understanding that the Wife required Seven Thousand dollars ($7,000) a month in rehabilitative alimony.

J. the extent to which each party has made such tangible and intangible contributions to the marriage as any monetary and homemaking contributions, and tangible and intangible contributions by a party to the education, training, or increased earning capacity of the other party.

The Husband was the breadwinner of the family.

The Wife was mother, homemaker, and marital partner. She agreed to quit her job in order to care for the children on a full-time basis. (Tr. at 79, L. 3-10). She encouraged the Husband in his work and helped him entertain. (Tr. at 80, L. 3-9). When the children were older, she desired to re-enter the work force but she acceded to the Husband's wishes that she devote her time to being a housewife and mother. (Tr. at 79, L. 11-17). It was not until divorce was inevitable that she went back to school. (Tr. at 84-85, L. 23-25, 1-5).

K. the relative fault of the parties where the court, in its discretion, deems it appropriate to

do so

The parties were divorced on the grounds of irreconcilable differences. (T.R, 3).

L. Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties

None.

Based upon the statutory factors set forth above, the solitary fact that the Husband has suffered a temporary setback in income does not render the trial judge's decision outside the range of reasonable alternatives. Judge Robinson fully appreciated the fact that the Husband's "income has decreased substantially following his termination" from his job. (T.R. 81-82). By the same token, she could not ignore the fact that the Wife relies on the rehabilitative alimony for her very sustenance. Perhaps the most critical finding of the trial court, fully supported by the evidence, was that the Husband "has the potential to earn substantially more income as he reestablishes his private law practice". (Id.). This earning capacity, combined with "his current assets ... and his current standard of living" place the court's twenty-nine percent (29%) reduction in his alimony obligation well within the range of reasonableness. (Id.). The Court has doubts as to the Husband's credibility regarding his income. (Tr. at 47-48, L. 24-25, 1-10).

The Husband makes much of the fact that Judge Robinson likened the case to the Milam case, (Milam v. Milam, 2002 WL 662026 (Tenn. App.).(Husband's Brief at pp. 21-23). The superficial factual distinctions between the two cases that the Husband presents do not place Judge Robinson's ruling outside the wide latitude of her discretion. The

distinctions highlighted by the Husband are not particularly relevant to the issue presented here; to wit; whether Judge Robinson abused her discretion. In this regard, the trial judge accurately stated that the instant case "is the Milam case" to the extent that the trial court in Milam was "very confident that (the husband) is going to get a position that is at least comparable to what he had ... (and that his) unemployment ... (is) temporary". Judge Robinson held a similar view in this case, which was a very reasonable viewpoint based upon the Husband's employment history. Similar to the Husband in the instant case, the husband in Milam was employed at the time of trial, earning $100,000 a year plus potential bonus. His support obligation to his family, affirmed by this Court, was $7,000 a month. Milam v. Milam, 2002 WL 662026 (Tenn. App.). Judge Robinson departed from the holding in Milam to the extent that she reduced the Husband's support obligation from $7,000 to $5,000 per month.

A greater reduction would be premature at this time in that, like Milam, "when (the Husband) liquidates such items and still hasn't a job, he may be in a better position to file a petition to modify his support obligations." (Id. at *2). See, Williams v. Williams, 2005 WL 2086029 (Tenn. App.)(husband initially denied reduction based upon trial court's optimism as to employment and granted reduction three years later when optimism proved unfounded). In the instant case, the Husband might be compelled to withdraw less than fifteen percent (15%) or Seventy-Two Thousand Dollars ($72,000) from his money market account (offset by accumulating interest on a half million dollars) during the next twelve months assuming his law practice stagnates. His retirement will be untouched and his home equity will

increase. Meanwhile, the Wife will be drawing from her nest egg on a monthly basis.

Based upon the trial judge's analysis of the evidence and observation of the parties, she was very optimistic that the Husband's income would increase as well: "It is the further intention of the Court that should Mr. Mimms enjoy a substantial income increase, Ms. Mimms shall retain her right to apply to the Court for reestablishment of her alimony of $7,000 per month." (T.R. 82-83). Again, this is not an unreasonable assumption which would constitute an abuse of discretion.

The case of Langley v. Langley, 2003 WL 22989026 (Tenn. App.), cited by the Husband for the proposition that alimony should not be awarded to a spouse who is "a millionaire in her own right", is also very instructive and supportive of Judge Robinson's decision. (Husband's Brief at p. 24). While it is true that the Langley court reversed the award of alimony *in futuro* of One Thousand Dollars ($1,000) a month because "the evidence reflects that Wife, *a millionaire in her own right*, has no need of further financial assistance" (Id., Husband's emphasis), the Langley wife was in far superior financial circumstances than the Wife in the instant case. Indeed, she has "no need of further financial assistance" because, specifically, the Langley wife:

> * **received $1,232,920.00, or about fifty-seven percent**, of the marital property, of which $1,033,898.00 were **liquid assets**;
>
> * is a **graduate of a business school**, and retired from State employment in 1999 after thirty years of service, entitling her to ***net* pension benefits of $17,376.00 yearly**
>
> * She almost immediately was **employed** by Baptist Hospital at a ***net* yearly salary of $33,000.00**, with retirement benefits vested

* Wife was awarded a promissory note in the amount of **$180,000.00, drawing ten percent interest**, executed by Fireworks, Inc., as **alimony *in solido*, further alimony *in solido* of $360,000.00**, payable $60,000.00 per year for six years

Langley v. Langley, 2003 WL 22989026 (Tenn. App.).

The Court of Appeals stated that the wife "by no means is in a transitional status", that she has job skills, and that "(h)er assured immediate income exceeds $100,000 per year and she has no debts". (Id. *3). Her stated needs were Six Thousand Dollars ($6,000) per month obviating any need to deplete property division assets for sustenance. Clearly, the wife in Langley was a far different type of "millionaire" than the Wife in the instant case. The Court of Appeals described the trial court's abuse of discretion in awarding alimony *in futuro* award as follows: "an award of unneeded alimony, assessed, in actuality, as punishment, or as a palliative to the wife, is anathema and contrary to law". (Id.).

The decision to reduce Husband's support obligation from $7,000 to $5,000, in a case where the Wife has no appreciable income and must use property division assets for her sustenance, is not "anathema and contrary to law". The fact that another court, or this Court, might have reduced the Husband's obligation to a greater degree, and such reduction may have been within the court's discretion, does not detract from the wisdom of Judge Robinson's decision. Second-guessing is not part of the abuse of discretion standard of review.

The Husband relies on Williams v. Williams, 2005 WL 2086029 (Tenn. App.) for the proposition that an alimony obligation should be reduced when an obligor's income decreases through no fault of his own and where the obligee spouse's income has increased.

Husband's reliance is misplaced since the Wife's income in the instant case has not increased in contrast to the fact that the William spouse's income from her employment increased from $33,000 to $90,000. The Williams case does not help the Husband. Rather, it is supportive of the principle that the Court of Appeals will defer to the trial court's judgment in alimony matters except in the most extreme circumstances. For example, in the prior appeal between the parties where the issue was the same, Williams v. Williams, 2000 WL 852121 (Tenn. App.) (Williams I), the Husband sought a decrease in his support obligation because his income had dropped from $143,000 to $90,000 and that he was currently unemployed. Id. *1-2. The trial court rejected this argument on a similar basis that Judge Robinson rejected the Husband's argument, to wit, that the Husband was suffering only a temporary setback in earnings and that his ability to pay would be restored. (Id.). The Court of Appeals deferred to trial court's discretion on this issue.

Three and a half years later, the court considered the husband's second petition to reduce his alimony obligation. Williams v. Williams, 2005 WL 2086029, *3, *7 (Tenn. App.)(Williams II). In Williams II, the husband stated that he was employed in the car industry, that the car industry was in decline, and that he could make no more than $90,000 a year. (Id.). He introduced expert testimony to substantiate this claim. (Id. *6). The trial court reduced the Husband's alimony *in futuro* obligation from $4,000 to $2,000 based upon this established and long-term reduction in income. The Court of Appeals again deferred to the trial court's discretion, finding that the facts did not preponderate against the court's conclusion that the husband, after almost three years of trying, could not earn his prior

income. (Id. *7).

Similarly, Judge Robinson's conclusion that the Husband will earn substantially more income as he reestablishes his private law practice is entitled to similar deference and respect. Unlike the wife in Williams who also earned $90,000, had no children to support, and had increased her net worth from $117,000 to $490,000, the Wife in the instant case has virtually no retirement assets, no job, no marketable skills, no liquid assets, and two children to care for and support.

The last case relied upon by the Husband as "strikingly similar" is Storm v. Storm, 2004 WL 1944132 (Tenn. App.) where, unlike the instant case, the "court specifically found that Mr. Storm ... could **not** find other employment providing comparable income ...". (Husband's Brief at p. 24). This citation is taken from a Memorandum Opinion which "shall not be published, and shall not be cited or relied on for any reason in any unrelated case." (Id.). In conclusion, the trial court was well within its discretion in determining that the Wife should not be compelled to further deplete the assets granted to her in the divorce pending her rehabilitation. Nor is it unreasonable to expect the Husband to deplete a small percentage of his liquid assets to provide for the Wife's basic needs while his law practice inevitably grows. The evidence does not preponderate against the fact that the Wife has no appreciable income and needs the $7,000 in alimony set forth in the Marital Dissolution Agreement. In a word, the statutory factors set forth in T.C.A. Section 36-5-101(d) fully support the trial judge's decision, and but for Wife's appreciation of the wide latitude of discretion possessed by the trial court, the Wife would have appealed Judge Robinson's decision to reduce the

Husband's support obligation in any amount.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY'S FEES TO THE WIFE.

The trial court awarded the Wife her attorney's fees in the amount of four thousand dollars ($4,000). (T.R. 87). The Husband argues that there is "nothing in the record to support the award, particularly since the husband was the prevailing party and the wife can clearly afford to pay her own attorneys' fees. (Husband's Brief at p. 25). On the contrary, the same factors which support the rehabilitative alimony award, especially the fact that the Wife's needs which will not be met even with the modified support award and the lack of liquid assets to pay attorney's fees, support Judge Robinson's discretionary decision on this issue.

> It is settled that trial courts have discretion to make awards to help a spouse defray his or her legal expenses in a divorce case. Loyd v. Loyd, 860 S.W.2d 409 (Tenn. App. 1993).
>
> A trial court has the authority to make an additional award to an innocent spouse to defray the legal expenses resulting from divorce. (citation omitted). These decisions, like those involving alimony, are within the discretion of the trial court. (citation omitted). Thus, this court will decline to disturb a trial court's decision regarding attorney's fees unless the decision is not supported by a preponderance of the evidence.

Luna v. Luna, 718 S.W.2d 673, 676 (Tenn. App. 1986).

The award of attorney's fees to defray a spouse's legal expenses in a divorce proceeding is appropriate where the spouse is disadvantaged and does not have sufficient resources. Thompson v. Thompson, 797 S.W.2d 599 (Tenn. App. 1990). Case law suggests that the determinative factors in the award of attorney's fees is whether or not the disadvantaged spouse was awarded sufficient non-essential assets in property division and

whether the payment of such fees by the disadvantaged spouse would deplete the estate he or she requires to maintain some semblance of the marital standard of living. See, Lancaster v. Lancaster, 671 S.W.2d 501 (Tenn. App. 1984), Martin v. Martin, 733 S.W.2d 883, 886 (Tenn. App. 1987). These awards are appropriate when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, Brown v. Brown, 913 S.W.2d 163, 170 (Tenn. App. 1994); Houghland v. Houghland, 844 S.W.2d 619, 623 (Tenn. App.1992); or would be required to deplete his or her resources in order to pay these expenses. Brown, 913 S.W.2d at 170; Harwell v. Harwell, 612 S.W.2d 182, 185 (Tenn. App.1980). See also, Martin v. Martin, supra ("(p)laintiff does not have liquid assets out of which to pay her counsel's fees."), Palmer v. Palmer, 562 S.W.2d 833, 839 (Tenn. App. 1977).

The Wife submits that the trial court did not abuse its discretion in ordering the Husband to pay a portion of her attorney's fees incurred at the trial level. The Husband has the ability to pay and the Wife clearly has the need, especially in light of the fact that she is already having to deplete her property division assets by approximately $5,000 per month.

III. THE WIFE SHOULD BE AWARDED ATTORNEY'S FEES WHICH HAVE BEEN INCURRED IN THE INSTANT APPEAL.

The Wife respectfully requests that the Court order the Husband to pay her attorney's fees which are being incurred in the instant appeal. The record shows that the Wife has absolutely no means, other than the depletion of assets awarded to her in property division, with which to pay her attorney's fees on appeal. To the extent that she has any "liquid assets", these funds must be devoted to her monthly expense deficit and her meager retirement fund.

The same criteria applicable to the award of attorney's fees at the trial court level is applicable to the award of attorney's fees incurred in representing the disadvantaged spouse on appeal. See, Wallace v. Wallace, 733 S.W.2d 102, 110 (Tenn. App. 1986). There is no question that this Court is authorized to award her attorney's fees on appeal. "(Attorney's fees) may ... be fixed either by the appellate court, or the case may be remanded for the purpose of having fees determined." Taylor v. Taylor, 232 S.W.2d 445, 447 (Tenn. 1921), See also, Seaton v. Seaton, 516 S.W.2d 91, 93 (Tenn. 1974), Folks v. Folks, 357 S.W.2d 828 (Tenn. 1962).

In Folks, the Supreme Court set forth the various factors which should be considered in determining whether or not attorney's fees should be awarded on appeal. Such factors suggest the appropriateness and necessity of such an award in the instant case.

* the ability of the appellant to pay -- in the instant case, this factor cannot be seriously disputed. The Husband earns over $100,000 per year, his new wife helps with his expenses, and he has cash assets of over a half million dollars, in addition to his substantial retirement

savings.

*whether or not the appellant was successful on appeal - the Wife hopes and believes that this Court will affirm the trial court's decision. If so, it is not clear who was the "prevailing party" when the Husband sought a reduction of his support obligation from $7,000 to $1,000 and was ordered to pay $5,000.

* whether or not the appeal was taken in good faith -- the Wife questions the good faith of the Husband's appeal especially in light of Husband's numerous misrepresentations of fact and citation to inapposite cases.

* whether there is a necessity for one spouse to pay the other's attorney's fees -- with no income often than child support and alimony, a large monthly deficit even with this support, no liquid assets except the profit she received from the sale and downsizing from the marital residence, the need to accumulate retirement assets, and a rehabilitative plan which precludes stable employment, it is absolutely necessary that the Husband pay the Wife's attorney's fees on appeal.

CONCLUSION

Based upon the foregoing, the Wife respectfully requests that the Court affirm the decision of the trial court and remand the case for the award of her attorneys fees incurred in this appeal.

Respectfully submitted,

MICHAEL W. BINKLEY
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CERTIFICATE OF SERVICE

I hereby certify that I have mailed, by U.S. mail, 1st class, postage pre-paid, a true and exact copy of the foregoing to William R. Willis, Mary Arline Evans and Tyree B. Harris IV, 215 Second Avenue North, Nashville, Tennessee. 37201 on this ___ day of August, 2006.

MICHAEL W. BINKLEY

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

MICHAEL SAYERS STEGALL,	)	
Plaintiff,	)	
	)	
v.	)	**No. 02C131**
	)	
ST. THOMAS HOSPITAL,	)	
Defendant.	)	

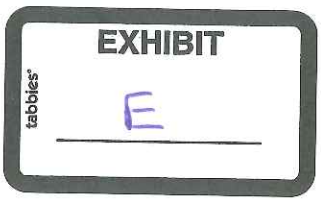
PLAINTIFF'S PRE-TRIAL BRIEF

I.
FACTS

This is a workers compensation case. The Plaintiff, Ms. Michael Sayers Stegall, sustained two permanent injuries as a result of her employment with the Defendant, St. Thomas Hospital. The Plaintiff suffered a permanent injury to her cervical spine, as well as a permanent injury to her right shoulder. Ms. Stegall's diagnosis has been described as follows:

1. Post-operative surgery on the right shoulder for a subacromial decompression and incision at the distal end of the clavicle with loss of movement to the right shoulder secondarily; and
2. Chronic right parascapular and paracervical soft tissue strain with pre-existing degenerative cervical disc disease.

Ms. Stegall is 54 years of age and lives at 52 Concord Park East in Nashville, Davidson County, Tennessee. At the time of the injury, Ms. Stegall was employed at St. Thomas Hospital as a pre-admission testing clerk. Previously, Ms. Stegall has been self-employed as a freelance artist and part-time clothing representative and has worked at other jobs, including Fidelity Federal Savings & Loan for a period of seven years as an IRA counselor and a computer operator. Currently, Ms. Stegall is employed with Neurosurgical Group in Nashville, Davidson County, Tennessee, as a surgical scheduler. Ms. Stegall's work-related requirements with her current employment do not require her to do the same type of physical labor that she was required to do at the time of her work-related injury to her right shoulder and to her neck.



Ms. Stegall has completed twelve years of education and has approximately two years of college education.

II.

MEDICAL TREATMENT

A.
DR. ALLEN ANDERSON

Ms. Stegall was initially seen for her work-related injuries by Dr. Allen Anderson, a well-respected orthopedic surgeon in Nashville, Tennessee. Dr. Anderson initially saw Ms. Stegall in his office regarding the present work-related injuries in August 1999, when she provided a history of right shoulder pain and a history of chronic neck pain. (Dr. Anderson's deposition, page 6.) In addition, upon physical examination, Dr. Anderson noted a positive crossed chest adduction, which indicates irritation of the acromioclavicular joint as well as impingement. Dr. Anderson explained that "impingement" is where the tip of the bone of the right shoulder, called the "acromion", hits up against the rotator cuff when the shoulder is brought overhead. Dr. Anderson reviewed x-rays that showed a spurring at the tip of the acromion of the right shoulder and degenerative changes in the AC joint. Dr. Anderson believed that Ms. Stegall was suffering from impingement and chronic neck problem, which had developed into chronic neck pain. (Dr. Anderson's deposition, pages 8-10.) Dr. Anderson provided a typical regime of conservative medical treatment with trigger point injections, as well as other conservative means of treatment through February 2000. After her shoulder and neck remained symptomatic through February of 2000, Dr. Anderson recommended surgery and stated to Ms. Stegall that she had an obvious neck and shoulder problem and that the shoulder surgery would not help her neck condition and that she may end up still having significant symptoms in her shoulder, even after the shoulder surgery if a lot of the pain she was actually experiencing was from her neck. (Dr. Anderson's deposition, pages 10-12.) Dr. Anderson performed surgery in March 2000 by examining the rotator cup under the tip of the bone and removing the bone spurs and taking the pursitis out and a small bit off of the end of the collarbone where she had arthritis. (Dr. Anderson's deposition, page 13.) After surgery, Ms. Stegall continued to see Dr.

Anderson and was still symptomatic with complaints of pain in her shoulder radiating into her neck. She continues to have tingling and numbness and she had pain localized with an area of her neck and her right trapezius area. In September 2000, Ms. Stegall believed that her shoulder was better, but that her neck was not any better at all. Since Ms. Stegall continued to have cervical problems and since Dr. Anderson believed that she had symptoms at least of pressure on the nerves coming from her neck, he referred Ms. Stegall to Dr. Howell on September 27, 2000 for Dr. Howell to treat her for her neck problems. Dr. Anderson has provided a final diagnosis as impingement syndrome in her shoulder, AC arthritis, and cervical spine pathology.

B.
DR. EVERETTE HOWELL

After being released by Dr. Anderson in September 2000, Ms. Stegall followed Dr. Anderson's advice and visited Dr. Howell on November 13, 2000. Ms. Stegall, once again, provided a history of problems with her neck and her shoulder prior to having a lifting injury in June of 1999. Dr. Howell had noted that Ms. Stegall still suffered from persistent complaints of neck pain. Upon physical examination, Dr. Howell noted that Ms. Stegall had limited range of motion in her neck and mild tenderness as well as muscle spasm in the neck. Dr. Anderson had recommended an MRI, which was conducted on September 28, 2000 and showed that Ms. Stegall had a spondylitic disc bulge at C5-6 and at C6-7. Dr. Howell went on to state that the report indicated degenerative wear-and-tear condition of a degenerative disc disease, as well as with a spur and disc bulge. He classified her neck as spondylosis, which is a degenerative disorder. Dr. Howell continued to see Ms. Stegall for a few more visits and eventually released her from his care on June 11, 2001, with a recommendation that if she continued to have more symptoms, he would recommend that she have an operation for the cervical disc protrusion and for the spondylosis.

C.
DR. DAVID GAW

Dr. Gaw is a well-respected orthopedic surgeon and he has provided an independent medical examination of Ms. Stegall, this year, on January 27, 2003. Dr. Gaw has provided his testimony through his deposition, which was conducted July 29, 2003. Dr. Gaw is a well-respected orthopedic surgeon and

expert witness with regard to the use of the AMA Guides in assessing impairment in Tennessee. Dr. Gaw's background and experience and area of evaluating patients for the purposes of providing an impairment based upon the American Medical Associations Guides, 5th Edition, is well-known and well respected. Dr. Gaw is a member of the American Academy of Disability Evaluating Physicians and the American Board of Independent Medical Examiners. He has been the course director for disability evaluation seminars sponsored by the Hospital Corporation of America. He has also lectured on disability evaluation of the American Academy of Disability Evaluating Physician's Seminar in Nashville, Tennessee in 1993 and 1996. Dr. Gaw has continued to lecture on disability evaluation for the Professional Education Systems Worker's Compensation Seminars in Nashville, Tennessee and in Memphis, Tennessee. In addition, he has lectured on disability evaluation for continuing medical education seminars at the University of Tennessee. His publications include *The Use and Misuse of the AMA Guides in Assessing Impairment*, which was co-authored by Dr. Trey Emerson and published in the Journal of the Tennessee Medical Association.

Dr. Gaw has testified that he carefully reviewed all of the records and diagnostic studies of Dr. Everette Howell, Dr. Robert Clendenin, Dr. Allen Anderson, as well as the medical record of Dr. Timothy Perrse, as well as all diagnostic studies provided and ordered by Dr. Anderson and Dr. Howell. Dr. Gaw provided a very lengthy and detailed history provided by medical records, as well as Ms. Stegall. Ms. Stegall told Dr. Gaw in January 2003 that she continued to have a lot of difficulty with the right side of her neck and shoulder blade area, indicating that her shoulder blade area continues to have a knot. (Dr. Gaw's deposition, page 9.) Ms. Stegall continues to have pain where she does activities with her hand over her head or in front of her for any pushing, pulling or lifting. Her neck continues to ache and hurt as indicated by Dr. Gaw. Ms. Stegall reported that she cannot hold her neck in one position for very long periods of time, such as when she is working on a computer or driving for long distances. She has to frequently move her neck in different positions to keep the pain from setting in over a period of time. Dr. Gaw confirmed that the symptoms that Ms. Stegall reported in January 2003 as a result of his independent medical examination are the type of symptoms that are consistent with a neck injury and a shoulder injury

such as Ms. Stegall suffered in her work-related accidents with the Defendant, St. Thomas Hospital. Dr. Gaw went on to state that Ms. Stegall continued to have tingling down in her right arm, which indicated to Dr. Gaw that she had numbness or nerve irritation from her neck that goes down into her arm. Dr. Gaw measured Ms. Stegall's range of motion and concluded that she loss of movement in her neck and flexion and with extension where she measured 45 degrees when normal would be 60 degrees. In addition, she had pain to flex against resistance and she was sore and tender around the right trapezius and the right parascapular muscles. (Dr. Gaw's deposition, pages 9-12.)

Dr. Gaw went on to provide very clear and consistent diagnosis and opinion regarding causation and permanency based upon the medical records and his independent medical examination of Ms. Stegall.

III.
ELEMENTS OF PLAINTIFF'S WORKERS COMPENSATION CLAIM

A.
INJURY BY ACCIDENT

Plaintiff suffered an injury by accident as alleged in the Complaint. Proof will be crystal clear that Plaintiff did suffer an injury by accident.

B.
ARISING OUT OF EMPLOYMENT

It will be clear that Plaintiff's injury arose out of and in the course and scope of her employment with the Defendant, St. Thomas Hospital.

C.
NOTICE

The Plaintiff gave proper notice of each of her work-related injuries. The Plaintiff will provide significant detailed proof of her notice of her injury to her employer.

D.
COMPENSATION RATE

The Plaintiff's compensation rate is $274.25.

E.
CAUSATION

The medical deposition of Dr. Allen Anderson, Dr. Everette Howell and Dr. David Gaw shall show clearly that there is a causal relationship between Ms. Stegall's employment and the physical requirements of her employment and the injuries sustained to her neck and to her right shoulder.

A.
DR. ALLEN ANDERSON

On page 18 of Dr. Anderson's deposition, he provided a final diagnosis of impingement syndrome of the right shoulder, AC arthritis, and cervical spine pathology and Dr. Anderson confirmed causation by stating that the history Ms. Stegall provided of her work-related injury of June 1999 is consistent with the diagnosis he described. He stated there was a slight exception in that she did have pre-existing arthritis in her shoulder, which was somewhat of a contributing factor and that it was certainly possible that she had no symptoms and the work-related injury caused the arthritis to become symptomatic when it wasn't symptomatic before her injury.

In addition, upon cross-examination, counsel for the Defendant reaffirmed the relationship between her work at St. Thomas and her injuries in questioning Dr. Anderson. Dr. Anderson responded on the issue of causation raised by defense counsel by stating the following:

> A. Well, it's my opinion that she had a pre-existing condition in her neck and her shoulder. And it's probable that her work related activities of outreach and overhead exacerbated the symptoms and impingement in her shoulder.

(Dr. Anderson's deposition, page 29.)

B.
DR. EVERETTE HOWELL

Dr. Howell opted to provide causation for Ms. Stegall's neck injury when he confirmed that the history Ms. Stegall gave him of a work-related injury that she had in June 1999, that history was consistent with his diagnosis that he provided of a cervical spondylitic disc bulge (C5-6 and C6-7) and that the symptoms she described in the various office visits were consistent with the diagnosis he described. (Dr. Howell's deposition, page 11-12.)

In addition, after defense counsel valiantly tried to persuade Dr. Howell to change his mind regarding causation, Dr. Howell refused to do so, as he stated on page 24 of his deposition.

> If, on the other hand, Ms. Stegall had a neck injury in '94 and had an episode of pain and then did well with no – no symptoms with neck pain and had not had prior problems with the neck before the time of this accident in 1999, based on the information that I have I still think that the injury she described in 1999 certainly played a part in the relation of her chronic pain from her – from her cervical Spondylitic disc disease.

(Dr. Howell's deposition, page 24.)

C.
DR. DAVID GAW

On the issue of causation, Dr. Gaw was asked about his conclusions relative to causation. Dr. Gaw stated that based on the history provided by Ms. Stegall and barring any other significant history, the work activities that Ms. Stegall described that is repetitive overhead, outstretched use of the right upper extremity, he believed that this type of physical activity at work was the most likely cause of her work-related injuries to her right shoulder and her neck.

IV.
TRIAL ISSUES

A.
VOCATIONAL/INDUSTRIAL DISABILITY

The Plaintiff's testimony will provide a factual basis and will sustain her position regarding each one of the elements of her vocational/industrial disability set forth below. In addition, the medical proof is clear that Ms. Stegall suffered two work-related injuries, which have significantly affected her ability to be employable in the future and for which she seeks compensation under the Worker's Compensation Statute.

1. PERMANENCY.

a. Dr. Allen Anderson. Dr. Anderson has unequivocally stated in his deposition of April 16, 2003 that the injuries sustained by Ms. Stegall are permanent injuries and have additionally defined the word "permanent" as meaning the rest of her life.

b. Dr. Everette Howell. Dr. Howell stated on page 12 of his deposition that he believed that Ms. Stegall's injuries that she suffered as a result of the work-related incident are permanent injuries that will be with her for the rest of her life. (Dr. Howell's deposition, page 12.)

c. Dr. David Gaw. Additionally, Dr. Gaw stated, on page 15 of his deposition, that he too believed that Ms. Stegall has suffered permanent injuries as a result of the injuries she sustained to her neck and to her shoulder and that those are permanent injuries that will be with her for the rest of her life. (Dr. Gaw's deposition, page 15.)

2. PERMANENT PAIN.

a. Dr. Allen Anderson. On page 18 and page 19 of Dr. Anderson's deposition, he was asked about the pain that Ms. Stegall was continuing to experience and he was specifically asked whether or not she can anticipate experiencing continued pain on a periodic or permanent basis in the future. He stated that yes, he believed that Ms. Stegall would continue to experience the pain that she experiences now and that pain is a permanent condition. (Emphasis supplied.) (Dr. Anderson's depositions, pages 18-19.)

b. Dr. Everette Howell. Dr. Howell was asked in direct examination that because of the length of the pain that Ms. Stegall was still experiencing, did he believe that she could experience either periodic or permanent pain as a result of her injuries. Dr. Anderson emphatically stated that he did and that he believed the pain would be periodic on a "consistent basis." (Emphasis supplied.) (Dr. Anderson's deposition, page 12.)

c. Dr. David Gaw. Dr. Gaw was asked in his deposition if he had an opinion regarding the component of pain that Ms. Stegall had and whether or not that pain was a chronic condition or a permanent condition. Dr. Gaw stated on page 16 of his deposition that he believes when a condition of pain extends beyond a year and is not responsive to treatment, it is categorized as a chronic or permanent condition and he believed that because of the length of time that Ms. Stegall had experienced her pain without being responsive to treatment, that she did have a chronic problem and that her chronic problem

was a permanent condition as a result of her injuries and that this permanent condition of pain would last for the rest of her life. (Dr. Gaw's deposition, page 16.)

3. PERMANENT RESTRICTIONS.

a. Dr. Allen Anderson. Dr. Anderson was not asked about permanent restrictions.

b. Dr. Everette Howell. Dr. Howell stated on direct examination that although he was not competent to answer questions regarding Ms. Stegall's shoulder, he believed that with regard to her neck and the superimposed injury as a result of her work, the majority of patients with the type of injuries Ms. Stegall had would be able to work in a light to moderate capacity so long as they don't work with arms overhead for a particular length of time, or do any heavy lifting. (Dr. Howell's deposition, page 14.)

c. Dr. David Gaw. Dr. Gaw was asked about whether or not he thought that permanent restrictions would be advisable because of Ms. Stegall's two work-related injuries. Dr. Gaw stated he believed that Ms. Stegall should avoid continuous outstretched overhead use of the right upper extremity for pushing, pulling or lifting. He went on to state that Ms. Stegall could perform these activities on occasional or alternating basis, just not on a continuous basis. He also thought she ought to avoid frequent awkward positions of her neck and avoid long periods of time having her neck in one position, such as driving for long periods of time, or looking at a computer or typing with her neck in one position for long periods of time. Dr. Gaw also believed that the restrictions he testified to would be permanent restrictions and that is restrictions that would last for the rest of her life. (Dr. Gaw's deposition, pages 17-18.)

4. IMPAIRMENT.

a. Dr. Allen Anderson. Dr. Anderson testified that Ms. Stegall would have a 10% impairment of the upper extremity based upon the 5th Edition of the American Medical Association Guides for such rating purposes. Dr. Anderson believed the impairment was a permanent impairment that would last for the rest of her life. (Dr. Anderson's deposition, page 20.) (The 10% impairment equates to a _____ impairment to the body as a whole as a result of her shoulder injury.)

b. Dr. Everette Howell. With regard to Ms. Stegall's neck, Dr. Howell provided a 5% impairment to the body as a whole based upon the AMA Guides, 5th Edition, DRE, Category II for the cervical spine. (Dr. Howell's deposition, page 14.)

c. Dr. David Gaw. Further, Dr. Gaw testified that based upon the AMA Guides, 5th Edition, pages 476-479, Ms. Stegall would have a 3% impairment due to the loss of movement of the shoulder for a total of 13% impairment to the upper extremity or 8% whole person due to the shoulder **or 8% to the body as a whole due to the shoulder**. For the cervical spine, Dr. Gaw specifically cited the AMA Guides, 5th Edition, page 392, DRE, Category II, which provided a 5% impairment to the body as a whole. Dr. Gaw went on to state that the impairments provided were permanent impairments for the rest of Ms. Stegall's life. (Dr. Gaw's deposition, pages 19-20.)

5. EDUCATIONAL BACKGROUND. Ms. Stegall has a 12th grade education with 2 years of college.

6. PAST EMPLOYMENT. Ms. Stegall has been self-employed as a freelance artist and part-time clothing representative and has worked at other jobs, including Fidelity Federal Savings & Loan for a period of seven years as an IRA counselor and a computer operator. Currently, Ms. Stegall is employed with Neurosurgical Group in Nashville, Davidson County, Tennessee, as a surgical scheduler.

V.
CONCLUSION

Ms. Stegall suffers a permanent impairment to her neck and to her right shoulder. She is seeking two and one-half times her impairment to her neck of 5% to the body as a whole and to her shoulder as 8% to the body as a whole. The assessment of permanent disability is based upon numerous factors, including the employee's skill and training, education, age, local job opportunities, and the employee's capacity to work at the kinds of employment available, and the Plaintiff's disabled condition. (Emphasis supplied.) Robertson v. Loretto Casket Company, 722 S.W.2d 380, 384 (Tenn. 1985). In addition, the Courts have stated, "...if the employee's ability to earn wages in the form that would have been available to him in an uninjured condition is diminished by an injury, then that is what is meant by vocational

disability for the purposes of worker's compensation. The assessment of the extent of vocational disabilities is based upon all pertinent factors taken together." Cochran v. Foster Auto GMC, Inc., 746 S.W.2d 432, 459 (Tenn. 1988). In addition, the case of Clark v. National Union Fire Insurance Company, 774 S.W.2d 586 (Tenn. 1989(, the Court citing Employer's Insurance Company of Alabama v. Heath, 536 S.W.2d 341, 343 (Tenn. 1976) the Court stated the following, "...To determine the extent of vocational disability, the lower trial court considers, 'many pertinent factors, including job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to the anatomical disability testified to by medical experts.'" In addition, the Court in Clark citing Holder v. Wilson Sporting Goods Company, 723 S.W.2d 104, 108 (Tenn. 1987), "The Court must ask whether the employee's earning capacity in relation to the open labor market has been diminished by the residual impairment caused by a work related injury and not whether he is able to return and perform the job he held at time of injury." Clark v. National Union Fire Insurance Company, 774 S.W.2d 586 (Tenn. 1989). It has been long held that pain in and of itself can be very disabling. Pain is considered a disabling injury compensable when it occurs as a result of a work-related injury. (Bowling v. Raytheon, Co., 448 S.W. 2d 405, 407 (Tenn. 1969).

The Court is well aware of the case law, which has stated that the Workers' Compensation Act is to be given very liberal and equitable construction by the Trial Courts. The Tennessee Supreme Court has cited on many occasions the proposition that the Trial Courts should interpret the various provisions of the Worker's Compensation Act in a manner that would be sympathetic to the employee. Eslinger v. Miller Brothers, 315 S.W.2d 261 (Tenn. 1955).

In summary, Ms. Stegall expects only fair compensation for the substantial disabling and permanent injuries that she has sustained to her right upper extremity and neck as a result of her employment with St. Thomas Hospital. Therefore, Ms. Stegall requests the following relief:

1. Right Upper Extremity. 8% permanent partial disability.

2. Neck. 5% permanent partial disability.

3. Accrued Benefits. Ms. Stegall requests that she be paid accrued benefits in lump sum from the date of her maximum medical improvement until the date of trial.

4. Open Medical Benefits. Ms. Stegall will receive open medical benefits as a result of the judgment that will be obtained in this case.

5. Attorney's Fees. Ms. Stegall requests that her attorney's fees of 20% of the gross judgment be paid in this case.

6. Discretionary Costs. Ms. Stegall has filed a Motion with the Court asking the Court to assess discretionary costs incurred by her in this case. Ms. Stegall requests that this Motion be treated as a post-trial Motion to give counsel an opportunity to determine whether or not the discretionary costs figures can be agreed upon.

Respectfully submitted,

MICHAEL W. BINKLEY, #5930
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Nashville, Tennessee 37201-1920
(615) 244-8630

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing has been forwarded via hand-delivery this the _____ of September, 2003, postage prepaid to:

D. Randall Mantooth
Leitner, Willliams, Dooley & Napolitan, PLLC
414 Union Street
Suite 1900
Nashville, TN 37219

_____
MICHAEL W. BINKLEY

IN THE FIRST CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE IN NASHVILLE

CHAROLETTE M. IVEY,	)	
Plaintiff,	)	
	)	
v.	)	**No. 01C-3300**
	)	
CIRCUIT CITY STORES, INC. and	)	
TRAVELERS INDEMNITY COMPANY	)	
OF ILLINOIS,	)	
Defendants.	)	

PLAINTIFF'S PRE-TRIAL BRIEF

I.
FACTS

This is a workers compensation case. Charolette M. Ivey sustained two separate work-related injuries that are the subject of this workers compensation case. Ms. Ivey sustained her first work-related injury to her right knee on February 22, 2000, when she was squatting down on her knees and suddenly her legs collapsed from under her because of what was ultimately described as a severe tear of the cartilage on the outer portion of the knee with loose bony substances floating in the knee along with damage to the joint surfaces of the right knee. After conservative medical treatment with a convenient care physician, the physician referred Charolette Ivey to Dr. Barrett Rosen, an orthopedic surgeon. Dr. Rosen ultimately performed surgery on Ms. Ivey's right knee in August 2000.

After extensive physical therapy, Dr. Rosen allowed Ms. Ivey to return to work in November 2000, but only working four (4) hours per day with frequent rest periods and restriction of no prolonged standing or walking and minimal squatting, climbing and other activities that would aggravate her knee.

Subsequently, Dr. Rosen tried to see if Ms. Ivey could go back to work six (6) hours a day, but Ms. Ivey was simply unable to perform her work duties six (6) hours per day and

because of Ms. Ivey's very extensive injury to her right knee, he limited her again to four (4) hours working per day with the same restrictions.

Subsequently, in the late summer of 2001, because of Ms. Ivey's unequal weight distribution from her right side to her left side, and because of her chronic use of her left lower extremity to compensate for the weakness in her right extremity, she developed chronic pain and tenderness across her left knee and subsequently underwent surgery of her left knee in August 2001, when Dr. Rosen found significant inflammation of the lining tissue of the knee with evidence of bands of tissue that had formed from the lining tissue that was rubbing and irritating the bone along with pieces of the lining tissue becoming entrapped and pinched between the bone as the knee moved.

Ms. Ivey is 51 years of age and has an 11th grade education. She has no other educational training or background. Ms. Ivey's past employment experience has consisted of being a waitress at The Jolly Ox, King of the Road and serving as a bartender and waitress, as well as hostess, at The Squire's Table, The Brass Rail and the Hilton Restaurant & Bar. She has also served as a leasing agent for a local apartment and has worked at Michael's Restaurant and Shoney's Restaurant for a period of time. Ms. Ivey became employed with Circuit City in August 1988 and received numerous honors, accolades and awards for her work performance during her 13 years of employment with Circuit City. In fact, Mr. Avery Goss, a long time employee and supervisor with Circuit City, will testify that for a period of five (5) years, while he was Ms. Ivey's direct supervisor at Hickory Hollow Mall in Nashville, Ms. Ivey was an excellent employee with a fantastic work ethic and a great attitude about her work and her work performance. Mr. Goss will further testify that out of thousands of employees that he has supervised during his career at Circuit City, Ms. Charolette Ivey was probably one of the best

employees he has ever had the pleasure of supervising. Mr. Goss will further confirm the fact that Ms. Ivey received recognition numerous times as the employee of the month and received national awards from Circuit City for her work performance while employed with Circuit City during the 13 years of her employment. Mr. Goss will further testify that prior to Ms. Ivey's work related injuries to her right and left knees, that she was an energetic and highly motivated employee and that after her injuries to her knees, although she continued to exhibit enthusiasm for her job and used every effort to try and get back to work on a full time basis, she was simply unable to do so because of the excruciating pain that she was experiencing on a daily basis. Ms. Ivey was terminated from Circuit City Stores, Inc. because of her inability to work more than four (4) hours per day, thus ending an excellent work career with Circuit City. Ms. Ivey has been unable to work since that time.

II.
ELEMENTS OF PLAINTIFF'S WORKER'S COMPENSATION CASE

During the course of this lawsuit, the Plaintiff has submitted Interrogatories, along with Requests for Admissions, designed to limit the issues at trial. Based upon the answers of the Defendant to Interrogatories and Requests for Admissions, the following are issues and facts, which appear to be undisputed in this case.

A.
INJURY BY ACCIDENT

It appears from discussions with the Defendant that the Defendant admits that the Plaintiff suffered an injury by accident to <u>both</u> knees while employed with Circuit City Stores, Inc.

B.
ARISING OUT OF EMPLOYMENT

The medical proof in this case is clear that the injuries sustained by Ms. Ivey to both her right knee and her left knee arose out of and in the course and scope of Ms. Ivey's employment with Circuit City Stores, Inc. It is believed, through discussions with the Defendant that the Defendant does not contest that Ms. Ivey's injuries arose out of an in the course and scope of her employment.

C.
NOTICE

It appears from the Defendant's answers to Plaintiff's Requests for Admissions that the Defendant admits notice for the injury to the right knee, but apparently the Defendant states that proper notice was not provided of her work-related injury to her left knee. However, Plaintiff will show that proper notice was, in fact, provided to Travelers Insurance Company and to the Defendant through Plaintiff's statement to the Defendant and Plaintiff's filing of her lawsuit on October 30, 2001, which is clearly sufficient notice of the injury to her left knee. Plaintiff believes that Defendant will not contest proper notice to the Defendant of her work-related left knee injury.

D.
COMPENSATION RATE

It appears from the answer to Requests for Admissions No. 3 that the parties agree that Ms. Ivey's compensation rate is $384.25 per week.

E.
CAUSATION

Charolette Ivey understands that the Defendant will not contest the causal relationship between her employment and the two injuries she sustained while employed with the Defendant.

Dr. Barrett Rosen and Dr. David Gaw, two well-respected orthopedic surgeons, have agreed that there is a causal relationship between Ms. Ivey's employment and her injury to her right knee and to her injury to her left knee.

III.
SUMMARY OF MEDICAL TREATMENT

A.
DR. BARRETT ROSEN

After Ms. Ivey's initial injury of her right knee on February 22, 2000, she immediately sought and obtained medical treatment from Dr. Billy Norwood of Baptist Care Center who treated Ms. Ivey conservatively for a period of time. Dr. Norwood drained fluid from Ms. Ivey's knee and provided shots of cortisone directly into her right knee to try and relieve the chronic pain that she was experiencing. Pain medication was also prescribed. When it was determined that restrictions of no squatting or kneeling and limited hours at work, as well as other conservative means were not providing any relief from Ms. Ivey's pain in her right knee, Dr. Norwood referred Ms. Ivey to Dr. Barrett Rosen, who first saw Ms. Ivey on July 5, approximately five (5) months after her initial injury.

Dr. Barrett Rosen took a history consistent with Ms. Ivey's injury to her right knee and upon examination there was obvious tenderness over the medial joint line with a positive McMurray's sign, which suggested a torn cartilage or torn meniscus of the right knee. Dr. Rosen felt that Ms. Ivey had obvious internal derangement of the right knee and damage to the internal structures of the right knee and suggested an MRI to better delineate the condition of her knee. Dr. Rosen reviewed the MRI, which showed chondromalacic softening and damage to the joint surface with changes in the cartilage and menisci and, further, the MRI showed signs indicative of a tear, effusion and fluid around the right knee. Dr. Rosen recommended immediate surgery

and upon performing surgery on August 8, 2000, Dr. Rosen discovered that there was substantial damage to the joint surfaces in various places, including a tear of the cartilage on the outer portion of the knee and also loose pieces of bone tissue that were basically floating in the knee, which were also removed. (Dr. Rosen's deposition, page 8.)

In addition, Dr. Rosen subsequently recommended aggressive physical therapy to help Ms. Ivey overcome her chronic pain and the weakening of her knee along with moderate strength narcotic drugs for pain control. Ms. Ivey continued with her exercises as well as anti-inflammatory medication and pain medication for several months. Ms. Ivey did notice some problems with her left knee in late 2000 and early January 2001, but was not aware of any connection between her injury and her work at that time. Dr. Rosen noted that after January 2001 Ms. Ivey continued to complain of significant pain in her right knee and general diffused tenderness across her knee. Additional x-rays showed significant narrowing of the joint space in her right knee. Dr. Rosen believed that Ms. Ivey was developing early secondary arthritis and suggested the use of a substance called Synvisc, which is an artificial lubricant injected into the joint. This suggestion was denied by the medical insurance carrier. Dr. Rosen also noted in January 2002 that Ms. Ivey was experiencing crepitance in the right knee, which is a crunching type of sensation or sound present when the knee is moved. Dr. Rosen stated that this condition resulted because of irregularity and roughness on the joint surface of Ms. Ivey's knee after surgery. Dr. Rosen also noted in the early months of 2001 that Ms. Ivey was also suffering from secondary osteoarthritis, which is the most common form of arthritis one usually sees, particularly with knee injuries such as the significant trauma that Ms. Ivey suffered to her right knee in her work-related injury. Dr. Rosen continued to try and treat the pain that Ms. Ivey was experiencing by using methods such as Depo-Medrol, which is a potent local anti-inflammatory

agent, injected into the knee, along with a local anesthetic. (Dr. Rosen's deposition, pages 12 through 13.)

Subsequently, in April 2001, Dr. Rosen noted that Ms. Ivey was trying to help herself with a walking program and also she had started attending the Weight Watchers Program, both of which were endorsed and fully recommended for completion by Dr. Rosen. His examination at that time continued to show crepitance and diffused tenderness upon motion of the right knee. In addition, at that point, Dr. Rosen told Ms. Ivey that she was going to have to avoid prolonged standing and walking and that at that point it appeared that her avoidance of prolonged standing and walking would be a permanent recommendation. Ms. Ivey indicated that when she was on her feet for prolonged periods of time, that she would have chronic and constant pain, all of which Dr. Rosen noted was a normal reaction to patients with the type of injury Ms. Ivey suffered to her right knee. She was advised to limit her standing and working of no more than four (4) hours a day and continuing to do her exercises.

Subsequently, Dr. Rosen prepared a letter to Michelle Primm of Traveler's Insurance Company, dated June 26, 2001, which in part stated as follows:

> Dear Ms. Primm, I realize that this has certainly been a very prolonged course related to Ms. Ivey's knee. Given the nature of her condition, she has not worked because she has been unable to work for more than four to six hours a day, and apparently her employer would not allow her to return on less than a full-time basis.

In addition, upon questioning Dr. Rosen in his deposition of June 3, 2003 as to whether or not he felt the same as indicated in his letter of June 26, 2001 that Ms. Ivey was unable to work more than four to six hours a day, Dr. Rosen stated the following:

> Q. Doctor, you indicated at that time, in June of 2001, she was unable to work more than four to six hours a day. Is that still your feeling today?
> A. Yes.

(Dr. Rosen's deposition, page 16.)

In July 2001 Ms. Ivey saw Dr. Rosen primarily for problems associated with her left knee noting that over the last year since she has problems with her right knee that she had developed a gradual increase in problems with pain in her right knee that had reached a point, at that time, in July 2001, where it was a major problem for her with her pain posterior and medially with swelling in her knee, particularly posteriorly. She also complained of difficulty with walking and described episodes of her left knee simply "giving way." (Dr. Rosen's deposition, page 17.) The examination of the knee that day showed significant medial joint line tenderness and probably positive medial McMurray sign indicative of a torn meniscus in the left knee as well. X-rays showed narrowing of the medial compartment, which Dr. Rosen felt was once again internal derangement of the left knee, much like what had occurred to the right knee. (Dr. Rosen's deposition, page 18.)

At that time, Dr. Rosen stated that an MRI could have been performed but he felt as though the symptoms were the same as her problems related to her right knee and that surgery was indicated in order for her to have any type of relief from her pain in her left knee. Dr. Rosen then stated in his office notes of July 11, 2001 that he felt the stress from the other knee with pressure on the left knee certainly tended to aggravate the problem in her knee.

In addition, Dr. Rosen recommended surgery on the left knee, which was conducted on August 27, 2001. Upon surgery, Dr. Rosen found "significant inflammation of the lining tissue of the knee with evidence of bands of tissue that had formed from the lining tissue that was rubbing and irritating the bone and pieces of the lining tissue becoming entrapped and pinched between the bones as the knee moved and as Ms. Ivey walked." Therefore, Dr. Rosen removed all of this tissue during this procedure. (Dr. Rosen's deposition, page 19 and 20.)

Subsequently, in September and October 2001 Ms. Ivey was seen in the office post-operatively to review her left knee, which ultimately resolved after a period of time, although she continued to experience pain and discomfort throughout her left knee with mild swelling and general effusion. Dr. Rosen continued to note in February 2002 that Ms. Ivey was still experiencing pain in her right knee and some pain in her left knee.

B.
DR. DAVID GAW

On May 30, 2002, Ms. Charolette Ivey saw Dr. David Gaw for an independent medical examination. Dr. Gaw provided his testimony through his deposition for proof, which was given on June 4, 2003. Dr. Gaw is a well-respected orthopedic surgeon and expert witness with regard to the use of the AMA Guides in assessing impairment in Tennessee. Dr. Gaw's background and experience and area of evaluating patients for the purposes of providing an impairment based upon the American Medical Associations Guides, 5th Edition, is well-known and well respected. Dr. Gaw is a member of the American Academy of Disability Evaluating Physicians and the American Board of Independent Medical Examiners. He has been the course director for disability evaluation seminars sponsored by the Hospital Corporation of America. He has also lectured on disability evaluation of the American Academy of Disability Evaluating Physician's Seminar in Nashville, Tennessee in 1993 and 1996. Dr. Gaw has continued to lecture on disability evaluation for the Professional Education Systems Worker's Compensation Seminars in Nashville, Tennessee and in Memphis, Tennessee.

In addition, he has lectured on disability evaluation for continuing medical education seminars at the University of Tennessee. His publications include *The Use and Misuse of the AMA Guides in Assessing Impairment*, which was co-authored by Dr. Trey Emerson and published in the Journal of the Tennessee Medical Association. Dr. Gaw thoroughly reviewed

all of the medical records of Dr. Billy Norwood of the Baptist Care Center, as well as Dr. Barrett Rosen and Dr. Thomas Miller, who treated Ms. Ivey for her injuries in this case.

Dr. Gaw's recent assessment of Ms. Ivey on May 30, 2002 is instructive and helpful in applying the facts of this case to Ms. Ivey's impairment based upon the *Guides to the Evaluation of Permanent Impairment*, 5th Edition. Dr. Gaw provided a very thorough and detailed analysis through is independent medical examination and ultimately relied upon the 5th Edition of the *AMA Guides* per the Arthritis section on page 544 to attribute a 20% partial impairment to the right lower extremity and a 7% permanent partial impairment to the left lower extremity. (See independent medical evaluation, Exhibit 4 to Dr. Gaw's deposition and Exhibit 3 delineating the methodology in providing a 7% impairment to the left extremity for 3 mm cartilage interval on the left side and 2 mm of cartilage interval on the right side for a 20% impairment.)

IV.
TRIAL ISSUES

A.
VOCATIONAL/INDUSTRIAL DISABILITY

The most significant issue in this case and probably the only issue in this case will be the extent of Ms. Ivey's industrial/vocational disability to her right knee and to her left knee as a result of her very disabling work-related injuries that she sustained in this cause.

1. PERMANENCY. Regarding the issue of permanency, Dr. Gaw stated the following:

> **Q. Doctor, the injuries that we're talking about here today that would be the right knee and the left knee, in your opinion are those injuries permanent injuries?**
> **A. Yes.**
> **Q. And by permanent, I mean for the rest of her life.**
> **A. Yes.**

(Emphasis supplied. Dr. Gaw's deposition, pages 17 and 18.)

Dr. Rosen stated the following on the same issue:

> Q. Doctor, the injuries that Ms. Ivey sustained to her right knee and her left knee, in your opinion, are those injuries permanent injuries?
> A. Certainly they're permanent sequela of the right knee injury.

(Dr. Rosen's deposition, page 23.)

2. PERMANENT PAIN. Unfortunately, Ms. Ivey will suffer permanent pain to her knees, particularly with regard to her right knee, because the knees are weight-bearing joints and there is only a thin 2 mm band protecting the bones from rubbing against each other, which will ultimately require a knee replace on the right side and possible the left side. With regard to the **right knee**, Dr. Gaw stated the following:

> Q. Doctor, throughout Dr. Rosen's records and through your history that you obtained and the physical examination, you indicated that there was a pretty large component of pain that this lady was having, particularly on the right side.
> Now, my question is this: **As to the right side, first of all, is that pain that she is experiencing in your opinion, is that a permanent component to her injury?**
> **A. Yes.**
> Q. With regard to the right knee, when I say "permanent," do you believe that component of pain is going to be something that she will have for the rest of her life?
> A. Yes, until she gets something done about it. I think she would come to a total joint, an artificial joint. I think that would significantly help her pain, but barring that, yes, I think that if she doesn't have anything done, there's nothing we know to do for it other than just stay off of her feet all the time.
> **Q. Is the pain that she's experiencing in her right knee a disabling condition for her in your opinion?**
> **A. Yes, it would be disabling.**

(Emphasis supplied. Dr. Gaw's deposition, pages 18 and 19.)

In addition, with regard to the **left knee**, Dr. Gaw stated as follows:

> **Q. Let's talk about the pain in her left knee. I know it's not as severe as the right, but in your opinion since she has continued to have pain in her left knee, is that component of her left knee injury also a permanent condition?**

A. Yes, it is permanent.

Q. And do you believe that the pain in her left knee is a disabling condition for her at this time?

A. Well, it's certainly not disabling as much as the right knee.

Q. I asked you about the (sic) pain in her left knee being a permanent condition, I also mean for the rest of her life in her left knee. Do you think she will experiencing pain in her left knee for the rest of her life?

A. I think the left knee will gradually get worse over a period of time, yes.

(Emphasis supplied. Dr. Gaw's deposition, page 19.)

In addition, Dr. Rosen stated as follows:

Q. It appears to me from the records that she has consistently described to you, particularly in the right knee, but somewhat in the left knee, what appears to be pain that shows up in these visits. In your opinion, with that pain being a consistent complaint of hers, do you believe that she'll have a permanent condition of pain either with her left or right knee?

A. Well, the last time I saw her related to the left knee, which was in January of 2002, she was essentially asymptomatic with no problems with the left knee, **but she certainly has continued – based on when I saw her last – problems with pain and difficulties with the right knee, and I anticipate that will continue and be a permanent factor.**

Q. Do you believe it will be a permanent condition for the rest of her life in her right knee?

A. Yes.

(Emphasis supplied. Dr. Rosen's deposition, pages 23 and 24.)

3. PERMANENT RESTRICTIONS. Unfortunately, Ms. Ivey will have permanent restrictions that she will have to live with for the rest of her life that essentially prevent her from being employed on a full-time basis with any job that would require her to do any standing for more than 4 to 6 hours a day. With regard to the permanent restrictions, Dr. Rosen stated as follows:

Q. Doctor, you had indicated in a letter to Ms. Primm, I believe, of some physical limitations that you had placed on Ms. Ivey. Can you tell us, first of all, what those limitations are, and then I'll ask you some questions regarding the permanency of those limitations.

A. As I said before, those limitations were no standing or walking for more than four to six hours a day, avoiding squatting, climbing or similar type positions and activities as much as possible.

Q. Doctor, why did you place those limitations on Ms. Ivey?
A. Because I felt that was all she could tolerate.
Q. Do you expect those limitations that you have prescribed to be permanent limitations?
A. Yes.

(Emphasis supplied. Dr. Rosen's deposition, page 25 and 26.)

Dr. Gaw agreed with Dr. Rosen on page 21 of his deposition. Counsel for the Plaintiff directed Dr. Gaw to Dr. Rosen's letter to Michelle Primm dated June 26, 2001 and read the portion of the letter regarding the limitations and the following exchange took place:

Q. Doctor, do you agree today with the opinion of Dr. Rosen?
A. Yes.
Q. Dr. Rosen also stated that she should have some restrictions. I'm just going to ask you what (sic) think about those. Let me read them first. It says, "She will have permanent restrictions of no prolonged standing or walking more than a total of four to six hours a day with intermittent rest during that period of time as well as minimal squatting, climbing, etcetera."
Do you agree with the restrictions that he has outlined for her?
A. Yes.
Q. And Doctor, I asked Dr. Rosen yesterday if he believed those restrictions were permanent, and by permanent, I meant for the rest of her life, and he said, yes. Do you also agree with Dr. Rosen's opinion in that regard?
A. Yes.

(Emphasis supplied. Dr. Gaw's deposition, pages 21 and 22.)

4. FUTURE KNEE REPLACEMENT. Unfortunately, both doctors agree that Ms. Ivey needs to have a total knee replacement of her right knee, simply because her right knee is no longer useful and will not provide her any relief from pain because of the thinning of the gristle over the end of the bone. Both doctors have stated that there is an excellent correlation between thickness of the gristle and the extent of pain being experienced by Ms. Ivey. Dr. Rosen has stated as follows with regard to future knee replacement:

Q. Doctor, do you have any recommendations for the treatment or management of her pain in her knees in the future?

A. **At this point in time I think continuing to use anti-inflammatory medication, such as Celebrex, moderating activities, weight reduction program would be all that I would recommend for her.**
It is certainly possible that over time that this condition will progress to the point where she might be a candidate for a knee replacement operation.

(Emphasis supplied. Dr. Rosen's deposition, page 25.)

In addition, Dr. Gaw stated the following with regard to future knee replacement:

Q. Doctor what are your recommendations for further treatment?
A. I thought she had excellent treatment from Dr. Rosen. I think it's certainly more likely than not that she will need a total knee replacement on the right. She's only 50 years of age and if she lives a normal span, you can say much more likely than not that she will need that. I think it should be her option when to have it done, and the reason for doing it should be pain.

(Dr. Gaw's deposition, page 16 and 17.)

5. FUTURE SUSCEPTIABILITY TO INJURY. On close questioning with Dr. David Gaw, questions were asked about whether or not Ms. Ivey is more susceptible to future injury because of the severe injuries she sustained to both of her knees. On close questioning, Dr. Gaw stated as follows:

Q. ...In your opinion based upon, again, a review of the prior medical records, the history that you obtained, the physical exam that you conducted, in your opinion is Ms. Ivey more susceptible to injury in the future with regard to her right knee and her left knee in the condition that they're both in now?
A. Well, she's certainly much more susceptible to pain with weight bearing because there's a decreased cushion in the knee. I'm not sure that she would be more susceptible to an injury. Is that what you mean?
Q. Yes, sir. **Would she be more susceptible to the possibility of future injury because of the weakened condition of her two knees?**
A. **Certainly on the right knee with the atrophy that she would have not have the strength like to go up and down stairs. There would probably some weakness and lack of endurance because of that. It would make her more susceptible certainly on the right knee.**

(Emphasis supplied. Dr. Gaw's deposition, page 17.)

6. IMPAIRMENT. Dr. Gaw has attributed a 20% impairment to Ms. Ivey's right lower extremity based upon the Arthritis section of the *Guides to the Evaluation of Permanent Impairment*, 5th Edition. In addition, Dr. Gaw has attributed a 7% impairment to Ms. Ivey's left extremity based upon the *Guides to the Evaluation of Permanent Impairment*, 5th Edition. On the other hand, Dr. Rosen, who performed surgery on Ms. Ivey's right knee and then surgery on Ms. Ivey's left knee, attributed a 10% impairment to the right knee and a 0% impairment to the left knee. It is respectfully submitted that Dr. Rosen's 0% impairment after surgery to the left knee is not at all supported by the clear listing of impairment for such an injury as listed in the *Guides to the Evaluation of Permanent Impairment*, 5th Edition. Dr. Gaw clearly delineates the basis for the 7% impairment rating attributed to Ms. Ivey for her left knee. Of significance is the fact that Dr. Gaw has attributed a 20% impairment to the right lower extremity and Dr. Rosen has attributed a 10% impairment to the right extremity. It should be closely noted that Dr. Gaw's assessment of 20% permanent partial impairment is directly supported by the AMA Guides, 5th Edition, for the assessment of impairment for the type of injury sustained by Ms. Ivey.

Specifically, the issue is whether or not the procedures utilities on page 557 of the AMA Guides, 5th Edition, are reliable to serve as a basis for a 20% impairment to Ms. Ivey's right knee. The method used by Dr. Gaw is specifically set out on page 554 of the *Guides to the Evaluation of Permanent Impairment*, 5th Edition. (See Dr. Gaw's deposition, page 27 through 30.)

The Guides state that the need for joint replacement or major reconstruction usually corresponds with a complete loss of the articular surface (joint space). The impairment estimates involving a person with arthritis are based upon standard x-rays, taken with the individual standing, if possible. The ideal film-to-camera distance is 90 cm (36 in.) and the beam should be

at the level of and parallel to the joint service. The estimate for the patello femoral joint is based on a "sunrise view" taken at 40° flexion or on a true lateral view. Dr. Rosen simply stated that he believed that the procedure was not reliable simply because the x-ray could be done differently and not accurately as described in the *AMA Guides*, 5th Edition. However, Dr. Gaw specifically agreed with Dr. Rosen and stated that if doctors do not specifically follow the Guides, that the procedure may not be as accurate. Dr. Gaw went on to state that he specifically instructs his x-ray technicians regarding page 554 of the *AMA Guides* and specifically requires his x-ray technician to follow the *AMA Guides* specifically with regard to the standing x-ray procedure. Dr. Gaw stated in his deposition that the methodology that he uses and requires of his x-ray technicians essentially eliminates any subjective component of the x-ray and that the x-ray in this particular case was accurate and satisfactory and of the quality that he requires according to the terms and conditions set forth in the *AMA Guides* would serve as a basis for his 20% impairment to the right extremity.

> Q. Now, I'll let you assume, and I know you've read Dr. Rosen's records, that he gave a 10% impairment rating based upon the AMA Guides to the right knee, and a zero percent impairment to the left knee.
> Now, with all that said, what I would like to do is ask you, first of all, how you rated this lady with regard to her right knee and then her left knee and how you came about that rating, keeping in mind that Dr. Rosen says, your methodology is unreliable because of apparently the different shifts that you can make and all that sort of thing with the x-ray machine or with the person.
> Can you explain that to us and help us with it, Dr. Gaw.
> A. I think he's right. If there's not a right x-ray, if it's not made right, that certainly that can throw off and be a confusing thing, but the guides on Page 544 give the x-ray technician specific ways to do it such as so many inches from the film, the angle. So, I mean, there's specific directions on how to take the x-ray to eliminate these inconsistencies that Dr. Rosen is talking about.
> I think it's generally assumed that the x-ray is by far the most objective way to tell anything about a patient because it has – it's completely objective in the sense that the patient is not involved in it. So, I think the guides kind of say it is. It is the best way because it's the most objective, but of course he's right, it has to be done right and the x-ray has to be taken right.

Q. How do we know the x-ray was taken right so that the rating that you gave here today or will give us here today is absolutely accurate?
A. Well, I have talked to the x-ray technician that does it for me. She's got a copy of that book, a copy of the page, a copy of the directions, and just the way the angle of the film is, I think they're pretty good. I think they're pretty easy to measure.
Q. So when Dr. Rosen says that this methodology is unreliable because of slight movements and that type of thing, you have done away with that risk by making sure that the x-ray technician knows exactly how to take these x-rays according to the AMA Guide recommendations?
A. Yes.
Q. And in this particular case, was that in fact done, the x-rays, according to the AMA Guides, 5th Edition?
A. Yes. I'm not there when she does it but she has the guides to follow, she has the directions, and just from over the years, the films seem to – yes, they are taken according to the guides.
Q. And in your opinion are the x-rays reliable for the purposes of issuing an impairment on Page 544 of the AMA Guides, 5th Edition?
A. Yes.
Q. Let's talk about the impairment if we can. First of all let's talk about the right knee. What impairment did you attribute to the right knee?
A. That would be based on Page 544, a 2 millimeter interval space would be a 20% impairment to the lower extremity.
Q. Doctor, I'm going to show you Page 544 of the AMA Guides, 5th Edition, and ask you first of all if you recognize that as the page where you took the impairment ratings?
A. Yes, it is.
Q. Can you explain to us, maybe highlight or use it as an exhibit at trial, where you came down with the 20% permanent partial impairment to the right knee.
A. Again, I took the x-ray, measure the space between the thigh bone and the leg bone, 2 millimeters, and then just reading off the chart, "two millimeters equals the 20% impairment."
Q. And then with regard to the left knee did you utilize the same procedure?
A. Yes. There was a three, less severe, but a three millimeter cartilage interval space.
Q. Doctor, physically, what does this millimeter spacing between the bones mean?
A. It's a good correlation to the severity of the person's arthritis. It quantifies it much better than – it's the best way to quantify how bad it is, because there's a direct correlation between the thinness of the gristle over the end of the bone and pain. So the less the space, the thinner the space, the more pain usually is present.

(Dr. Gaw's deposition, pages 26 through 29.)

Dr. Gaw again reiterated the specificity with which he conducted the standing x-ray in the following exchange:

> Q. Now, a couple of other questions and I'll be done. You talked about he way you did this standing x-ray and that it was in conformity with Page 544 of the AMA Guides, 5th Edition. And we also know that Dr. Rosen had some problems with I guess the subjective variables in the method that you used. My question is this: Because your technicians are instructed specifically on how to conduct these x-rays according to the AMA Guides, in your opinion, are those subjective variables eliminated?
> A. Yes.
> Q. And are you satisfied based upon the recommendations of the AMA Guides on how these x-rays need to be done to make them reliable, are you satisfied with the quality of the x-rays you have reviewed, not only in this case but in all of your cases from your technicians?
> A. Yes.
> Q. And specifically in this case, was the x-ray that you received of good and consistent quality that you would have to have in order to provide an impairment upon the AMA Guides, 5th Edition, under the arthritis section on Page 544?
> A. Yes.

(Dr. Gaw's deposition, pages 42 and 43.)

7. EDUCATIONAL BACKGROUND. As stated previously, Ms. Ivey has an 11th grade education and no other educational training or background.

8. PAST EMPLOYMENT. As stated earlier, Ms. Ivey's past employment consists of work where she is on her feet almost entirely during the work day, including her jobs as a waitress, a bartender, a hostess and, particularly, her job with Circuit City.

V.
CONCLUSION

Ms. Ivey suffers a very real, extensive and permanent disability to both of her knees. Obviously, her right knee is almost to the point where it is useless, therefore, requiring a total knee replacement. The condition of Ms. Ivey's right knee is so severe and useless to her that she is clearly 100% permanently, totally disabled to the right extremity. The medical proof is

overwhelming that the "cushion" in her right knee of 2 mm a year ago in May 2002 provided very little, if any, protection from a nearly "bone-to-bone" contact in Ms. Ivey's right knee. Both doctors agree that a knee replacement is necessary to the right side in order for Ms. Ivey to have any semblance of relief from the chronic pain that she is experiencing in her right knee. The medical proof and the facts applied to case law clearly support compensation in the amount of 100% permanent total disability to the right extremity.

Regarding the left extremity, the injury is not as severe. However, her condition is slowly deteriorating, which is supported by the medical proof of Dr. David Gaw and Dr. Barrett Rosen. The condition of her left knee represents a 1 cm difference from her right knee. The "cushion" in her left knee is only 3 mm. Ms. Ivey requests that she be compensated at the rate of 65% permanent partial disability to the left extremity for her left knee injury.

Ms. Ivey has tried to return to full-time work. She has been unable to do so. The Court must remember that Ms. Ivey has an excellent work record with her employer and has an excellent work ethic that is second to none. Ms. Ivey wants to work and support herself. She has done so her entire life and wishes to continue to do so, but simply cannot work any more than possible four (4) hours per day. Her educational background of an 11^{th} grade education does not provide her an opportunity to advance her career in any real respect. No employer is going to hire an employee who can only work four (4) hours a day with an 11^{th} grade education and who is over 50 years of age when the market is full of younger employees who can work full-time and have no medical problems. Ms. Ivey has tried to increase her skills by becoming computer literate but if she is unable to work more than four (4) hours a day at a part-time job, she is not very useful to any employer in comparison to other full-time workers with better education and a more lengthy work life.

It is axiomatic that the assessment of permanent disability is based upon numerous factors, including the employee's skill and training, education, age, local job opportunities, and the employee's capacity to work at the kinds of employment available, and the Plaintiff's disabled condition. (Emphasis supplied.) Robertson v. Loretto Casket Company, 722 S.W.2d 380, 384 (Tenn. 1985). In addition, the Courts have stated, "...if the employee's ability to earn wages in the form that would have been available to him in an uninjured condition is diminished by an injury, then that is what is meant by vocational disability for the purposes of worker's compensation. The assessment of the extent of vocational disabilities is based upon all pertinent factors taken together." Cochran v. Foster Auto GMC, Inc., 746 S.W.2d 432, 459 (Tenn. 1988). In addition, the case of Clark v. National Union Fire Insurance Company, 774 S.W.2d 586 (Tenn. 1989(, the Court citing Employer's Insurance Company of Alabama v. Heath, 536 S.W.2d 341, 343 (Tenn. 1976) the Court stated the following, "...To determine the extent of vocational disability, the lower trial court considers, 'many pertinent factors, including job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to the anatomical disability testified to by medical experts.'" In addition, the Court in Clark citing Holder v. Wilson Sporting Goods Company, 723 S.W.2d 104, 108 (Tenn. 1987), "The Court must ask whether the employee's earning capacity in relation to the open labor market has been diminished by the residual impairment caused by a work related injury and not whether he is able to return and perform the job he held at time of injury." Clark v. National Union Fire Insurance Company, 774 S.W.2d 586 (Tenn. 1989). It has been long held that pain in and of itself can be very disabling. Pain is considered a disabling injury compensable when it occurs as a result of a work-related injury. (Bowling v. Raytheon, Co., 448 S.W. 2d 405, 407 (Tenn. 1969).

It is Ms. Ivey's position that due to the fact that she has two bad knee injuries, she is a high industrial risk for any prospective employer. This is clearly supported by the medical proof from Dr. Rosen and from Dr. Gaw. A worker who has physical limitations, as well as pain limitations, that are permanent in nature, and a worker who cannot work more than four to six hours a day as stated by Dr. David Gaw and Dr. Barrett Rosen, is not an employee who has any real chance of employment in the future.

The Court is well aware of the case law, which has stated that the Workers' Compensation Act is to be given very liberal and equitable construction by the Trial Courts. The Tennessee Supreme Court has cited on many occasions the proposition that the Trial Courts should interpret the various provisions of the Worker's Compensation Act in a manner that would be sympathetic to the employee. Eslinger v. Miller Brothers, 315 S.W.2d 261 (Tenn. 1955).

In summary, Ms. Ivey expects only fair compensation for the substantial disabling and permanent injuries that she has sustained while employed with Circuit City. Therefore, Ms. Ivey requests the following relief:

1. Right knee – 100% permanent total disability.

2. Left knee – 65% permanent partial disability.

3. Accrued Benefits – Ms. Ivey requests that she be paid accrued benefits in lump sum from the date of maximum medical improvement until the day of trial. An exhibit will be presented to the Court setting forth the specific amount requested.

4. Open Medical Benefits – Ms. Ivey will receive open medical benefits as a result of a judgment that is obtained in this case.

5. Attorney Fees - Ms. Ivey requests that her attorney be paid attorney's fees of 20% of the gross judgment in this case.

6. Discretionary Costs – Ms. Ivey has filed a Motion with the Court asking the Court to assess discretionary costs incurred by her in this cause. Ms. Ivey requests that this Motion be treated as a post-trial Motion to give counsel an opportunity to determine whether or not that figure can be agreed upon.

7. Reimbursed Mileage and Medical Expenses – Ms. Ivey will present proof of her out-of-pocket medical expenses and her mileage expenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing has been forwarded via hand-delivery this the _____ of July, 2003, postage prepaid to:

Thomas C. Gorham
Spicer, Flynn & Rudstrom PLLC
211 Seventh Avenue, North, Suite 500
Nashville, Tennessee 37219-1823

_____
MICHAEL W. BINKLEY