

	A	B	C	D	E	F
1	IN THE CHANCERY COURT OF HENDERSON COUNTY, TENNESSEE AT LEXINGTON					
2	DOCKET NO. 22929					
3						
4	JIMMY EUGENE POWELL					
5						
6	VS			EXHIBIT A		
7						
8	LISA ANN POWELL					
9						
10	<u>REAL ESTATE</u>	<u>VALUE</u>	<u>DEBT</u>	<u>EQUITY</u>	<u>WIFE</u>	<u>HUSBAND</u>
11	home and 3.8 acres	\$ 146,100.00	\$ 98,709.97	\$ 47,390.03	\$ 47,390.03	
12			\$ -	\$ -		
13		\$ -	\$ -	\$ -		
14		\$ -	\$ -	\$ -		\$ -
15				\$ -		
16	<u>VEHICLES</u>			\$ -		
17	1996 Jeep	\$ 1,500.00	\$ -	\$ 1,500.00	\$ 1,500.00	
18	1997 Dodge Ram	\$5,500.00	\$ -	\$ 5,500.00		\$ 5,500.00
19	1985 Camaro (pre-marital)		\$ -	\$ -		\$ -
20		\$ -	\$ -	\$ -	\$ -	
21		\$ -		\$ -	\$ -	
22				\$ -		
23				\$ -		
24	<u>INVESTMENTS AND ACCOUNTS</u>			\$ -		
25	Retirement through Henderson Co. Board of Ed.	\$ 16,082.80		\$ 16,082.80	\$ 8,041.40	\$ 8,041.40
26	Retirement through TBDN	51619.47		\$ 51,619.47	25809.74	25809.74
27	joint banking account no. 3914038	\$ 249.42		\$ 249.42	\$ 249.42	
28	husband's banking account no. ---5140	\$ 229.63		\$ 229.63		\$ 229.63
29				\$ -		
30				\$ -		
31				\$ -		
32	<u>HOUSEHOLD GOODS</u>			\$ -		
33				\$ -		
34	Refrigerator	\$ 300.00		\$ 300.00	\$ 300.00	
35	Cook stove	\$ 200.00		\$ 200.00	\$ 200.00	

	A	B	C	D	E	F
36	microwave in grandparent's home	\$ 100.00		\$ 100.00		\$ 100.00
37	microwave	\$ 100.00		\$ 100.00	\$ 100.00	
38	coffeepot	\$ 10.00		\$ 10.00		\$ 10.00
39	food processor	\$ 25.00		\$ 25.00		\$ 25.00
40	T.V. in living room	\$ 200.00		\$ 200.00	\$ 200.00	
41	grandfather clock	\$ 200.00		\$ 200.00	\$ 200.00	
42	washer & dryer	\$ 225.00		\$ 225.00	\$ 225.00	
43	rocker in child's den	\$ 25.00		\$ 25.00	\$ 25.00	
44	end tables in child's den	\$ 25.00		\$ 25.00	\$ 25.00	
45	love seat in child's den	\$ 50.00		\$ 50.00	\$ 50.00	
46	ottoman in child's den	\$ 50.00		\$ 50.00	\$ 50.00	
47	lamps in child's den	\$ 25.00		\$ 25.00	\$ 25.00	
48	entertainment center in child's den	\$ 200.00		\$ 200.00	\$ 200.00	
49	entertainment center in grandparent's home	\$ 100.00		\$ 100.00		\$ 100.00
50	entertainment center in living room	\$ 500.00		\$ 500.00	\$ 500.00	
51	child's playstation 3	\$ 400.00		\$ 400.00	\$ 400.00	
52	full size mattress & box springs (blue)	\$ 100.00		\$ 100.00		\$ 100.00
53	brown bedroom suite	\$ 100.00		\$ 100.00	\$ 100.00	
54	white bedroom suite	\$ 100.00		\$ 100.00	\$ 100.00	
55	pine bedroom suite	\$ 100.00		\$ 100.00		\$ 100.00
56	electronic holiday projector	\$ 50.00		\$ 50.00	\$ 50.00	
57	recliner	\$ 200.00		\$ 200.00	\$ 200.00	
58	child's bunk bed	\$ 100.00		\$ 100.00	\$ 100.00	
59	coffee table in living room	\$ 20.00		\$ 20.00	\$ 20.00	
60	living room couch & loveseat	\$ 50.00		\$ 50.00	\$ 50.00	
61	19 in tv in basement	\$ 50.00		\$ 50.00	\$ 50.00	
62	19 in tv in spare bedroom	\$ 50.00		\$ 50.00		\$ 50.00
63	computer table in basement	\$ 100.00		\$ 100.00	\$ 100.00	
64	computer desk in bedroom	\$ 100.00		\$ 100.00	\$ 100.00	
65	computer chair	\$ 50.00		\$ 50.00	\$ 50.00	
66	computer (gift in 2007)	\$ 200.00		\$ 200.00	\$ 200.00	
67	computer in master bedroom	\$ 100.00		\$ 100.00	\$ 100.00	
68	printer (newer one)	\$ 100.00		\$ 100.00	\$ 100.00	
69	printer	\$ 50.00		\$ 50.00		\$ 50.00
70	printer	\$ 50.00		\$ 50.00	\$ 50.00	
71	child's T.V. in den	\$ 100.00		\$ 100.00	\$ 100.00	

	A	B	C	D	E	F
72	child's T.V. in spare bedroom	\$ 50.00		\$ 50.00	\$ 50.00	
73	DVD/VCR	\$ 50.00		\$ 50.00	\$ 50.00	
74	DVD/VCR	\$ 50.00		\$ 50.00		\$ 50.00
75	DVD/VCR	\$ 50.00		\$ 50.00	\$ 50.00	
76	(2) Playstation 2	\$ 25.00		\$ 25.00	\$ 25.00	
77	Dishwasher	\$ 200.00		\$ 200.00	\$ 200.00	
78	kitchen table	\$ 50.00		\$ 50.00		\$ 50.00
79	pool table	\$ 1,000.00		\$ 1,000.00	\$ 1,000.00	
80	air hockey table	\$ 150.00		\$ 150.00	\$ 150.00	
81	above ground swimming pool	\$ 1,500.00		\$ 1,500.00	\$ 1,500.00	
82	outdoor storage shed	\$ 1,000.00		\$ 1,000.00	\$ 1,000.00	
83	DVDs, videos & games	\$ 100.00		\$ 100.00	\$ 100.00	
84	gun cabinet	\$ 200.00		\$ 200.00		\$ 200.00
85	waterbed & mattress	\$ 100.00		\$ 100.00		\$ 100.00
86	tan couch/chair in basement	\$ 100.00		\$ 100.00		\$ 100.00
87	weights and yoga mat	\$ 100.00		\$ 100.00		\$ 100.00
88	satellite box	\$ 50.00		\$ 50.00		\$ 50.00
89	digital camera	\$ 100.00		\$ 100.00	\$ 100.00	
90	camcorder	\$ 100.00		\$ 100.00	\$ 100.00	
91	radio in the basement	\$ 25.00		\$ 25.00		\$ 25.00
92	fireproof safe	\$ 200.00		\$ 200.00		\$ 200.00
93	home interior deco	\$ 100.00		\$ 100.00	\$ 100.00	
94	outdoor furniture	\$ 100.00		\$ 100.00	\$ 100.00	
95	treadmill	\$ 200.00		\$ 200.00	\$ 200.00	
96	wicker trunk	\$ 10.00		\$ 10.00	\$ 10.00	
97	misc. items such as baskets, etc.	\$ 25.00		\$ 25.00	\$ 25.00	
98	misc. items in attic	\$ 200.00		\$ 200.00	\$ 200.00	
99				\$ -		
100				\$ -		
101				\$ -		
102	<u>OUTSIDE AND SPORTING EQUIPMENT</u>			\$ -		
103	05 or 06 Polaris 4- wheeler	\$ 3,500.00		\$ 3,500.00	\$ 3,500.00	
104	1994 4-wheeler	\$ 1,000.00		\$ 1,000.00	\$ 1,000.00	
105	300 Win Mag. Savage Rifle	\$ 1,000.00		\$ 1,000.00		\$ 1,000.00
106	12 ga. Baretta Extrema 2	\$ 1,000.00		\$ 1,000.00		\$ 1,000.00
107	410 pump shot gun	\$ 1,000.00		\$ 1,000.00		\$ 1,000.00

	A	B	C	D	E	F
108	9mm rifle	\$ 1,000.00		\$ 1,000.00		\$ 1,000.00
109	12 ga. Browning BPR shotgun	\$ 1,000.00		\$ 1,000.00		\$ 1,000.00
110	50 cal. Muzzle loader	\$ 1,000.00		\$ 1,000.00		\$ 1,000.00
111	9mm smith & wesson pistol	\$ 1,000.00		\$ 1,000.00	\$ 250.00	
112	suntracker pontoon boat	\$ 3,000.00		\$ 3,000.00		\$ 3,000.00
113	flat bottom boat, tailer	\$ 700.00		\$ 700.00		\$ 700.00
114	craftman's lawnmower	\$ 1,000.00		\$ 1,000.00	\$ -	\$ 1,000.00
115	chainsaw	\$ 50.00	\$ -	\$ 50.00	\$ -	\$ 50.00
116	leaf blower	\$ 50.00		\$ 50.00		\$ 50.00
117	seed spreader	\$ 50.00		\$ 50.00		\$ 50.00
118	weed eater	\$50.00		\$ 50.00		\$ 50.00
119	pressure washer	\$ 250.00		\$ 250.00	\$ 250.00	
120	air compressor/tank	\$ 100.00		\$ 100.00		\$ 100.00
121	cordless drill	\$ 20.00		\$ 20.00	\$ 20.00	
122	craftsman tool box	\$ 100.00		\$ 100.00	\$ 100.00	
123	tool box with professional tools	\$ 1,000.00		\$ 1,000.00		\$ 1,000.00
124	generator	\$ 500.00		\$ 500.00		\$ 500.00
125	2 outdoor/wildlife cameras	\$ 200.00		\$ 200.00		\$ 200.00
126	deer stands	\$ 200.00		\$ 200.00		\$ 200.00
127	deer head/mounted items	\$ 50.00		\$ 50.00		\$ 50.00
128	hunting boxes	\$ 25.00		\$ 25.00		\$ 25.00
129	bow/arrows	\$ 100.00		\$ 100.00		\$ 100.00
130	household tools, screwdrivers, etc.	\$ 25.00		\$ 25.00	\$ 25.00	
131	duck decoys and duck hunting accessories	\$ 100.00		\$ 100.00		\$ 100.00
132	fishing rods and reels	\$ 200.00		\$ 200.00		\$ 200.00
133	deer feeder	\$ 250.00		\$ 250.00		\$ 250.00
134	<u>DEBTS</u>			\$ -		
135				\$ -		\$0.00
136	Bass Pro Shoppe Platinum Plus Visa		\$ (4,144.71)	\$ 4,144.71		\$ (4,144.71)
137	Joint Visa account ----9812		\$ (5,134.60)	\$ 5,134.60	(\$2,567.35)	\$ (2,567.35)
138	Ducks unlimited Platinum Plus Visa		\$ (14,524.04)	\$ 14,524.04		\$ (14,524.04)
139				\$ -		
140	Captial One		\$ (1,522.30)	\$ 1,522.30		\$ (1,522.30)
141				\$ -		
142				\$ -		
143				\$ -		

	A	B	C	D	E	F
144				\$ -		
145				\$ -		
146				\$ -		
147				\$ -		
148				\$ -		
149				\$ -		
150				\$ -		
151				\$ -		
152				\$ -		
153	TOTALS	\$ 251,141.32	\$ 73,384.32	\$ 177,757.00	\$ 94,498.24	\$ 31,857.37

	A	B	C	D	E	F	G	H
1	IN THE CHANCERY COURT OF HENDERSON COUNTY, TENNESSEE AT LEXINGTON							
2	DOCKET NO. 22929							
3								
4	JIMMY EUGENE POWELL							
5	EXHIBIT B							
6	VS							
7								
8	LISA ANN POWELL							
9	<u>DIVISION OF PROPERTY POWELL V POWELL</u>							
10	<u>REAL ESTATE</u>	<u>Husband's Value</u>	<u>Wife's Value</u>	<u>Court's Value</u>	<u>Debt</u>	<u>Equity</u>	<u>Wife</u>	<u>Husband</u>
11	home and 3.8 acres- First Mortgage to	\$165,000.00	\$146,100.00	\$146,000.00	\$99,011.00	\$46,989.00	\$46,989.00	
12	Regions Bk.--\$68750.46; Second Mort. To							
13	Regions --\$17139.32							
14	House & 1 acre, wife's inherited property	\$32,700.00	None Given	\$32,700.00	\$0.00		separate	
15								
16								
17								
18	<u>VEHICLES</u>							
19	1996 Jeep	\$2,735.00	\$1,500.00	\$1,500.00	\$0.00	\$1,500.00	\$1,500.00	
20	1997 Dodge Ram- husband	\$2,885.00	\$5,500.00	\$2,885.00	\$0.00	\$2,885.00		\$2,885.00
21	1985 Camaro (pre-marital) wife's sep.property	None Given	None Given	Not Assessed	\$0.00		separate	\$0.00
22	2004 BMW-husband's separate property	None Given	None Given	Not Assessed	\$0.00			separate
23								
24								
25								
26	<u>INVESTMENTS AND ACCOUNTS</u>							
27	Retirement through Henderson Co. Bd. of Ed.	\$16,082.00	\$16,082.80	\$16,082.00	\$0.00	\$16,082.00	\$16,082.00	
28	Retirement through TBDN	\$65,074.91	\$65,074.91	\$65,074.91	\$0.00	\$65,074.91		\$65,074.91
29	joint banking account no. 3914038	\$249.42	\$249.42	\$249.43	\$0.00	\$0.00	\$249.42	
30	husband's banking account no. ---5140	\$229.63	\$229.63	\$229.63	\$0.00	\$229.63		\$229.63
31	Roth IRA-husband	\$60.94	none	\$60.94	\$0.00	\$60.94		\$60.94
32								
33								
34								
35	<u>HOUSEHOLD GOODS</u>							
36								
37	Refrigerator	\$300.00	\$300.00	\$300.00		\$300.00	\$300.00	
38	Cook stove	\$200.00	\$200.00	\$200.00		\$200.00	\$200.00	
39	microwave in grandparent's home	\$100.00	\$100.00	\$100.00		\$100.00		\$100.00

	A	B	C	D	E	F	G	H
40	microwave	\$100.00	\$100.00	\$100.00		\$100.00	\$100.00	
41	coffeepot	\$0.00	\$10.00	\$10.00		\$10.00		\$10.00
42	food processor	\$0.00	\$25.00	\$25.00		\$25.00		\$25.00
43	T.V. in living room	\$200.00	\$200.00	\$200.00		\$200.00	\$200.00	
44	grandfather clock	\$200.00	\$200.00	\$200.00		\$200.00	\$200.00	
45	washer & dryer	\$225.00	\$225.00	\$225.00		\$225.00	\$225.00	
46	rocker in child's den	\$0.00	\$25.00	\$25.00		\$25.00	\$25.00	
47	end tables in child's den	\$0.00	\$25.00	\$25.00		\$25.00	\$25.00	
48	love seat in child's den	\$0.00	\$50.00	\$50.00		\$50.00	\$50.00	
49	ottoman in child's den	\$0.00	\$50.00	\$50.00		\$50.00	\$50.00	
50	lamps in child's den	\$0.00	\$25.00	\$25.00		\$25.00	\$25.00	
51	entertainment center in child's den	\$0.00	\$200.00	\$200.00		\$200.00	\$200.00	
52	entertainment center in grandparent's home	\$0.00	\$100.00	\$100.00		\$100.00		\$100.00
53	entertainment center in living room	\$300.00	\$500.00	\$500.00		\$500.00	\$500.00	
54	child's playstation 3	\$0.00	\$400.00	\$400.00		\$400.00	\$400.00	
55	full size mattress & box springs (blue)	\$0.00	\$100.00	\$100.00		\$100.00		\$100.00
56	brown bedroom suite	\$0.00	\$100.00	\$100.00		\$100.00	\$100.00	
57	white bedroom suite	\$0.00	\$100.00	\$100.00		\$100.00	\$100.00	
58	pine bedroom suite- husband's sep. property	\$0.00	\$100.00	\$100.00		\$100.00		separate
59	electronic holiday projector	\$0.00	\$50.00	\$50.00		\$50.00	\$50.00	
60	recliner	\$200.00	\$200.00	\$200.00		\$200.00	\$200.00	
61	child's bunk bed	\$0.00	\$100.00	\$100.00		\$100.00	\$100.00	
62	coffee table in living room	\$0.00	\$20.00	\$20.00		\$20.00	\$20.00	
63	living room couch & loveseat	\$50.00	\$50.00	\$50.00		\$50.00	\$50.00	
64	19 in tv in basement	\$0.00	\$50.00	\$50.00		\$50.00	\$50.00	
65	19 in tv in spare bedroom	\$0.00	\$50.00	\$50.00		\$50.00		\$50.00
66	computer table in basement	\$25.00	\$100.00	\$100.00		\$100.00	\$100.00	
67	computer desk in bedroom	\$25.00	\$100.00	\$100.00		\$100.00	\$100.00	
68	computer chair	\$0.00	\$50.00	\$50.00		\$50.00	\$50.00	
69	computer (gift in 2007)-wife's sep. property	\$0.00	\$200.00	\$200.00		\$200.00		separate
70	computer in master bedroom	\$100.00	\$100.00	\$100.00		\$100.00	\$100.00	
71	printer (newer one)	\$0.00	\$100.00	\$100.00		\$100.00	\$100.00	
72	printer	\$0.00	\$50.00	\$50.00		\$50.00		\$50.00
73	printer	\$25.00	\$50.00	\$25.00		\$25.00	\$50.00	
74	child's T.V. in den	\$0.00	\$100.00	\$100.00		\$100.00	\$100.00	
75	child's T.V. in spare bedroom	\$0.00	\$50.00	\$50.00		\$50.00	\$50.00	
76	DVD/VCR	\$50.00	\$50.00	\$50.00		\$50.00	\$50.00	
77	DVD/VCR	\$50.00	\$50.00	\$50.00		\$50.00		\$50.00
78	DVD/VCR	\$50.00	\$50.00	\$50.00		\$50.00	\$50.00	
79	(2) Playstation 2	\$0.00	\$25.00	\$25.00		\$25.00	\$25.00	

	A	B	C	D	E	F	G	H
80	Dishwasher	\$50.00	\$200.00	\$200.00		\$200.00	\$200.00	
81	kitchen table & chairs	\$50.00	\$50.00	\$50.00		\$50.00		\$50.00
82	pool table	\$1,500.00	\$1,000.00	\$1,000.00		\$1,000.00	\$1,000.00	
83	air hockey table		\$150.00	\$150.00		\$150.00	\$150.00	
84	above ground swimming pool	\$1,500.00	\$1,500.00	\$1,500.00		\$1,500.00	\$1,500.00	
85	outdoor storage shed	\$1,000.00	\$1,000.00	\$1,000.00		\$1,000.00	\$1,000.00	
86	DVDs, videos & games	\$0.00	\$100.00	\$100.00		\$100.00	\$100.00	
87	gun cabinet-husband's sep. property		\$200.00	\$200.00		\$200.00		separate
88	waterbed & mattress	\$100.00	\$100.00	\$100.00		\$100.00		\$100.00
89	tan couch/chair in basement	\$0.00	\$100.00	\$100.00		\$100.00		\$100.00
90	weights and yoga mat	\$0.00	\$100.00	\$100.00		\$100.00		\$100.00
91	satellite box	\$0.00	\$50.00	\$50.00		\$50.00		\$50.00
92	digital camera	\$50.00	\$100.00	\$100.00		\$100.00	\$100.00	
93	camcorder	\$50.00	\$100.00	\$100.00		\$100.00	\$100.00	
94	radio in the basement	\$0.00	\$25.00	\$25.00		\$25.00		\$25.00
95	fireproof safe	\$0.00	\$200.00	\$200.00		\$200.00		\$200.00
96	home interior deco	\$0.00	\$100.00	\$100.00		\$100.00	\$100.00	
97	outdoor furniture	\$0.00	\$100.00	\$100.00		\$100.00	\$100.00	
98	treadmill	\$0.00	\$200.00	\$200.00		\$200.00	\$200.00	
99	wicker trunk	\$0.00	\$10.00	\$10.00		\$10.00	\$10.00	
100	misc. items such as baskets, etc.	\$0.00	\$25.00	\$25.00		\$25.00	\$25.00	
101	misc. items in attic	\$0.00	\$200.00	\$200.00		\$200.00	\$200.00	
102								
103								
104								
105	<u>OUTSIDE AND SPORTING EQUIPMENT</u>							
106	05 or 06 Polaris 4- wheeler-gift to child	\$0.00	\$3,500.00	\$3,500.00		\$3,500.00	\$3,500.00	
107	1994 4-wheeler	\$0.00	\$1,000.00	\$1,000.00		\$1,000.00	\$1,000.00	
108	300 Win Mag. Savage Rifle-husband's sep. prop	\$0.00	\$1,000.00	\$1,000.00		\$1,000.00		separate
109	12 ga. Baretta Extrema 2-husband's sep. prop		\$1,000.00	\$1,000.00		\$1,000.00		separate
110	410 pump shot gun		\$1,000.00	\$300.00		\$300.00		Separate
111	9mm rifle		\$1,000.00	\$300.00		\$300.00		Separate
112	12 ga. Browning BPR shotgun		\$1,000.00	\$1,000.00		\$1,000.00		\$1,000.00
113	50 cal. Muzzle loader		\$1,000.00	\$1,000.00		\$1,000.00		Separate
114	9mm smith & wesson pistol-wife's sep. prop.		\$1,000.00	\$1,000.00		\$1,000.00	separate	
115	suntracker pontoon boat		\$3,000.00	\$3,000.00		\$3,000.00		\$3,000.00
116	flat bottom boat, tailer	\$250.00	\$700.00	\$250.00		\$250.00		\$250.00
117	craftman's lawnmower	\$1,000.00	\$1,000.00	\$1,000.00		\$1,000.00		\$1,000.00
118	chainsaw	\$25.00	\$50.00	\$25.00		\$25.00		\$25.00
119	leaf blower		\$50.00	\$50.00		\$50.00		\$50.00

	A	B	C	D	E	F	G	H
120	seed spreader	\$50.00	\$50.00	\$50.00		\$50.00		\$50.00
121	weed eater	\$20.00	\$50.00	\$20.00		\$20.00	\$20.00	
122	pressure washer	\$50.00	\$250.00	\$50.00		\$50.00	\$50.00	
123	air compressor/tank	\$100.00	\$100.00	\$100.00		\$100.00		\$100.00
124	cordless drill	\$20.00	\$20.00	\$20.00		\$20.00		\$20.00
125	craftsman tool box-husband's sep. property	\$0.00	\$100.00	\$100.00		\$100.00		separate
126	tool box with professional tools-husband's sep	\$500.00	\$1,000.00	\$500.00		\$500.00		\$500.00
127	generator	\$100.00	\$500.00	\$100.00		\$100.00		\$100.00
128	2 outdoor/wildlife cameras		\$200.00	\$200.00		\$200.00		\$200.00
129	deer stands		\$200.00	\$200.00		\$200.00		\$200.00
130	deer head/mounted items		\$50.00	\$50.00		\$50.00		\$50.00
131	hunting boxes		\$25.00	\$25.00		\$25.00		\$25.00
132	bow/arrows		\$100.00	\$100.00		\$100.00		\$100.00
133	household tools, screwdrivers, etc.		\$25.00	\$25.00		\$25.00	\$25.00	
134	duck decoys and duck hunting accessories		\$100.00	\$100.00		\$100.00		\$100.00
135	fishing rods and reels-husband's sep. prop.		\$200.00	\$200.00		\$200.00		separate
136	4 wheeler disk	\$100.00	\$0.00	\$100.00		\$100.00		\$100.00
137	gun case-husband's sep. property					\$0.00		separate
138	deer feeder		\$250.00	\$250.00		\$250.00		\$250.00
139	Digital Trail Camera--Husband's Separate							Separate
140	Old 35 mm camera--Husband's Separate							Separate
141								
142								
143	DEBTS							
144								
145	Bass Pro Shoppe Visa #7102 (now 9145)	\$1,219.00	\$4,144.71	\$1,219.00	-\$1,219.00	-\$1,219.00		-\$1,219.00
146	Visa account ----9812	\$10,532.00	\$5,134.00	\$10,532.00	-\$10,532.00	-\$10,532.00	-\$5,266.00	-\$5,266.00
147	Ducks unlimited Platinum Plus Visa#2989	\$12,314.00	\$14,524.00	\$12,314.00	-\$12,314.00	-\$12,314.00		-\$12,314.00
148	Husband's loan from Larry Powell	\$32,000.00		\$32,000.00	-\$32,000.00	-\$32,000.00		Not Marital Debt
149	Capital One-Mastercard #0516	\$1,242.00	\$1,522.30	\$1,242.00	-\$1,242.00	-\$1,242.00	-\$1,242.00	
150	VISA credit card #7182	\$4,276.70		\$4,276.70	-\$4,276.70	-\$4,276.70	-\$4,276.70	
151	TBDN Tuition Reimbursement --Husband's Debt	\$12,114.00		\$12,114.00	-\$12,114.00	-\$12,114.00		
152	Note TBDN is speculative-Husband only will benefit							
153	The liability issue not settled--Husband to hold Wife							
154	Harmless-May be post divorce debt							
155								
156	TOTALS		\$289,921.77	\$365,409.61			\$67,360.72	\$57,681.48
157								
158								

TENNESSEE JUDICIAL ACADEMY

AUGUST 20, 2014

DOMESTIC RELATIONS

CHANCELLOR JAMES F. BUTLER

TWENTY-SIXTH JUDICIAL DISTRICT

I. DIVORCE

- COBRA Notice - Must be filed with the Clerk

36-4-133. Compliance with notice of insurance termination provisions required. On and after January 1, 2007, before entering an order or decree for a divorce or a legal separation under this title, the court shall determine that the appropriate spouse has complied with the provisions of [§ 56-7-2366](#), if applicable. If the court determines that the notification process has not been followed, then the court shall consider requiring the insured or covered individual to provide a health care insurance policy for the former spouse.

56-7-2366. Notice of termination of coverage for spouses and former spouses. (a) Every insured or policy holder of a group policy of accident and sickness insurance offered for sale in this state, that provides coverage for hospital or medical expenses that also provides coverage to the spouse of the insured, shall provide at least thirty (30) days' prior notice of the termination of coverage to the covered spouse as a result of a divorce, a legal separation, or other separation. The notice shall be written, filed with the court that is hearing the divorce or legal separation prior to or at the final hearing, and served upon the spouse as provided by Tennessee Rules of Civil Procedure. If no divorce, legal separation or similar legal proceeding is pending, then the notice shall be transmitted by certified mail, return receipt requested, to the last known address of the spouse.

- Debt Notice - TCA-36-4-134

36-4-134. Notice that the decree does not necessarily affect the ability of a creditor to proceed against a party or a party's property. (a) Every final decree of divorce granted on any fault ground of divorce and every marital dissolution agreement shall contain a notice that the decree does not necessarily affect the ability of a creditor to proceed against a party or a party's property, even though the party is not responsible under the terms of the decree for an account, any debt associated with an account or any debt. The notice shall also state that it may be in a party's best interest to cancel, close or freeze any jointly held accounts.(b) Failure to include the notice required by subsection (a) shall not affect the validity of the decree of divorce, legal separation or annulment.

- **No hearing required in irreconcilable differences divorce.**

The plain reading of [section 36-4-103\(b\)](#) and [\(c\)](#) does not require a formal hearing unless the court finds that the parties have not made adequate and sufficient provision for the custody and maintenance of their children and the equitable settlement of any property rights. In such cases, a hearing may be had to ratify any amendments to the original agreement.

Pursuant to the statute, this Court has held an irreconcilable differences divorce valid where neither party appeared before the trial court, neither party presented any testimony or evidence to the trial court, and no hearing was had before the final decree was entered. See [Brown v. Brown](#), 863 S.W.2d 432 (Tenn. Ct. App. 1993). *Vacarella v. Vacarella*, 49 S.W. 3d 307 (Tenn. Ct. App. 2001)

- **No corroborating witness required in a contested divorce - only in uncontested divorces. No two witness rule - one is enough. TCA-36-4-114**

36-4-114. Proof required. If the defendant admits the facts charged in the bill or petition and relied upon as the ground for a divorce, or the bill is taken for confessed, the court shall, nevertheless, before decreeing a divorce, except a divorce on the ground of irreconcilable differences, hear proof of the facts alleged as aforementioned, and either dismiss the bill or petition or grant a divorce, as the justice of the case may require.

Fann v. Fann (Tenn. App. 2001 Crawford, J.)

II. FINAL DECREE

- Should recite:

1. Date of filing so court will know if the 60/90 day period has elapsed.
2. That the COBRA Notice has been filed with Clerk and that Parenting Class Certificates are filed with Clerk.
3. Recite the debt notice or state that it is in the Marital Dissolution Agreement.
4. State that 60/90 days have elapsed since filing.
5. Grant a divorce or legal separation.
6. Find the Marital Dissolution Agreement makes a fair and equitable division of property and allocation of marital debts, and approve the MDA, and incorporate the MDA by reference.
7. If children are involved, find the Permanent Parenting Plan makes a fair and adequate provision for the custody and support of the children and approve it and make it an Order of the Court.
8. Contains a proper certificate of service on the opposing party, or the signature of the opposing party or opposing counsel.
9. Names and address of both parties.

III. Permanent Parenting Plan - Things to watch for:

1. Days - Very important in calculation of child support. Must total 365 days.
 - Person with most days is the Primary Residential Parent.
 - A PRP must be designated.
 - Cannot have both parents as co-PRPs.
 - Check to see if the “days” stated are in line with the actual schedule.

- Check to see if the New Plan dated July 1, 2013 is being used.
 - What a difference a day makes
- A. Guidelines say: "Days" -- For purposes of this chapter, a "day" of parenting time occurs when the child spends more than twelve (12) consecutive hours in a twenty-four (24) hour period under the care, control or direct supervision of one parent or caretaker. The twenty-four (24) hour period need not be the same as a twenty-four (24) hour calendar day. Accordingly, a "day" of parenting time may encompass either an overnight period or a daytime period, or a combination thereof. Tenn. Comp. R. & Regs. 1240-2-4-.02(10)(emphasis added).
 - B. *Flemming v. Elder*, 2009 Tenn. App. LEXIS 376, Franks, J., E.S.
 - C. Father and mother testified child came to father's home for 5-6 hours every day after work.
 - D. The Trial Court's Order read as follows:

"Respondent's monthly current child support obligation is \$ 110. The Court finds that Respondent exercises 156 days of visitation per year, calculated by counting the 5 - 6 hours per day visitation. The Parties testified that the visitation is exercised at the Petitioner's home and averages 38 hours per week, or three days per week for an annualized amount of visitation of 156 days"
 - E. The Trial Court engaged in "tacking". The Court found father exercised 38 hours visitation each week which the Court translated into 3 "days" each week of at least 12 hours. Three (3) days x 52 = 156 days per year. Trial judge reduced father's child support accordingly.
 - F. The Appellate Court ruled that for the trial court to find that a parent has spent a "parenting" day with the child, the child must spend more than twelve consecutive hours in a twenty-four hour period under their care, control, or direct supervision of one parent. The Appellate Court explained:

In *Eaves v. Eaves*, No. Tenn. App. LEXIS 744, 2007 WL 4224715 (Tenn. Ct. App. Nov. 30, 2007) the disputed issue before the Court was, as here, the proper method of counting the partial days in the regular weekly and biweekly schedule, when the children spend part of the day with one parent and part with the other. The Court stated that Rule 1240-2-4-.02(10) of the Guidelines provides the rule of decision for this issue. The Wife in *Eaves* claimed that Husband, who had parenting time every other weekend from Friday at 3:30 p.m. to the start of school Monday morning, only had the children for two days under the rule. The court held the Wife's interpretation of the rule was incorrect and that under the rule, a stretch of time starting Friday at

3:30 p.m. and ending sometime Monday morning counts as three days, since that stretch includes three 24-hour periods during which the children spend more than half of the period with Husband. The Court gave an example: "For instance, the children are with Husband for 20.5 out of 24 hours between noon Friday and noon Saturday; for all 24 hours from noon Saturday until noon Sunday; and for another 20.5 out of 24 hours from noon Sunday until noon Monday." The Court said that this method of counting is clearly allowable according to the plain meaning of Rule 1240-2-4-.02(10), which states explicitly that " *State ex rel. Flemming v. Elder*, 2009 Tenn. App. LEXIS 376, 7-9 (Tenn. Ct. App. June 16, 2009)

- G. Appellate Court ruled father had spent "no" days as defined by the Guidelines for the purposes of calculated child support.
- H. Trial court abused it's discretion. Case remanded for figuring child support based on lack of parenting time.

- 2. The Plan should provide for drivers license, car seats, smoking restrictions, drug and alcohol use when transporting children or when they are in a parent's possession.
- 3. The Court should not require a "paramour clause" unless there is proof before the Court that a particular paramour has an adverse effect on the children. It cannot be required just because the judge wants it, or one parent wants it, or Local Rules require it.

"After reviewing the record, we find that the trial court abused its discretion in requiring the paramour provision. The record is devoid of any evidence whatsoever to support the finding that a paramour provision is in the best interests of the children. In fact, the record contains evidence demonstrating that a paramour provision is contrary to the best interests of the children." See *Barker v. Chandler*, 2010 Tenn. App. 6-29-10)

4. Income of the parties:

- Parties and attorneys often manufacture phantom income to affect the child support.
- Red flag when the parties make the same amount.
- Child support must have a beginning date, otherwise arrears are difficult to compute.

- Deviation from Guidelines.
- Deviation must be explained in the Plan and the Court must decide if it is appropriate and is reasonable. The parties “agreement” is not sufficient. The worksheets attached to the Plan must show what the child support would be without the deviation.
- Plan should clearly specify how the support is to be paid; i.e. wage assignment, direct pay, deposit to payee’s account.
- Pension and retirement benefits divided by the Court as marital property division, whether paid in a lump sum or periodic payments shall not be considered income for the purpose of determining a spouses right to receive child support or alimony. (TCA 36-5-101(a)(9))

5. Computing Child Support Arrears:

- Determine the child support amount for the relevant period.
- Determine the starting date.
- Determine the total that should have been paid.
- Determine how much has been paid.
- Difference is the arrears.

6. Interest on Child Support:

- Child support becomes a judgment on date due.
- The payment, if not made, accrues interest at the rate of 12% per annum from the date due. (TCA 36-5-101(f))

7. Life Insurance:

- If the parties have life insurance, or can obtain it reasonably, the Court should require the Plan to state that the parent maintain it during minority with other parent as beneficiary for benefit of the child or children equally

during minority.

8. Medical Insurance:

- If child is on TennCare, require the Plan to say so, and who is responsible for medical insurance if child is no longer TennCare eligible.
- Non-covered medicals are very important to deal with since many parents have no coverage or have policies with high deductibles and significant co-pay provisions.
- Simply ordering a parent to maintain medical insurance is not sufficient. A policy with a \$5,000 deductible is essentially no insurance. It is also not fair to the other parent who is sharing in the non-covered medical expenses. It is very appropriate to compare coverage, co-pays, and deductibles in relation to premiums.

9. Tax Exemption:

- Normally is claimed by the PRP.
- The Child Support Guidelines have factored in certain assumptions, one of which is the tax exemption being claimed by the PRP.
- When the PRP earns little or no income, it is appropriate to award it to the ARP and not waste it.
- The Court does have the authority to allocate the tax exemption to the ARP, but should not do it as a matter of course.
-

10. Mediation:

- The PPP provides for mediation for disputes about the Plan except for child support issues.
- Often parties file petitions/motions before they attempt to mediate the disputes.

- The Court may use it's discretion whether to waive mediation. Some issues simply need a definitive ruling. Cost is sometimes a factor to consider; i.e. two lawyers, and a mediation, may be cost prohibitive to some parents.
- Many times the parties/attorneys forget mediation is the agreed on resolution method and simply want to bypass it and get a quick, inexpensive ruling from the court rather than take a chance on not settling the issue in mediation.

11. Parenting Class:

- The parenting class is required by statute.
- Court cannot hold up the entry of the Decree if class not attended.
- Court can delay visitation or issue contempt/show cause orders. This is a lot of trouble and requires much work by the court and clerks, plus expense of mailing and filing.
- I simply require the Decree to provide the parent will not be eligible to appear and seek relief until the requirement is completed.

12. Adult children:

- Child support is generally payable until the child reaches age 18, or until the class the child is in on the child's 18th birthday graduates, whichever is the longer date; i.e. child 18 in February and graduates in May.(TCA 34-1-102(b))
- Example: Child graduates in May and reaches 18 in following September. Support continues until September.
- Example: Child fails 6th grade, and reaches age 18 in child's junior class. Child support is payable until that junior class graduates, regardless of age of child, and regardless of whether child graduates.

13. College Expenses:

- Parents often insert provisions in the Plan to provide for higher education expenses. The usual reasons are:
 1. Guilt
 2. Good intentions
 3. To get the other parent to sign the Plan.
 4. Lots of time before it comes up.

- Parties too often simply agree to pay colleges expenses for an adult child without considering the consequences, such as:
 1. The child is usually 18 or older and thus not under parental authority.
 2. Grades are not available to parent unless child agrees.
 3. Child is a 3rd party beneficiary of the contract between parents, and can enforce it by legal action against the parent.
 4. The child does not have to return parent's calls or otherwise have contact with the parent or follow parent's rules or directions.
 5. Child does not have to make good grades or otherwise avoid embarrassing paying parents.
 6. Child decides which school to attend.

- The Court should not approve a blanket agreement to pay or share college expenses without requiring parents and/or their attorneys to further define the conditions precedent to agreeing to pay for college expenses and how the college is selected and other conditions such as:
 1. Who pays the expense.
 2. If shared, what happens if one cannot pay.
 3. Limit on tuition.
 4. How many hours must child take per session.
 5. Grade average that must be maintained.
 6. How many years within which to graduate.
 7. What if child gets sick or cannot finish within set time frame.
 8. Credit against parent's responsibility for scholarships, grants, and work credits.

 9. Good behavior requirement.
 10. Access to grades and other private information from the college.
 11. Personal and social requirements.
 12. Marriage, babies, jail, general hellraising.

13. Class attendance requirements.
14. Return parents calls and reasonable requests for information.
15. Other family specific requirements.

14. Child Support Beyond Child's Minority

- A. Prior to 2008, Tennessee Code Annotated §36–101 (p)(2) was interpreted as giving the trial court authority to “continue child support” for a severely disabled child only where an order awarding child support was entered when the child was a minor, or as a modification of any other valid child support order. Beverly Anne Jones v. Kevin Thomas Jones, No. M2004-00173-COA-R3-CV, filed December 22, 2004.
- B. Statutory Amendment, effective July 1, 2008.

Tenn. Code Ann. § 36-5-101

(k) (1) Except as provided in subdivision (k)(2), the court may continue child support beyond a child's minority for the benefit of a child who is handicapped or disabled, as defined by the Americans with Disabilities Act, until such child reaches twenty-one (21) years of age.(2) Provided, that such age limitation shall not apply if such child is **severely disabled** and living under the care and supervision of a parent, and the court determines that it is in the child's best interest to remain under such care and supervision and that the obligor is financially able to continue to pay child support. In such cases, the court may require the obligor to continue to pay child support for such period as it deems in the best interest of the child; provided, however, that, if the severely disabled child living with a parent was disabled prior to this child attaining eighteen (18) years of age and if the child remains severely disabled at the time of entry of a final decree of divorce or legal separation, then the court may order child support regardless of the age of the child at the time of entry of the decree.(3) In so doing, the court may use the child support guidelines.

15. Paternity

- A. DNA test is required.
- B. Test results must be placed in evidence.
- C. Tenn. Code Ann. § 36-5-101

(m) No provision, finding of fact or conclusion of law in a final decree of divorce or annulment or other declaration of invalidity of a marriage that provides that the husband is not the father of a child born to the wife during the marriage or within three hundred (300) days of the entry of the final decree, or that names another person as the father of such child, shall be given preclusive effect, unless scientific tests to determine parentage are first performed and the results of the test that exclude the husband from parentage of the child or children, or that establish paternity in another person, are admitted into evidence. The results of such parentage testing shall only be admitted into evidence in accordance with the procedures established in § 24-7-112.

IV. CONTEMPT

CONTEMPT–SHORT VERSION

INDIRECT CONTEMPT

A. Child Support Criminal Contempt

- Tennessee Code Annotated §36-5-104
- Up to 6 months incarceration
- Right to jury trial attaches
- Comply with Rule 42, Tenn. R. Crim. Proc.

B. Child Support Criminal Contempt

- Tennessee Code Annotated §29-9-102 and 103
- \$50.00 fine and/or ten days each payment missed
- Comply with Rule 42, Tenn. R. Crim. Proc.
- No right to a jury trial

C. Child Support Civil Contempt

- Tennessee Code Annotated §29-9-102 and 104

- Indefinite incarceration - “keys to jail in defendant’s pocket”

D. Spousal Support Criminal Contempt

- Tennessee Code Annotated §29-9-102 and 103
- \$50.00 fine and/or ten days each payment missed
- Comply with Rule 42, Tenn. R. Crim. Proc.

E. Spousal Support Civil Contempt

- Tennessee Code Annotated §29-9-102 and 104
- Indefinite incarceration - “keys to jail in defendant’s pocket”

F. Property Division “Contempts”

- generally are not acts of contempt unless court finds the performance of the omitted act(s) is “in nature of support”.
- If so, will fall under D or E above.
- Both contempt and breach of contract are proper remedies for breach of Marital Dissolution Agreement provisions that have been approved and incorporated, but not merged into Final Decree. [i.e., alimony in solido awards, provisions including disposition of the marital estate, and agreements for child support in excess of the support required by law]

G. Visitation Criminal Contempt

- Denial of co-parenting time.
- Tennessee Code Annotated §29-9-102 and 103
- \$50.00 fine and/or ten days each instance
- Comply with Rule 42, Tenn. R. Crim. Proc.

H. Order of Protection Criminal Contempt

- Tennessee Code Annotated §29-9-102 and 103
- Tennessee Code Annotated §36-3-610

- \$50.00 fine and/or ten days each violation of protective order
- Comply with Rule 42, Tenn. R. Crim. P.

I. Other Specific Court Orders not followed

- Criminal or civil
- depends on the purpose of the hearing

J. Note:

- A civil contempt incarceration must allow defendant to purge from incarceration by performing the act for which he/she was found in contempt. *Ahern v. Ahern*, 15 S.W. 3rd 73 (Tenn. 2000).
- The purge amount must be one the defendant is presently able to perform at the time of the contempt hearing. *Id.*
- It is impossible to have a suspended sentence in a civil contempt proceeding. *Mayer v. Mayer*, 532 S.W. 2d 54 (Tenn. App. 1975)
- A criminal contempt determinate sentence may or may not be suspended.
- In criminal contempt, the accused could receive a determinate sentence for willfully refusing to pay child support during the time alleged even though he/she may not have the present ability to pay support.
- It is difficult to see how a visitation contempt can be handled as a civil contempt.
- In a civil contempt, the burden of proof is on the accused to show why he/she did not comply with the court order, assuming the moving party first establishes non-compliance with the order. *State ex rel Wright v. Upchurch*, 254 S.W. 2d 748 (Tenn. 1953)
- The burden of proof in a criminal contempt is on the moving party to establish the violation beyond a reasonable doubt. *Cottingham v. Cottingham*, 193 S.W. 3r 531 (Tenn. 2006) The burden never shifts to the accused, Fifth Amendment rights attach and the accused is not required to testify. But see 2007 amendment to Tennessee Code Annotated §36-5-101(a), Tennessee Code Annotated §36-5-101 (c)(2)(B), and Tennessee Code Annotated §36-5-104.

CONTEMPT—LONG VERSION

CIVIL AND CRIMINAL CONTEMPT

29-9-102. Scope of power. The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:(1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice;(2) The willful misbehavior of any of the officers of such courts, in their official transactions;(3) The willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts;(4) Abuse of, or unlawful interference with, the process or proceedings of the court;(5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them; or(6) Any other act or omission declared a contempt by law.

29-9-103. Punishment. (a) The punishment for contempt may be by fine or by imprisonment, or both.

(b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars (\$50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars (\$10.00).

29-9-104. Omission to perform act. (a) If the contempt consists in an omission to perform an act which it is yet in the power of the person to perform, the person may be imprisoned until such person performs it.(b) The person, or if same be a corporation, then such person or corporation can be separately fined, as authorized by law, for each day it is in contempt until it performs the act or pays the damages ordered by the court.

29-9-105. Performance of forbidden act. If the contempt consists in the performance of a forbidden act, the person may be imprisoned until the act is rectified by placing matters and person in status quo, or by the payment of damages.

29-9-106. Bail. (a) Upon an attachment to answer for a contempt, except in not performing a decree, the officer executing the process shall take bail from the defendant as in other cases.(b) (1) The court ordering the attachment shall specify the penalty of such appearance bond.(2) If the penalty is not fixed by the court, it shall be two hundred fifty dollars (\$250).

The general rule is that a person arrested upon an attachment to answer for a contempt is entitled to bail or to give a bond for his appearance; and it seems to be a practice to extend this rule to attachments for contempt in not paying alimony or support. But there is no authority for such a practice. The chancery rule is that an attachment for nonperformance of a decree, unlike other attachments for contempt, is not aailable process; and the person attached for nonperformance must be committed to or detained in prison. Loy v. Loy,

32 Tenn. App. 470, 222 S.W.2d 873, 1949 Tenn. App. LEXIS 103 (Tenn. Ct. App. 1949).

Winston Churchill said that “Russia is a riddle wrapped in a mystery inside an enigma.” He could have been describing contempt proceedings.

Criminal contempt is intended to preserve the power and vindicate the authority of the court. *Black v. Blount*, 938 S.W. 2d 394, 309 (Tenn. 1996). Civil contempt is typically brought to enforce private rights. *Black v. Blount*, 938 S.W. 2d 394, 398 (Tenn. 1996).

Nature of Relief Determines Nature of Proceeding

The nature of the relief sought is determinative of the nature of the action. *Robinson v. Fulliton*, 140 S.W. 3d 304, 309 (Tenn. App. 2003) *no pta*; *International Union v. Bagwell*, 512 U.S. 821 (1994); *Overnite Transportation Co. v. Teamsters Local Union No 480*, 172 S.W. 3d 507 (Tenn. 2005).

One must be aware that the same body of facts may support both a criminal and civil contempt action. *Bailey v. Crum*, 183 S.W. 3d 383, 389 (Tenn. App. 2005) *pta den*. Where relief is sought in a single pleading for both civil and criminal contempt, the pleading must be separated into two separate actions. *Tacker v. Davidson*, 2008 Tenn. App. Lexis 460.

Tennessee Code Annotated §29-9-103-Criminal Contempt

Tennessee Code Annotated § 29-9-103 (a) and (b) provide that for criminal contempt may be confinement, fine, or both. The maximum period of confinement is 10 days and the maximum fine is \$50.00.

The Tennessee Criminal Sentencing Act does not apply to sentences imposed for contempt. *State v. Wood*, 91 S.W. 3d 769 (Tenn. App. 2002). Community service may not be imposed as part of the punishment. *Cansler v. Cansler*, 2010 Tenn. App. Lexis 76; *no pta*.

General Sessions courts have the same sentencing authority if the judge is licensed to practice law, otherwise, the limit is \$50.00. Tennessee Code Annotated §16-15-713 (2005).

Consecutive Sentencing

Consecutive sentencing for multiple convictions of criminal contempt is allowed under our decisional authority. *Sliger v. Sliger*, 181 S.W. 3d 684 (Tenn. App. 2005); *State v. Wood*, 91 S.W. 3d 769, 766 (Tenn.

App. 2002).

Tennessee Code Annotated §29-9-104 - Keys in the Pocket - Civil Contempt

This statute is the one most frequently invoked in enforcing a court's order for the benefit of the petitioner.

If it is a matter where the defendant can perform the act ordered, then he "has the keys to the jail in his pocket" and can be confined until he performs the act. *International Union v. Bagwell*, 512 U.S. 821 (1994). This is designed to force the defendant to act.

This provision enables the court to punish for *civil contempt*, but only if the court makes an *express finding that at the time of the trial that the defendant has the present ability to comply with the order, e.g., pay the support due.* *Beard v. Beard* 206 S.W. 3d 463 (Tenn. App. 2006), *Tacker v. Davidson*, 2008 Tenn. App. Lexis 460 (court must make a specific finding at trial that the defendant willfully violated the order, and presently has the ability to comply with the order); *Ahern v. Ahern*, 15 S.W. 3d 73 (Tenn. 2000).

If the defendant does not have the *present ability to comply with the order, or purge himself of contempt*, then the court cannot sentence the defendant to jail for *civil contempt.* *Beard, supra* at 267; *Ahern v. Ahern*, 15 S.W. 3d 73 (Tenn. 2000).

Tennessee Code Annotated §29-9-105 - Performance of Forbidden Act - Civil Contempt

This civil contempt statute provides for the award of damages in order to make the plaintiff whole. This distinguishes this statute from Tennessee Code Annotated §29-9-104 which does not allow the imposition of damages.

This provision permits the imprisonment of the defendant until the "act is rectified *by placing matters and person in the status quo, or by the payment of damages.*" This allows the court to assess damages for the defendant's misbehavior constituting civil contempt. *Overnight Transportation Co. v. Teamsters Local Union No. 480*, 172 S.W. 3d 507 (Tenn. 2005).

If the act is complete, and cannot be undone, i.e. restore one to the status quo, then it is criminal contempt subject to a fine and confinement, but not damages, or attorney's fees. If compliance is still possible then

the proceeding is under Tennessee Code Annotated §29-9-104. *Law v. Law*, 2007 Tenn. App. Lexis 655.

Contempt Cannot Be Used To Enforce Contractual Matters

Matters Retaining Their Contractual Nature Upon Entry of A Final Decree

This area causes great confusion because even though a provision of the Marital Dissolution Agreement is breached, the breach may not support contempt. Only those portions of the Marital Dissolution Agreement over which the court has continuing jurisdiction to modify lose their contractual nature when merged into the final decree. *Penland v. Penland*, 521 S.W. 2d 222 (Tenn. 1975); *Kesser v. Kesser*, 201 S.W. 3d 636 (Tenn. 2006).

However, *Long v. Mattingly-Long*, 221 S.W. 3d 1 (Tenn. App. 2006) *pta denied*, holds that contempt can be used to enforce a *hold harmless and indemnity agreement*. This decision represents a drastic departure from *Penland* and its progeny holding that suing for breach is the only available remedy.

Whether *Long* can be argued as support for using contempt to enforce contractual obligations is doubtful. If the hold harmless agreement is by agreement of the parties, it is subject to enforcement by a breach of contract in accordance with *Penland*.

Tennessee Code Annotated § 36-5-104 - Criminal Proceedings For Failure To Pay Child Support

This statute is not a contempt statute. It is a criminal statute. Its purpose is to punish for non-compliance with an order of support. *Brown v. Latham*, 914 S.W. 2d 887 (Tenn. 1996).

Because it is a criminal statute, the defendant is entitled to a jury trial and all of the protections afforded the accused in a criminal proceeding. *Ahern v. Ahern*, 15 S.W. 3d 73 (Tenn. 2000); *Brown, supra*. Other issues arise.

The defendant cannot be compelled to testify. The burden of proof is beyond a reasonable doubt. The right to counsel is mandatory. *Cottingham v. Cottingham*, 193 S.W. 3d 531 (Tenn. 2006). Arguably, because it is a pure criminal statute, only the district attorney general is authorized to prosecute under it even though private counsel can prosecute criminal contempt proceeding. *Wilson v. Wilson*, 984 S.W. 2d 898 (Tenn. 1998).

V. GRANDPARENT VISITATIONS

For years the Legislature enacted several statutes providing for grandparent visitations, almost elevating it to the status of a God-given right. The state Appellate Courts and the United States Supreme Court weighed in declaring these statutes unconstitutional invasions of the parent's right of privacy. The current statute has passed constitutional muster and while it is awkwardly drafted, it is adequate. The Legislature, feeling it's oats about two years ago (and having discovered "presumptions"), amended the statute creating a presumption of substantial harm if grandparent visits ceased. The feat was accomplished with the following provision:

Tenn. Code Ann. § 36-6-306

(b)(4) For the purposes of this section, if the child's parent is deceased and the grandparent seeking visitation is the parent of that deceased parent, there shall be a **rebuttable presumption of substantial harm** to the child based upon the cessation of the relationship between the child and grandparent.

The change effectively shifted the burden of proof to the parent(s) to rebut the presumption. Last year the Legislature again amended the statute to add four additional matters the court must consider in determining the child's best interest for grandparent visitation, expanding the list of mandatory considerations to eleven.

36-6-307. Determination of best interests of child for grandparent visitations. In determining the best interests of the child under § 36-6-306, the court shall consider all pertinent matters, including, but not necessarily limited to, the following: (1) The length and quality of the prior relationship between the child and the grandparent and the role performed by the grandparent; (2) The existing emotional ties of the child to the grandparent; (3) The preference of the child if the child is determined to be of sufficient maturity to express a preference; (4) The effect of hostility between the grandparent and the parent of the child manifested before the child, and the willingness of the grandparent, except in case of abuse, to encourage a close relationship between the child and the parent or parents, or guardian or guardians of the child; (5) The good faith of the grandparent in filing the petition; (6) If the parents are divorced or separated, the time-sharing arrangement that exists between the parents with respect to the child; (7) If one (1) parent is deceased or missing, the fact that the grandparents requesting visitation are the parents of the deceased or missing person; (8) Any unreasonable deprivation of the grandparent's opportunity to visit with the child by the child's parents or guardian, including denying visitation of the minor child to the grandparent for a period exceeding ninety (90) days; (9) Whether the grandparent is seeking to maintain a significant existing relationship with the child; (10) Whether awarding grandparent visitation would interfere with the parent-child relationship; and (11) Any court finding that the child's parent or guardian is unfit.

VI. EX PARTE CUSTODY CHANGES TCA 36-6-405

36-6-405. Modifying Permanent Parenting Plans. (a) In a proceeding for a modification of a permanent parenting plan, a proposed parenting plan shall be filed and served with the petition for modification and with the response to the petition for modification. Such plan is not required if the modification pertains only to child support. The obligor parent's proposed parenting plan shall be accompanied by a verified statement of that party's income pursuant to the child support guidelines and related provisions contained in chapter 5 of this title. The process established by § 36-6-404(b) shall be used to establish an amended permanent parenting plan or final decree or judgment. (b) In a proceeding for a modification of a permanent parenting plan, the existing residential schedule **shall not be modified prior to a final hearing unless the parents agree to the modification or the court finds that the child will be subject to a likelihood of substantial harm** absent the temporary modification. If a temporary modification of the existing residential schedule is granted ex parte, the respondent shall be entitled to an expedited hearing within fifteen (15) days of the entry of the temporary modification order. (c) Title IV-D child support cases involving the department of human services or any of its public or private contractors shall be bifurcated from the remaining parental responsibility issues. Separate orders shall be issued concerning Title IV-D issues, which shall not be contained in, or part of, temporary, permanent or modified parenting plans. The department and its public or private contractors shall not be required to participate in mediation or dispute resolution pursuant to this part.

VII. CUSTODY BY DEFAULT

Tenn. R. Civ. P. 55.01 recognizes that, even where a default judgment is procedurally authorized, certain issues may be required to be determined after an evidentiary hearing in order to enable the court to enter judgment. Where custody is disputed and allegations relevant to determination of the comparative fitness of the parents and the best interests of the child have been made and denied, a trial court must hear sufficient evidence upon which to make the findings required.

Castleman v Castleman, Tenn. App. December 21, 2000, Cottrell, J.

VIII. RELOCATION CASES TCA 36-6-108

TCA 36-6-108

(a) If a parent who is spending intervals of time with a child desires to relocate outside the state or more than one hundred (100) (**now 50 miles as of July 1, 2013**) miles from the other parent within the state, the relocating parent shall send a notice to the other parent at the other parent's last known address by registered or certified mail. Unless excused by the court for exigent circumstances, the notice shall be mailed not later than sixty (60) days prior to the move. The notice shall contain the following:

(1) Statement of intent to move;(2) Location of proposed new residence;(3) Reasons for proposed relocation; and(4) Statement that the other parent may file a petition in opposition to the move within thirty (30) days of receipt of the notice.(b) Unless the parents can agree on a new visitation schedule, the relocating parent shall file a petition seeking to alter visitation. The court shall consider all relevant factors, including those factors enumerated within subsection (d). The court shall also consider the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent. The court shall assess the costs of transporting the child for visitation and determine whether a deviation from the child support guidelines should be considered in light of all factors including, but not limited to, additional costs incurred for transporting the child for visitation.

(c) If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child. The court shall consider all relevant factors including the following where applicable:(1) The extent to which visitation rights have been allowed and exercised;(2) Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangement;(3) The love, affection and emotional ties existing between the parents and child;(4) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;(5) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;(6) The stability of the family unit of the parents;(7) The mental and physical health of the parents;(8) The home, school and community record of the child;(9) (A) The reasonable preference of the child if twelve (12) years of age or older;(B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;(10) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and(11) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child.(d) (1) If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. The other parent may not attempt to relocate with the child unless expressly authorized to do so by the court pursuant to a change of custody or primary custodial responsibility. The parent spending the greater amount of time with the child shall be

permitted to relocate with the child unless the court finds:

- (A) The relocation does not have a reasonable purpose;
- (B) The relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody; or
- (C) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.....

As the statute provides, **the first step of the trial court in a contested relocation matter is to determine the amount of parental time each parent spends with the children.** If the court finds that the parents spend substantially equal time with the children then Tenn. Code Ann. § 36-6-108(c) applies and the proposed relocation is subject to an analysis that is based upon the best interests of the child(ren). If, however, the court finds that the relocating parent spends substantially more time with the children, then Tenn. Code Ann. § 36-6-108(d), not (c) applies. Subsection (d) provides a presumption that the parent with the greater amount of parental time should be permitted to move unless the opposing parent can show one of the three enumerated circumstances listed in (d). *Robinson v. Robinson*, 2005 Tenn. App. LEXIS 383, 6-7 (Tenn. Ct. App. June 30, 2005)

The key word in the statute is "substantially" and the issue to be decided is whether the children spend "substantially" more time with one parent. Such a determination does not require mathematical precision. As the Court of Appeals explained in *Collins v. Coode*, Tenn. Code Ann. § 36-6-108 does not define the term "substantially equal." However, no special definition is required because the common meaning of the words and the phrase are easily understood. The word "substantially" means "essentially," "to all intents and purposes," or "in regard to everything material." 17 OXFORD ENGLISH DICTIONARY 68 (2d ed.1989). Thus, the plain meaning of the term "substantially equal" connotes a relationship that is very close to equality--so close that it may be considered equal.

The courts have not provided bright-line rules for determining whether parents are spending "substantially equal" custodial time with their children. As convenient as a bright-line rule might be, the appellate courts find no need to adopt one because custody decisions, by their very nature, are inherently fact-dependent. Courts must have flexibility to consider the parents as they find them. However, courts called upon to determine whether parents are spending substantially equal amounts of time with their children should consider, among other things: (1) the terms of the applicable custody and visitation orders, (2) the number of days each parent has actually spent with the child or children, (3) whether the parents are using the full amount of residential time provided them, (4) the length of the period during which the comparison of residential time is being made, and (5) the particular exigencies of the parent's circumstances. *Robinson v. Robinson, Id.*

IX. GAY AND LESBIAN PARENTS

Eldridge v. Eldridge (42 S.W. 3d 82, Holder, Justice)

We granted review of this child visitation case to determine whether the trial court abused its discretion in ordering unrestricted overnight visitation with the mother. The Court of Appeals held that the trial court had abused its discretion and imposed restrictions prohibiting the presence of the mother's lesbian partner during overnight visitation. We hold that the record does not support a finding of an abuse of discretion. Accordingly, we reverse the judgment of the Court of Appeals. As a general proposition, we agree that in an appropriate case a trial court may impose restrictions on a child's overnight visitation in the presence of non-spouses. The procedural posture of the case at bar is markedly different. In this case, the *appellate court*, in spite of the deference to which the trial court is entitled, has displaced the trial court's ruling and imposed a restriction that was considered and rejected by the trial court. Justification for that action must be found in the record and, preferably, be developed in the appellate court's opinion. We find no justification in this record.

X. TERMINATION OF PARENTAL RIGHTS

- There is little reason to terminate parental rights unless an adoption is pending or ready to be filed.
- Often Petitions are filed combining the request to adopt and to terminate parental rights.
- The grounds most often cited as justifying termination are non-support and/or lack of visitations which constitute abandonment.
- Because relationships between parent and child are the strongest known bond between humans, the termination of these constitutionally protected rights are required to be “near perfect”. To that end, there are a number of things that should be considered when embarking on this type case.
 1. Always cite T.R.Civ.Pro. 9A verbatim in the complaint.
 2. Always refer to Supreme Court Rule 13 in the complaint, notifying the

defendant of his or her rights, if indigent, to appointed counsel at the state's expense, if they qualify, and instruct the defendant to contact the court for information on how to qualify.

3. Remember that in any contested termination case, the court must appoint a Guardian Ad Litem for the child/children. There is no provision for waiver, even if you are 100% certain you will prevail and feel this is a waste of time and money.
4. The burden of proof is on the moving party to prove grounds for termination, even in a default judgment situation.
5. The standard of proof is "clear and convincing". This standard is higher than "preponderance of the evidence", less than "beyond a reasonable doubt". Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. It should produce in the fact finders mind a firm belief or conviction with regard to the truth of the allegations sought to be established.
6. There must be clear and convincing evidence of grounds for termination AND clear and convincing evidence that termination is in the child's best interest.
7. The court must state specific findings of fact and conclusions of law which support grounds and best interest. This must be in writing and filed in the record.
8. The Guardian Ad Litem's role is not that of an advisor to the court, but that of an attorney representing the interest of the child. The Guardian Ad Litem is a participant in an adversary proceeding and may subpoena witnesses, present proof, and participate fully as any other attorney representing a party.
9. The Court is charged with the ultimate responsibility of assuring a proper record is made to ensure the availability for Appellate review. The presumption in other civil cases (where there is no transcript) that the evidence is presumed to support the trial court's ruling, does not apply in termination cases. Even if the petitioner wins, the Defendant does not have a court reporter, and the trial court makes its findings, the Appellate Court cannot determine if the findings are supported by clear and convincing evidence, and will vacate and remand for a new trial.

10. Clear and convincing evidence of non-support and/or lack of visitations is not sufficient. Petitioner also has the burden of proof that the non-support or lack of visitation is willful and intentional. This would include proof of ability to pay or visit during the relevant four month period. Likewise, defense counsel should seek to discover evidence of substantial restraint on a parent's efforts to maintain a relationship with the child, and evidence of defendant's non-employment or other factors that might show lack of willful non-support. See *In Re: Alex B.T.* WS, Stafford, Nov. 15, 2011.
11. If a defendant is incarcerated at the time of the beginning of the relevant four month period, the beginning of the period is backed up to four months before the date of incarceration. If the defendant became incarcerated during the relevant four month period, the four month period is tolled until the defendant's release and then resumes.
12. A defendant who is incarcerated at the trial date is entitled to participate in the trial by telephone. Petitioner and defendant's attorney should anticipate this possibility, and seek guidance from the court to the end that arrangements are made with the warden or designee to arrange for defendant to have telephone access for the duration of the trial. The defendant's attorney and/or petitioner's attorney should confer on obtaining a pre-paid telephone card for defendant's use and secure the court telephone number.

SUPREME COURT RULE 13(d)(1)

In the following cases, and in all other cases required by law, the court or appointing authority **shall** advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and requests appointment of counsel.

(B) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or neglected or in **terminating parental rights**;

XI. SUMMONS

XII. DEFAULT JUDGMENTS

55.01. Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, judgment by default may be entered as follows: The party entitled to a judgment by default shall apply to the court. Except for cases where service was properly made by publication, all parties against whom a default judgment is sought shall be served with a written notice of the application at least five days before the hearing on the application, regardless of whether the party has made an appearance in the action. A party served by publication is entitled to such notice only if that party has made an appearance in the action. No judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute. Tenn. R. Civ. P. 55.01

6.01. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the date of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday as defined in Tenn. Code Ann. § 15-1-101, or, when the act to be done is the filing of a paper in court, a day on which the office of the court clerk is closed or on which weather or other conditions have made the office of the court clerk inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. Tenn. R. Civ. P. 6.01

6.05. **Additional Time after Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party and the notice or paper is served upon such party by mail three (3) days shall be added to the prescribed period. Tenn. R. Civ. P. 6.05

Tenn. R. Civ. P. 5.02

(c) A document transmitted electronically shall be treated as a document that was mailed for purposes of computation of time under Rule 6.

RECAP:

Computation of Time on Defaults

- A. Rule 6.01
Rule 55.01
Tennessee Code Annotated §1-3-102
- B. 5 days written notice of application for default judgment prior to hearing. Rule 55.01 (5 days)
- C. Saturdays, Sundays, and legal holidays excluded from the computation (2 days)
- D. Service by mail (3 days)
- E. Exclude day of service. Include last day of period, but it runs until midnight.
- F. Can get default usually on 11th day after service.
- G. Affidavit of counsel as to compliance with the requirements for default.
- H. Judgment only for amount or things prayed for in the Complaint.
- I. Filing answer after application for default does not cure default.
(See *Pache Industries, LLC v. Wallace Hardware Co.*, E.S. Tenn. Ct. App., Nov. 2003)

FACTS:

Plaintiff sued Defendant for several unpaid invoices. The summons and complaint were served on the Defendant's agent. Defendant did not answer the complaint within 30 days. Service was on September 9, 2002. On November 1, 2002, Plaintiff filed motion for default judgment and served same to be heard on February 3, 2003. On November 24, 2002, Defendant hired an attorney who contacted Plaintiff's attorney the next day. On January 15, 2003, 18 days prior to the default judgment hearing, Defendant filed his

answer. The trial court heard argument on the default judgment on February 3, 2003 and granted Plaintiff a default judgment. Defendant filed motion to set aside the default judgment, claiming the failure to timely file the answer was the result of excusable neglect, mistake, and inadvertence of the Defendant. Further, Defendant claimed it had a valid and meritorious defense in that Plaintiff would not be prejudiced by the Defendant's motion being granted. The Court refused to set aside the default judgment and Defendant appealed.

ISSUES:

1. Did the trial court err in granting judgment by default after an answer had been filed?
2. Did the trial court err in denying the motion to set aside the default judgment?

HOLDING:

The belated filing of an answer is not an adequate response to a motion for default. There must be some application to the Court for relief from the failure to file a timely answer. Under the Rules, an extension of time within which to file an overdue answer is available in the discretion of the trial court, for good cause shown, and upon a showing of excusable neglect. Rule 55.01 gives the trial judge discretion one way or the other. While dismissals based on procedural grounds like failure to prosecute and default judgments are not favored in our judicial system, a Defendant may not simply ignore a suit or delay filing an answer to inconvenience the Plaintiff. The Rules of Civil Procedure are construed to secure the just, speedy and inexpensive determination of every case. To relieve a Defendant from the default judgment because it allowed the summons and complaint to "languish" would not be just to a Plaintiff. Rule 60.02 is not intended to rescue a party who fails to answer a complaint for no good reason. A default judgment protects a diligent party from continual delay and uncertainty as to his or her rights. It has been declared that the mere negligence or inattention of a party is no ground for vacating a judgment against him. Careless is not synonymous with excusable neglect. Mere forgetfulness of a party to an action is not a sufficient ground for vacating or setting aside a judgment by default. The parties are not justified in neglecting their cases merely because of the stress or importance of their own private business and such neglect is ordinarily not excusable. As to the setting aside of the default judgment, the Court held the Defendant did not carry its burden of proof that it is entitled to relief under Rule 60.02. Since Defendant did not prove it is entitled to relief under Rule 60.02, proof of a meritorious defense and a lack of prejudice to the Plaintiff are insufficient to overturn a default judgment. The judgment of the trial court was affirmed.

XIII. RESTRAINING ORDERS - TENN. R. CIV. P.

- A. Rule 65, TRCP.
- B. Shall only restrict the doing of an act.
- C. Verified allegations that applicants rights are being or will be violated AND the applicant will suffer immediate and irreparable injury, loss or damage before notice can be served and a hearing held thereon - Bond required.
- D. Service by person authorized to serve a Summons as provided in Rule 4.04 and return made on the Order.
- E. Becomes effective and binding on the restrained party at time of service or when party is informed of the Order.
- F. Must expire in 15 days or less. Judge must note on the Order the date of expiration.
- G. Must be specific and reasonably capable of being performed by the party being restrained.
- H. Rule 65.07 - Domestic Relations Exception - Time limit and bond in Court's discretion.
- I. Tennessee Code Annotated § 29-1-107 - Complaint or Motion must state that it is the first application for extraordinary process.
- J. Tennessee Code Annotated § 29-1-108 - If application refused, no other application shall be granted except by the Court where Complaint is filed.
- K. Tennessee Code Annotated § 29-1-109 - If refused, the Judge shall endorse the refusal on the Complaint or Order and sign his/her name.
- L. Breach or threatened breach punishable by Court's contempt powers.
- M. If bond is set by Court, it is to guarantee any damages suffered by the restrained party. Recovery does not require a showing of bad faith,

malicious or tortious act, but only that the Order was issued wrongfully and that restrained party was deprived of rights to which he/she was entitled and show damages. Attorneys fees are not recoverable from the injunction bond.

- N. Restraining Orders should not be worded in such a manner as to direct a transfer of custody.

Ex Parte Domestic Restraining Orders

- A. Must have an adequate factual basis set out in the pleading requesting same or in an Affidavit, signed by the party, sworn to, containing admissible evidence citing to irreparable harm, or other emergency.
- B. If the opposing party is represented by counsel, that counsel must make diligent effort to notify counsel in advance that the application will be made, giving date, time and place, and certify this to the court by Affidavit, or in the Motion.
- C. If no counsel on the opposite side, the Court will hear without notice to opposing party.
- D. The proposed restraining order must contain a section where notation of a hearing date may be scheduled to decide whether to extend, modify, or dissolve the order.
- E. The pleading seeking a restraining order must state if this is the first, second, third, etc., time extraordinary relief has been requested. (Tennessee Code Annotated §29-1-107).
- F. At the hearing, be prepared to prove the allegations made in order to extend the restraining order.
- G. Do not use a restraining order to direct a transfer of custody of a child. Use TCA 36-6-405 to obtain an ex parte custody order.

XIV. CHILDREN'S STATEMENTS - HEARSAY

Clarneau v. Clarneau, 30 TAM, 29-13, Tenn. Ct. App. (June 2, 2005) Judge Clement

FACTS:

The parties married in 1997 and divorced in 2000. Mother was Primary Residential Parent. Both remarried. In January, 2002, mother obtained an exclusive custody order ex parte because D.H.S. had charged father with child neglect because he disciplined the stepchildren by locking them in the bathroom and removing the light bulbs from the bedroom. Father employed a Certified Social Worker to help them in blending the two families together, his and his new wife's. The two year old child told the worker that stepfather had hit the mother. The father therefore petitioned for custody of the two daughters based on violence in the mother's home and the stepfather's addiction to prescription drugs. The Chancellor found there was physical violence in the mother's home being witnessed by the children and that this was a material change in circumstances. He then conducted a best interest analysis and awarded custody to the father. The mother appealed. The Court of Appeals reversed.

In this case the mother and the older child had testified there was never any hitting. The appellate opinion holds that the social worker was never qualified as an expert witness and excluded her professional opinion. The child's statement was held not to come under the Tennessee Rules of Evidence 803 (25 Exception to Hearsay) because it was not corroborated, it was denied by other witnesses, and the child was only 2 years old and the social worker had not taken any further action.

XV. MEDICAL RECORDS - CUSTODY CASES

ADMISSIBILITY OF PSYCHOLOGICAL RECORDS IN A CUSTODY CASE OVER OBJECTION:

- **PSYCHOLOGICAL RECORDS**
- *Culbertson v. Culbertson* 2012 Tenn. Lexis 328, Tenn. Ct. App., May 23, 2012, Judge Farmer
- In this divorce case, Wife alleged physical and emotional abuse toward her and the children. Husband denied it, and demanded “strict legal proof thereof”, and sought sole custody. In discovery, Wife filed a Motion to obtain Husband’s psychological records. Husband defended that the records were privileged pursuant to Tennessee Code Annotated §63-11-213, and that he had not waived the privilege. Wife argued Husband placed his mental health at issue and waived the psychologist-client privilege by seeking sole custody and demanding she provide “strict legal proof thereof”. The trial court ordered the records released. Husband sought and was granted an extraordinary appeal.
- The Appellate Court noted that the legislature chose to treat the confidential communications between a psychologist and client the same as those between an attorney and client.
- The attorney-client privilege is designed to protect the client and because it belongs to the client, may be waived by him.

- Given the unique nature of child custody determinations, a parent's assertion of the psychologist-client privilege to prevent access to mental health records presents a more difficult issue than those raised in other situations involving the privilege. In child custody cases, the paramount consideration is the best interest of the child.
- The Appellate Court agreed with husband, that seeking custody does not by itself, amount to an automatic waiver of the psychologist-client privilege, nor does denying allegations of mental instability and abuse, and demanding proof of the same, automatically waive the privilege protection afforded to his psychological records. If this were the law, there would be no privilege in child custody cases.
- Although the best interests of the children remain the focus of the trial courts concern when making custody determinations, the importance of the confidential relationship between a psychologist and client must not go unnoticed.
- The trial court order was vacated, the case remanded with instructions that on remand, husband's psychological records shall be disclosed to the trial court for an *in camera* review for the purpose of conducting the comparative fitness analysis. Following this determination, the trial court shall enter an appropriate order protecting husband's privileged psychological records.

- See also *Herman v Herman*, (Court of Appeals, Nashville, May 9, 2012. This case raised the same issue as *Culbertson*, and arrived at the Court of Appeals on a Rule 10 emergency appeal. In this case, the Court of Appeals did not order the production of the records *in camera* or otherwise, recognizing that while marital health is a factor in TCA 37-6-106, it is not, however a licence to disregard statutory privileges from disclosure.
- The Legislature amended TCA 33-3-105(3) as of July 1, 2013 to permit a court to order the examination of a parent pursuant to Rule 35 and, if necessary to order the disclosure of confidential mental health information of a party. Appropriate protections are built into the statute and provides for the return or destruction of the information at the conclusion of the proceedings.

XVI. RULINGS IN DOMESTIC CASES

- Tenn. R. Civ. P. 52.01
- Rule 52.01: Findings Required.

In all actions tried upon the facts without a jury, the court shall find the facts

specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rules 41.02 and 65.04(6).

RECAP:

Rule 12.02 Motion to Dismiss: No Findings Required.

Rule 41.02 Motion for Involuntary Dismissal after Plaintiffs proof: Findings of fact and conclusions of law required.

Rule 65.04(6) Motion for Temporary Injunction: Findings of fact and conclusions of law required supporting the courts action granting or denying the injunction.

Rule 56 Motion for Summary Judgement: Court required to state the basis for the granting or denying the motion,

XVII. RULE 4 - CONSTRUCTIVE PROCESS - POSTING

1. No rule of procedure provides for posting.
2. No statute provides for posting.
3. Posting is a court created rule using its inherent and statutory supervisory

process to insure the rights of bonafide indigents to access to the courts under the U.S. Constitution and Constitution of Tennessee. *Dungan v. Dungan*, 579 S.W. 2d 183 (Tenn. 1979)

4. The Procedure:
 - a. Affidavit of indigency
 - b. Affidavit in support of publication - full and detailed account of efforts made to locate defendant, including names and addresses of next of kin, name and address of defendant's last employer, etc.
 - c. Motion to order constructive service of process.
 - d. Order for posting in lieu of publication.
 - e. Clerk to post copy of summons in three public places in the county.
 - f. Clerk to mail a copy of complaint and summons by return request registered mail to defendant's last known address.
 - g. Clerk to make an entry on the rule docket showing the details of mailing and posting and the document returned, and file the document returned with the record.

XVIII. RECUSAL

- Findings of fact is not required when ruling on:
- Section 1. Motion Seeking Disqualification or Recusal of Trial Judge of Court of Record.1.01. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a timely filed written motion. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials. The motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this Rule.
- 1.02. While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken.1.03. Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion.
- 1.04. A judge who recuses himself or herself, whether on the Court's own initiative or on motion of a party, shall not participate in selecting his or her successor, absent the agreement of all parties. With the agreement of all parties to the case, the judge may seek an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(1). Otherwise, the presiding judge of the court shall effect an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(2)

or (3). If an interchange cannot be effected, or if the presiding judge is the recused judge, the presiding judge shall request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4).

- HISTORY: [As adopted by order filed January 4, 2012, effective July 1, 2012; and amended by order filed June 13, 2012, effective July 1, 2012.]
- NOTES: Compiler's Notes. In its order filed January 4, 2012, the Supreme Court provided that new Tenn. Sup. Ct. R. 10B establishes procedures for filing motions for disqualification or recusal of a judge and for appeals from the denial of such motions. Rule 10B shall take effect on July 1, 2012, and shall have prospective application only, applying to all motions for disqualification or recusal filed on or after that date. In a separate order, the Court also is adopting Advisory Commission Comments to certain rules set out in the Rules of Appellate, Civil, Criminal and Juvenile Procedure, which Comments will provide appropriate cross-references to the procedures set out in the new Tenn. Sup. Ct. R. 10B.

- Section 2. Availability of Interlocutory Appeal as of Right Following Denial of Disqualification or Recusal Motion.
- 2.01. If the trial court judge enters an order denying a motion for the judge's disqualification or recusal, or for determination of constitutional or statutory incompetence, an accelerated interlocutory appeal as of right lies from the order. The failure to pursue an accelerated interlocutory appeal, however, does not constitute a waiver of the right to raise any issue concerning the trial court's ruling on the motion in an appeal as of right at the conclusion of the case. The accelerated interlocutory appeal or an appeal as of right at the conclusion of the case shall be the exclusive methods for seeking appellate review of any issue concerning the trial court's denial of a motion filed pursuant to this Rule.

- 2.02. To effect an accelerated interlocutory appeal as of right from the denial of the motion, a petition for recusal appeal shall be filed in the appropriate appellate court within fifteen days of the trial court's entry of the order. In civil cases, a bond for costs as required by Tenn. R. App. P. 6 shall be filed with the petition. A copy of the petition shall be promptly served on all other parties, and a copy also shall be promptly filed with the trial court clerk. For purposes of this section, "appropriate appellate court" means the appellate court to which an appeal would lie from the trial court's final judgment in the case.
- 2.03. The petition for recusal appeal shall contain:(a) A statement of the issues presented for review;(b) A statement of the facts, setting forth the facts relevant to the issues presented for review;(c) An argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities; and(d) A short conclusion, stating the precise relief sought. The petition shall be accompanied by copies of any order or opinion and any other parts of the record necessary for determination of the appeal.
- 2.04. The filing of a petition for recusal appeal does not automatically stay the trial court proceeding. However, either the trial court or the appellate court may grant a stay on motion of a party or on the court's own initiative, pending the appellate court's determination of the appeal.
- 2.05. If the appellate court, based upon its review of the petition and supporting documents, determines that no answer from the other parties is needed, the court may act summarily on the appeal. Otherwise, the appellate court shall order that an answer to the petition be filed by the other parties. The court, in its discretion, also may order further briefing by the parties within the time period set by

the court.2.06. The appeal shall be decided by the appellate court on an expedited basis upon a de novo standard of review. The appellate court's decision, in the court's discretion, may be made without oral argument. Any order or opinion issued by the appellate court should state with particularity the basis for its ruling.

- HISTORY: [As adopted by order filed January 4, 2012, effective July 1, 2012.]
- NOTES: Compiler's Notes. In its order filed January 4, 2012, the Supreme Court provided that new Tenn. Sup. Ct. R. 10B establishes procedures for filing motions for disqualification or recusal of a judge and for appeals from the denial of such motions. Rule 10B shall take effect on July 1, 2012, and shall have prospective application only, applying to all motions for disqualification or recusal filed on or after that date. In a separate order, the Court also is adopting Advisory Commission Comments to certain rules set out in the Rules of Appellate, Civil, Criminal and Juvenile Procedure, which Comments will provide appropriate cross-references to the procedures set out in the new Tenn. Sup. Ct. R. 10B.

XIX. BALANCE SHEETS

- Exhibit A - What The Court Requests
- Exhibit B - What The Attorney's Get Back With The Decision.

EXHIBIT A

· **EXHIBIT B**

