





Hon. Mary L. Wagner

- *Circuit Court Judge, Division VII for the 30th Judicial District;
- *Appointed by Tennessee Gov. Bill Haslam in 2016 and elected in 2018 and 2022
- *Practiced at Rice Amundsen & Caperton, PLLC, where she had a general civil litigation practice that included domestic relations litigation.



Joseph W. Smith



- *Associate Attorney, Miles Mason Family Law Group, PLLC.
- *Memphis Business Journal's 40 Under 40, Immediate past Chair, TBA Family Law Section.
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Trial Procedures

10. Thomas v. Thomas, 666 S.W.3d 456 (Tenn. Ct. App. 2022)

Under Rule 63, the new judge must either certify familiarity with the record and determine that the proceedings may continue without prejudice to the parties or grant a new trial. The successor judge may not proceed in a case without making the requisite certifications.

26. Waddell v. Waddell, No. W2020-00220-COA-R3-CV, 2023 WL 2485667 (Tenn. Ct. App. Mar. 14, 2023)

Under Rule 54.02, courts may revisit any interlocutory orders before the entry of a final judgment. There is no requirement that a motion to revisit be analyzed under the same requirements as a Rule 59.04 motion (previously unavailable evidence, change in controlling law, unique circumstances). Court also noted that credibility findings must be based on evidence, not statements by parties' counsel.

Trial Procedures Cont.

27. Creger v. Creger, No. M2022-00558-COA-R3-CV, 2023 WL 2533213 (Tenn. Ct. App. Mar. 16, 2023)

In determining the appropriate sanction for failing to name a witness, the trial court should consider: the explanation for the failure, the importance of the testimony of the witness, the need for time to prepare to meet the testimony and the possibility of a continuance.

28. McCurry v. McCurry, No. E2023-00297-COA-T10B-CV, 2023 WL 2591161 (Tenn. Ct. App. Mar. 22, 2023)

Court declined to consider flash drive of recorded trial proceedings as it was not admitted into evidence, approved by trial court, nor was it properly authenticated.

Trial Procedures Cont.

42. Justice v. Hanaway, No. E2022-00447-COA-R3-CV, 2023 WL 3451544 (Tenn. Ct. App. May 15, 2023)

Psychologist that was ordered to conduct therapy, testify, and to assist the court in the evaluation and assessment of a minor child in a domestic dispute was entitled to judicial immunity for acting pursuant to a court order.

53. Jones v. Jones, No. M2022-00624-COA-R3-CV, 2023 WL 4559880 (Tenn. Ct. App. Jul. 17, 2023)

An award of discretionary costs may be influenced by the equities of the case, and the Court is free to amend oral rulings prior to final entry of judgment.

Trial Procedures Cont.

68. *Austin v. Richmond*, No. W2022-00559-COA-R3-JV (Tenn. Ct. App. Aug. 31, 2023)

"Allegations in pleadings are not evidence of the facts averred. Unless such facts are admitted or stipulated, they must be proved by documents, affidavits, oral testimony or other competent evidence." Merely attaching a document to a pleading does not place that document in evidence.

Custody/Parenting

5. *Boren v. Wade*, No. W2020-01560-COA-R3-CV, 2022 WL 17072370 (Tenn. Ct. App. Nov. 18, 2022). (*Rule 10 Memorandum Opinion)

The trial court failed to make findings concerning the child using the best interest factors before suspending the Father's parenting time.

13. *Burnett v. Burnett*, No. E2021-00900-COA-R3-CV, 2022 WL 17484311 (Tenn. Ct. App. Dec. 7, 2022)

Trial court conducted extensive and detailed findings based on the best interest factors, noting Father's lack of involvement, excessive drinking and drug use, and verbal abuse. Court of Appeals affirmed finding of 90 days for Father but vacated because schedule only reflected 63 days.

Custody/Parenting Cont.

14. *L.A.S. v. C.W.H.*, No E2021-00504-COA-R3-JV, 2022 WL 17480100 (Tenn. Ct. App. Dec. 7, 2022)

There is a higher threshold for changing PRP rather than just residential schedule. After weighing non-exhaustive factors, Father failed to show material change of circumstances affecting the best interest of the child.

17. *In Re Aiden*, No. W2021-01187-COA-R3-JV, 2022 WL 17684082 (Tenn. Ct. App. Dec. 15, 2022)

Trial court properly made clear findings regarding why they declined to apply the reasonable preference of a child 12 or older in its best interest analysis.

Custody/Parenting Cont.

18. *Bean v. Bean*, No. M2022-00394-COA-R3-CV, 2022 WL 17830533 (Tenn. Ct. App. Dec. 21, 2022)

Record was replete with evidence of abuse, but trial court failed to make findings as to credibility of the abuse or effect the abuse had its in decision to award equal parenting time.

22. *Macomber v. Macomber*, No. M2021-01503-COA-R3-CV, 2023 WL 1100318 (Tenn. Ct. App. Jan. 30, 2023).

Due to COVID-19, Mother lost her job and school shut down, so Mother stopped daily parenting time for Father between end of school days and when Mother ended her workday. Given lower threshold for change in residential parenting schedule, court found material change of circumstances and remanded for best interest determination.

Custody/Parenting Cont.

23. *Thompson v. Thompson*, No. E2022-00345-COA-R3-CV, 2023 WL 1099255 (Tenn. Ct. App. Jan. 30, 2023).

In order for trial court to exercise temporary emergency jurisdiction under the UCCJEA, child must be present in the state. Massachusetts lacked temporary, emergency jurisdiction because child was in Tennessee.

32. *In Re McKayla H.*, No. W2020-01528-COA-R3-JV, 2023 WL 2809507 (Tenn. Ct. App. Apr. 6, 2023)

Court noted the relocation statute was amended in 2018 to remove language requiring trial courts to conduct inquiry into substantially equal intervals of time and reasonable purpose. Instead, courts have discretion to use best interest factors in deciding relocation matters.

Custody/Parenting Cont.

37. *Barrett v. Killings*, No. M2022-00946-COA-R3-JV, 2023 WL 3055535 (Tenn. Ct. App. Apr. 24, 2023)

For relocation, courts should use radial miles rather than driving miles.

41. *Goughenour v. Goughenour*, No. M2022-00297-COA-R3-CV, 2023 WL 3269661 (Tenn. Ct. App. May 5, 2023)

It was harmless error for court to consider forensic alcohol assessments not submitted into evidence. Despite not having an alcohol problem, there was evidence that Father yelled at child while intoxicated, which prompted court to award 50/50 parenting time. Additionally, best interest analysis can turn on one single factor.

Custody/Parenting Cont.

50. *Edwards v. Edwards*, No. M2022-00614-COA-R3-CV, 2023 WL 4287203 (Tenn. Ct. App. Jun. 30, 2023)

The Court of Appeals stressed that the case should not signal (1) that an agreement to deviate from the PPP will always constitute a material change in circumstances and (2) that a parent risks losing co-parenting time for being cooperative and accommodating another parent's schedule or unpredictable circumstances.

51. *Bumbalough v. Hall*, No. M2022-01003-COA-R3-CV, 2023 WL 4401137 (Tenn. Ct. App. Jul. 7, 2023)

There is no authority to support the contention that half-siblings have to be placed together. While there is a presumption not to separate siblings, courts must still take into account the best interest factors.

Custody/Parenting Cont.

52. *Sevigny v. Sevigny*, No. M2022-00953-COA-R3-CV, 2023 WL 4542620 (Tenn. Ct. App. Jul. 14, 2023)

After Wife filed for criminal contempt, parties announced a settlement, but could not agree on terms. Court of Appeals found no double jeopardy because it was a continuation of the same proceeding.

54. *Hasley v. Lott*, No. M2022-01141-COA-R3-JV, 2023 WL 4633509 (Tenn. Ct. App. Jul. 20, 2023)

While there was no abuse of discretion in awarding equal parenting time, Mother should have been named primary residential parent, as she performed majority of parental duties.

Custody/Parenting Cont.

63. *McCurry v. McCurry*, No. E2022-01037-COA-R3-CV (Tenn. Ct. App. Aug. 16, 2023) (Rule 10 Memorandum Opinion)

Father was named PRP, and Mother filed emergency petition. Court of Appeals upheld the denial of Mother's emergency custody petition and issued mutual restraining order which required the parents to communicate only through text or email regarding the child.

65. *Smith v. Smith*, No. W2022-00704-COA-R3-CV (Tenn. Ct. App. Aug. 25, 2023)

The statutory requirement that the trial court maximize each parent's parenting time, does not mandate equal time. Court overemphasized need to maximize parenting time when it awarded both parents equal time.

Custody/Parenting Cont.

66. James v. James, W2022-00739-COA-R3-CV (Tenn. Ct. App. Aug. 28, 2023)

Enrolling the child in daycare and not providing the daycare with contact information does not violate the Parental Bill of Rights statute regarding the right to receive educational records or joint decision making on education. Daycare is not an educational provision.

70. Rushing v. Rushing (Strickland), No E2022-01229-COA-R3-CV (Tenn. Ct. App. Sept. 14, 2023)

The trial court improperly considered the gender of the Mother when finding a material change of circumstances for the custody of the parties' two daughters.

Custody/Parenting Cont.

74. State of TN ex rel. Andrea Gutierrez v. Lane Baggett, No. M2022-01658-COA-R3-CV (Sept. 28, 2023).

Trial court properly awarded Mother sole decision-making as to medical decisions, finding factors in favor of sole decision-making to be in Mother's favor. Court vacated finding that gave Mother religious decision-making, finding no evidence to support.

76. Schanel v. Richardson, No. M2022-00800-COA-R3-CV (Tenn. Ct. App. Sept. 29, 2023).

Court of Appeals affirmed joint decision-making responsibility for major decisions regarding education, non-emergency health care, religious upbringing, and extracurricular activities, noting that difficulty to get along does not rule out joint decision-making.

Child Support

6. Marcel v. Marcel, No. M2021-00594-COA-R3-CV, 2022 WL 17335655 (Tenn. Ct. App. Nov. 30, 2022)

Child support guidelines require a court to consider a "reasonable period of time" for purposes of calculating a parent's variable income. While not required, if possible, figures for at least a year should be considered.

11. State v. Barron, No. W2022-00085-COA-R3-JV, 2022 WL 17369012 (Tenn. Ct. App. Dec. 2, 2022)

Juvenile court lacks jurisdiction to modify child support order after the child reaches the age of majority.

Child Support Cont.

24. Buntin v. Buntin, No. E2022-00017-COA-R3-CV, 2023 WL 2232082 (Tenn. Ct. App. Feb. 27, 2023)

Trial court properly issued findings and did not abuse its discretion in ordering a downward deviation of \$0 predicated upon Father's payment of extraordinary educational expenses.

29. Stooksbury v. Varney, No. E2021-01449-COA-R3-JV, 2023 WL 2642616 (Tenn. Ct. App. Mar. 27, 2023)

Even if it was not waived, the 50% of income ceiling set by T.C.A. § 36-5-501(a)(1) does not apply in this case because the trial court was not issuing a wage assignment or garnishment.

Child Support Cont.

71. Reese v. Reese, No. E2022-0116-COA-R3-CV, (Sept. 21, 2023)

A PPP that reserves or does not determine child support, leaves no final order. There was nothing in the record to demonstrate that child support services "has relieved the trial court of jurisdiction to determine child support or that Ohio courts have made a determination of child support."

Property Division

1. Mangum v. Mangum, No. E2021-00285-COA-R3-CV, 2022 WL 16728237 (Tenn. Ct. App. Nov. 7, 2022)

Generally, property acquired during the marriage is presumed marital, and property acquired before the marriage is presumed separate. The burden is on the party seeking to have property acquired during the marriage deemed separate to prove.

15. Chase v. Chase, 670 S.W.3d 280 (Tenn. Ct. App. 2022)

Enterprise or business goodwill is separate from personal goodwill, but the Court has been reluctant to allow enterprise goodwill to be divided as a marital asset upon divorce when the business involved is a sole proprietorship. The Court of Appeals will affirm as long as the value assigned is within the range of values proven by evidence.

Property Division

19. Cooke v. Cooke, No. E2022-00049-COA-R3-CV, 2022 WL 17952651 (Tenn. Ct. App. Dec. 27, 2022)

Trial court entered an amended Final Decree, which increased by 10% the amount of proceeds father receives from the marital residence. The trial court failed to provide an explanation for the increase and the Court of Appeals vacated the award.

20. Webb v. Webb, No. W2021-01227-COA-R3-CV, 2023 WL 568331 (Tenn. Ct. App. Jan. 27, 2023)

Wife was properly awarded approximately 13% of the proceeds from the marital residence. In reaching this conclusion, the Court of Appeals emphasized how, in a short-term marriage, each spouses' contribution to the marital estate is important.

Property Division Cont.

21. Grider v. Grider, No. M2022-00213-COA-R3-CV, 2023 WL 1098473 (Tenn. Ct. App. Jan. 30, 2023)

Even if you allow a party to maintain an asset, the trial court should assign a value. Retirement accounts should be valued. Without values, the Court of Appeals cannot determine if the overall division is equitable.

30. Prichard v. Prichard, No. W2022-00728-COA-R3-CV, 2023 WL 2726776 (Tenn. Ct. App. Mar. 31, 2023)

There is a rebuttable presumption that property purchased during the marriage is marital property, which can be rebutted by evidence indicating the property to remain separate. Trial court found Husband's statements not credible.

Property Division Cont.

31. Dessie X v. Idris X, No. W2021-01155-COA-R3-CV, 2023 WL 2804672 (Tenn. Ct. App. Apr. 6, 2023) (*Rule 10 Memorandum Opinion)

Wife rebutted the presumption of marital property, and Husband failed to rebut the contention that the arrangement to hold the properties was just an accommodation for a friend.

38. Bannor v. Bannor, No. E2022-00507-COA-R3-CV, 2023 WL 3071341 (Tenn. Ct. App. Apr. 25, 2023)

While the trial court properly allocated marital debt to Husband, the trial court failed to assign values to the debt. Thus the Court of Appeals could not consider the division of marital property.

Property Division Cont.

40. Taylor v. Taylor, No. M2022-00140-COA-R3-CV, 2023 WL 3193200 (Tenn. Ct. App. May 2, 2023)

There was no error in classifying Father's "secret day trading account" as marital property and dividing it evenly between the parties, despite Father's contention that the court should have only considered him to own only 50% of the account.

44. Hill v. Hill, No. E2021-00399-COA-R3-CV, 2023 WL 3675829 (Tenn. Ct. App. May 26, 2023)

Trial court properly found the marital residence to have transmuted to marital property because the home was under construction when they moved into together, both contributed financially, and the mortgage and HELOC were placed in both names.

Property Division Cont.

64. Hammond v. Hammond, No. M2022-01253-COA-R3-CV (Tenn. Ct. App. Aug. 22, 2023)

Parties may contractually agree in advance to an alimony requirement in the event of military retirement waiver by the service-member-spouse.

Alimony

25. Perkins v. Perkins, No. W2021-01246-COA-R3-CV, 2023 WL 2446807 (Tenn. Ct. App. Mar. 10, 2023)

Taking into consideration the factors for allocating marital debt, the trial court found that Wife debts were after separation, from her family, as well as litigation costs. As a result, only some of Wife's litigation expenses were reasonable and the trial court decided to make her solely responsible for the balance of these expenses.

Alimony Cont.

34. Patteson v. Patteson, No. W2022-01187-COA-R3-CV, 2023 WL 2983110 (Tenn. Ct. App. Apr. 18, 2023)

Whether an award is alimony *in solido* or alimony *in futuro* is determined by the definiteness or indefiniteness of the sum ordered. Because the MDA contains contingencies that affect the total amount to be paid, the award is *in futuro*.

48. Sparks v. Sparks, No. E2022-00586-COA-R3-CV, 2023 WL 4067179 (Tenn. Ct. App. Jun. 20, 2023)

Trial court ordered alimony in future in the amount of \$750 to be increased to \$1,250 when the child reaches majority. In vacating the increase, the Court of Appeals held that an automatic increase was not appropriate because the child was not near the age of majority.

Alimony Cont.

69. Davalos (Dale) v. Dale, No. E2022-00859-COA-R3-CV (Tenn. Ct. App. Sept. 1, 2023)

Cohabitation need not involve a paramour and the type of relationship with the third-party is irrelevant to whether the cohabitation statute applies

Attorney's Fees

4. Colley v. Colley, No. M2021-00731-COA-R3-CV, 2022 WL 17009222 (Tenn. Ct. App. Nov. 17, 2022)

Husband's nonsuit terminated the action and left the parties as if no action had occurred, resulting in no "prevailing party" and no right to recover under the MDA or Tenn. Code Ann. § 36-5-103(c).

77. Parker v. Parker, No. E2022-00720-COA-R3-CV (Tenn. Ct. App. Oct. 12, 2023).

Tenn. Code Ann. § 36-5-103(c) provides for attorney's fees solely for matters involving alimony, child support, permanent parenting plan provisions, and custody of children.

Contempt

8. McCurry v. McCurry, No. E2022-00635-COA-R3-CV, 2022 WL 17347387 (Tenn. Ct. App. Dec. 1, 2022)

Mother's petition did not state whether she was seeking civil or criminal contempt. Trial Court announced because the Petition did not specify, that he was treating the Petition as one for civil contempt. Trial Court held that if it was criminal, it would dismiss the petition for failure to comply with Tenn. R. Crim. P. 42(b)(1).

35. Boren v. Wade, No. W2022-00194-COA-R3-CV, 2023 WL 300081 (Tenn. Ct. App. Apr. 19, 2023)

Father was prohibited from communicating with the child's school, and he posted a Facebook post that accused the Superintendent, who was also the child's principal, of covering up child abuse. The Court of Appeals found that the post did not concern the child and reversed the finding of contempt

Contempt Cont.

47. Bolton v. Bolton, No. M2022-00627-COA-R3-CV, 2023 WL 3881696 (Tenn. Ct. App. Jun. 8, 2023)

While Father might not have undertaken taking the child to the medical provider against the trial courts order with bad intent, he clearly displayed a careless disregard to whether he had the right to act. As a result, Father was guilty of criminal contempt.

55. Nolan v. Nolan, No. W2021-01018-COA-R3-CV, 2023 WL 4559883 (Tenn. Ct. App. Jul. 17, 2023)

In non-jury proceedings, double jeopardy only attaches when the 1st witness is sworn. Entering into a consent agreement to dismiss the 1st petition is not the equivalent of a guilty plea.

Contempt Cont.

60. Stark v. Stark, No. W2021-01288-COA-R3-CV, 2023 WL 5098594 (Tenn. Ct. App. Aug. 9, 2023)

The trial court erred by ordering Wife to perform community service because T.C.A. 29-9-103 only provided the court to issue a \$50 fine and/or imprisonment up to ten days.

62. Grande v. Grande, No E2022-00981-COA-R3-CV (Tenn. Ct. App. Aug. 20, 2023)

Post Divorce. A marital settlement agreement incorporated into a divorce decree can serve as a basis to assert the defense of *res judicata* where the issue was or could have been addressed in the agreement. Husband must have brought instead a claim for fraud or a Rule 60 motion.

Contempt Cont.

State of TN ex rel. Ananaba v. Ananaba, No. W2022-00443-COA-R3-CV (Sept. 21, 2023)

It is for the Petitioner to elect the type of contempt. Further, Father's purge payment would not have absolved him from criminal contempt. By requiring Mother to prosecute as civil contempt, the trial court created a remedy for Father. COA held this was reversible error and vacated.

Recusal

Green v. Green, No. E2022-01518-COA-T10B-CV, 2022 WL 17346229 (Tenn. Ct. App. Dec. 1, 2022)

Rule 10B requires the motion to recuse to be filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal.

12. Austermilller v. Austermilller, No. M2022-01611-COA-T10B-CV, 2022 WL 17409921 (Tenn. Ct. App. Dec. 5, 2022)

When a Rule 10B motion is pending, the trial court may enter orders that are based upon rulings made from the bench before the recusal motion was filed.

Recusal

61. Lowe v. Lowe, No. E2023-01061-COA-T10B-CV, 2023 WL 5257960 (Tenn. Ct. App. Aug. 16, 2023)

Trial court denied the motion to recuse because it was not timely filed and did not include an affidavit. Court of Appeals affirmed on the grounds that Wife could not show prejudice or bias from the trial court.

Statutory Update

- **TCA 36-6-701:** All judges involved in child custody proceedings shall complete two hours of training on domestic violence per year or 10 hours every 5 years

- **TCA 36-3-601:** Modified the definition of abuse and added financial abuse
