2008 Domestic Law in Review

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BIOGRAPHICAL SECTION

Mrs. Rogers graduated from Vanderbilt University *magna cum laude* with a degree in Political Science and Economics. She is a 1980 graduate of the Nashville School of Law. Helen Rogers practices with the firm of Rogers & Associates and has an office in Nashville and Franklin. Her husband, Lawrence J. Kamm and Ms. Siew-Ling Shea are associates in the firm. As a certified civil trial specialist, Mrs. Rogers practices in the areas of domestic relations and general civil, business, and probate law in state and federal courts. She served five (5) years on the hearing panel for the Board of Professional Responsibility. Mrs. Rogers is a Rule 31 Civil Mediator and devotes a large portion of her practice to serving as a mediator in civil and domestic matters.

Alimony

(a) ***In Futuro***

Farrell Nesbitt v. Paula Nesbitt, 2008 WL 314631 (MS Tenn. App. February 4, 2008). In an opinion delivered by Special Judge Don Ashe, husband was found to be at greater fault and wife was awarded alimony *in futuro* in an 18 year marriage with no children where both parties were 49 years old. Wife's lifetime wages had ranged from $7 to $16 per hour and husband had income of around $60,000 per year.

While there is an explicit legislative intent for rehabilitative alimony, the court should not dismiss the option of long term support where the facts warrant long term or open ended support where the dependant spouse's circumstances are such that the standard of living during the marriage were not being maintained or the standard of living comparable to post-divorce standard of the other spouse is not achievable even with rehabilitation. In the *Nesbitt* case, the *in futuro* was affirmed with the Court finding that Ms. Nesbitt had contributed to Mr. Nesbitt's success so that he could accomplish a greater earning capacity than wife and that she could not be rehabilitated to a standard of living comparable to the post-divorce standard living of Mr. Nesbitt.

Mohammed v. Mohammed, 2008 WL 639738 (WS Tenn. App. March 11, 2008). In a 36-year marriage where wife was 52 and husband 57, wife was granted alimony *in futuro* of $2,000 per month. The marriage ended because of husband's inhumane treatment of the wife and the court specifically found that rehabilitation was not feasible. Husband did everything wrong, not answering discovery, filing a bankruptcy, and everything possible to try to minimize alimony claiming that he was making negative income. However, wife was a hair stylist with no college, and he had two advanced engineering degrees and was simply

choosing not to use them. In addition to the *in futuro* award, the Court of Appeals also remanded the case back to the trial court for an award to wife of her attorney's fees.

(b) Wife pays husband

Stacy Davis v. Robert Davis, 2008 WL 2219277 (ES Tenn. App. May 29, 2008. After 18 years of marriage, wife was 42 years old earning $72,000 a year and husband was 45 years old earning $20,000 a year. Husband had lost a job making $48,000 a year previously and said that he wanted to go back to school and earn a college degree so that he could make more money with a degree in industrial engineering. Wife's income and expense statement showed she had a $1,400 a month surplus while husband's affidavit showed $1,800 per month deficit. The Court of Appeals came down to the basics of husband's need and wife's ability to pay. Husband was awarded $800 per month for 36 months on appeal plus his attorney's fees for the trial and appeal. Wife tried to raise the issue that husband had lost his job through his own fault but was unsuccessful with that argument on appeal.

(c) $2.5 million is too much.

Franklin v. DeKlein-Franklin, 2008 WL 1901113 (ES Tenn. App. April 30, 2008). Husband now age 65 and wife now 64 years old met in Cancun, Mexico, in 1983. They married in 1987 after each divorcing their spouses and had a 16 year marriage. Wife is a native of the Netherlands and was fluent in many languages and also an accomplished artist. Husband was a plastic surgeon who had a well-established career in Chattanooga. There were no minor children. In a long decision written by Judge Susano, the division of the marital estate was affirmed but the Court of Appeals reversed the award to wife of transitional alimony based on her receiving $2,548,530 in marital property and having separate property

totaling $318,979. The transitional alimony had been $2,500 per month for 24 months. Husband also had health issues that he raised as limiting his ability to earn in the future.

Attorney's Fees

Bearb v. Bearb, 2008 WL 538977 (WS Tenn. App. February 28, 2008.) After 12 years of marriage, wife filed for divorce and then spent 7 years divorcing. Husband was a cardiologist and wife a nurse and at the time of the final divorce was 50 years old. Husband and wife each received $1.2 million, and wife was awarded $5,000 per month of alimony for 10 years and $2,500 per month thereafter *in futuro*. She also received $100,000 as an alimony *in solido* award and her attorney's fees. On appeal, the trial court was affirmed except on the issue of attorney's fees. The Appellate Court noted that need was a primary factor in attorney's fees and in this case, Ms. Beard had more than sufficient assets from which to pay her attorneys.

Attorney General's Opinions

Attorney General Opinion No. 08-62. State Senator Burchett asked the Attorney General whether *Tenn. Code. Ann*. Section 36-6-110 provides a nonresidential parent the right to receive reports of child care programs and after-school programs. The Attorney General's opinion was that it does not and that *Tenn. Code. Ann*. Section 36-6-110 was clear and unambiguous that the noncustodial parent has the right to receive only school records directly from the school such as report cards, attendance records, teacher names, class schedules, standardized test scores and any other reports customarily made available to parents upon written request includes a current mailing address and payment of reasonable costs of duplication.

Business Valuations

(a) Marketability discount excluded

Bertuca v. Bertuca (Tenn. Ct. App. November 14, 2007). 2007 WL 3379668. This Wilson County Circuit Court case involved the valuation of the husband's business in a McDonald's franchise and a battle of the expert witnesses as to that value. Husband owned 90% of Capital Food Services, a general partnership. The trial court's decision that husband's value in the business had increased about $900,000. The Appellate Court, on rehearing, calculated the value of the business which varied significantly from the trial court's valuation as follows:

Cash Flow (Landers)	$412,663
Capitalized at 12%	$3,438,858
Add: Current Assets	$1,016,829
Less: Current Liabilities	($ 525,891)
Less: Notes Payable 6/30/2005	($2,199,028)
Less: Lebanon Rebuild Note	($ 950,000)
VALUE:	$ 780,768

Thus, the wife's adjusted share in the business should be $351,345. However, what is significant is that the Court of Appeals did not allow a "lack of marketability" discount which is frequently done in valuation cases "unless it appears from the records that his needs or situation were such that the sale of his interest would be necessary or desirable."

The Court of Appeals also rejected a similar argument that the buy-sell agreement was applicable to husband's 90% partnership interest since the record did not reflect that husband had plans to sell his interest in the partnership. The payments of the wife of $351,345 interest were spread over 84 months with no interest. Wife claimed that this was error because she claimed this was an *in solido* alimony award rather than a division of the marital property. The Court reasoned under the analysis of **Price v. Price**, 472 S.W.2d 732 (Tenn. 1971), that

interest did not accrue on the judgment until it became due and in this case it was due in 84 installments and thus interest was not properly accessible. The valuation was also complicated by the fact that the restaurants had been recently acquired and there were not lengthy earnings history. This most interesting opinion was written by Senior Judge Donald Harris but Judges Patsy Cottrell and Frank Clement joined in the opinion.

(b) Division of Assets

Keyt v. Keyt (Tenn. S.Ct. Dec. 19, 2007). 2007 WL 4409712, 244 S.W.3d 821 (Tenn. 2007). In an 18-year marriage with one child, the husband with three years of college, was employed by his family business service, Transport, Inc., and based in Putnam County. He had been gifted stock, which according to the tax return, was valued at $253,229 at the time of marriage. In 2002, husband's father and the remaining shareholders, agreed to sell their stock in the business for $18,000,000 which resulted in net proceeds from the sale to husband of $1,283,367. Husband also retained a 14.24% interest in the real estate reserved from the sale which was valued at $709,904.

The Court of Appeals addressed two issues: (1) whether the increase, if any, and the value of husband's separately owned stock interest in the family owned company for which he worked, qualifies as marital property and, if so, (2) whether the chance of correctly assess the increase in value. Chancellor Vernon Neil findings in the case were not affirmed to the end that he held that the increase in husband's separate property was marital and the Court of Appeals decision in this matter was reversed. Key to the opinion written by Justice Connie Clark is the finding that "nothing in the record demonstrates to us that husband's contributions substantially led to the increase in the value of the company stock." Husband performed duties of an average employee. They were not managerial; they did not

substantially contribute to the profitability of the business. This case has an excellent discussion and analysis of cases that have found where both parties substantially contributed to the appreciation of separate property, that value would be treated as marital and also contains an interesting dissent from Justice Gary Wade who felt that the husband's long-term employment with the company substantially contributed to the preservation and appreciation of this separately-owned stock and was upheld that increase in value during the marriage would qualify as marital property.

Child Support

(a) Increase in appreciation of retirement only.

Farmer v. Stark, 2008 WL 836092 (MS Tenn. App. March 27, 2008). In a Williamson County appeal from Judge Lee Davies, the father had asked for a reduction in child support based on his net income reducing from the time of the divorce which was in 2004. Father's income had been reduced although he paid his day laborers in cash and did not report the cash and claimed that it was a "wash." Father had cashed in two retirement accounts to pay his taxes. Mother argued that the cashing in of the IRAs should have been included in income for the purposes of child support. While the definition of gross income includes monies from retirement, in this case the retirement funds were a division of the marital estate and thus only the increase or appreciation in those funds was actually income that should have been considered for purposes of child support. Thus, the case was remanded for consideration of that issue only but the denial of a motion for a new trial to present further evidence as to the father's business expenses was upheld. The motion for new trial or to alter or amend the judgment should not be used to add proof that was not properly heard or produced at the trial with the court stating that granting a new trial because certain issues were

not addressed more thoroughly at the original trial is not appropriate nor is it appropriate because counsel did not ask enough questions, despite the court's own inquiry of a witness.

(b) Upward Deviation.

Janet Billingsley-Travis v. James Kenneth Travis, 2008 WL 2220681 (MS Tenn. App. May 28, 2008). The trial court affirmed an upward deviation in child support where the parties had two sons who were 8 and 6 years old when the parties divorced. Eight years after the parties' divorce, mother filed a petition to increase child support and for other relief. Mother had placed the children at Webb School for many years, and they were doing well. Father had voluntarily been paying an increase of child support of $900 per month. The trial court ordered him to continue paying this as an upward deviation and also to pay $2,000 a year toward the children's school tuition. On appeal, in an opinion by Judge Clement, the upward deviation in child support was approved based on the trial court's findings that (1) it was in the best interest of the children, (2) the need to insure that the children continued their education at Webb School, (3) mother's previous reliance on father's voluntary child support payments and (4) the amount of debt mother had incurred to pay the children's tuition. The court reviewed the upward deviation under an abuse of discretion standard and cited **Ballard v. Herzke,** 924 S.W.2d 652, 661 (Tenn. 1996) that discretionary decisions must, however, take the applicable law and relevant facts into account.

The Appellate Court did not approve the $2,000 per year, noting that the trial court had found that the parties did not appear to have the financial capacity to pursue private school education and that this amount really exceeded the father's ability to pay.

Civil Procedure

(a) Personal Service

In re: Adoption of F.M.B.P.W., 2008 WL 832670 (MS Tenn. App. March 26, 2008). In an opinion by Judge Andy Bennett a father's parental rights had been terminated but on appeal that order was vacated because the Court determined that the statutory requirements for service by publication were not met. Mother of the child was married but not to the biological father. The stepfather brought an action to terminate the parental rights of the biological father and allow the step-father to adopt. The last known address of the defendant was listed in the petition which asked for service of the petition or in the alternative, publication issue. Service by certified mail was attempted on the biological father at his last known address but returned unserved on May 2, 2006. Then a notice of a lawsuit was published in the *Stewart Houston Times* for three weeks and the biological father's mother told him of the notice in the paper and he wrote the court a letter dated May 3, 2006, alleging that he had been kept from the children and had just learned of the matter. This letter had a return address in Greenbrier, Tennessee, that was printed on the envelope. Notice of the final adoption hearing was sent to the Greenbrier address on May 15, 2007, but father claims that he did not receive any notice until two days after the June 22, 2007, hearing.

On appeal, it was found that *Tenn. Code Ann*. Section 21-1-203(a) allows personal service of process to be dispensed with when the residence of the defendant is unknown and cannot be ascertained upon diligent inquiry. This same code section requires "diligent inquiry" to attempt to determine the unknown father's residence. *Tenn. Code Ann*. Section 36-1-117(m)(3) places the burden of demonstrating diligent inquiry upon the petitioner by requiring a detailed affidavit from the petitioners attesting to all efforts to determine the

whereabouts of the unserved party. In this case there was no affidavit from the petitioners or their attorney detailing their efforts to locate the biological father. The record was devoid of any information beyond the petitioners contacting the putative father registry. There is no order from the court making findings about an effort to locate the biological father. Clearly, once the father sent a letter to the court with his return address, personal service was possible but did not take place. The biological father was not before the court and all proceedings held pursuant to the notice were void. Citing *Overby v. Overby*, 457 S.W.2d 851, 852 (Tenn. 2007).

(b) Spoliation

Cincinnati Insurance Company v. Mid-South Drillers Supply, 2008 WL 220287 (Tenn. Ct. App. January 25, 2008). The issue being presented on appeal is whether a trial court may exercise its discretion to grant under Rules 34 and 37 of the *Tennessee Rules of Civil Procedure* a dismissal of a party's case for spoliation of evidence where spoliation may have been inadvertent rather than intentional. The Tennessee Court of Appeals held that the trial court does have the discretion to sanction a party by dismissing their case where the destruction of evidence severely prejudices an adverse party's defense irrespective of whether the destruction was inadvertent or intentional. In this case a blue hose was destroyed apparently in testing, and it was a critical piece of evidence that justified a grant of summary judgment in a case that was worth over $105,000.

(c) Pleadings.

Armstrong v. Armstrong, 2008 WL 624862 (MS Tenn. App. March 5, 2008). Connie Reguli was the third attorney for Mary Armstrong at the trial before Judge Don Ash and made an argument asking for alimony for her client who claimed that she was diagnosed with two

lung disorders. The trial court pointed out that Ms. Armstrong had no action pending before the court that requested an award of spousal support. The Appellate Court states that it is a fundamental rule of law that in order to receive relief, a party must plead it, request it and prove it in court with the opposing party having an opportunity to offer proof opposing the items requested. In this case, when the trial court indicated that it would not hear the request for alimony absent a pleading for relief, Ms. Reguli conceded that she could not proceed with a claim for alimony absent such a claim and asked the court to proceed with the division of the marital property. She did not request that the pleadings be amended to include such a request nor was the trial court asked to continue the proceedings in order to correct the pleadings. Thus, the trial court's decision to deny any alimony award was affirmed. Also, affirmed was the trial court's grant to Mr. Armstrong of attorney's fees when Ms. Armstrong changed from her second attorney at the last minute before the trial was set and a continuance was required.

(d) Court Misconduct

Joey Conner v. Carmen Conner, 2008 WL 2219255 (WS Tenn. App. May 29, 2008). In an opinion delivered by Judge Walter Kurtz, the change of custody case was remanded for further proceedings after four days of trial on August 22, 2006, November 27, 2006, May 8, 2007 and May 9, 2007, when the court had a session with the lawyers after the mother had testified on direct but before her cross-examination and before the father had testified and announced its decision that custody was to be changed from the father who resided in Haywood County to the mother who lived in Murfreesboro. The Appellate Court vacated the court's decision and found that the trial court applied an incorrect legal standard, i.e., what an 11 year old child wanted to do, and that the final hearing was prematurely

terminated. However, they declined to return the child to the father while the testimony was concluded.

(e) Sanctions to Attorney.

GMAC Bank v. HTFC Corporation, 248 FRD 182 (B.D. Pa. 2008). This is a case of first impression in Federal Court which, under a motion to compel deposition testimony in addition to a sanction against the defendant for misconduct at his deposition, defendant's attorney was also ordered to pay plaintiff jointly and severally with the defendant $13,026 in attorney fees and expenses plaintiff incurred in connection with this motion to compel defendant's testimony. The inaction of the defendant's attorney in faith of the defendant's gross misconduct at his deposition impeded and contributed to the total frustration of the deposition and thus the attorney was ordered plaintiff jointly and severally with the defendant an additional $16, 296 in costs and fees. In this case, the deponent used the "f---" word repeatedly through his deposition, told the questioner to "shut up" and was generally belligerent and completely inappropriate.

(f) Local Rules.

Pennington v. Pennington, 2008 WL 1991117 (MS Tenn. App. May 7, 2008). Mother and father were divorced in 2004 and in 2006 father filed an emergency request for temporary removal of the child from the mother and to modify custody and mother filed a counter-petition. The parents had been sharing custody on an equal time basis for their young child. There were allegations of abuse against the stepfather and stepbrothers and a great deal of testimony on that issue. The case was reversed and remanded for further proceedings when it was found an abuse of discretion when the trial court erred in excluding testimony from the stepfather, the alleged abuser of the child, based on the mother's failure to comply with the

local Davidson County rule with request on witness disclosure 72 hours in advance. In an opinion written by Judge Andy Bennett, the Court reviewed the holding in **Strickland v. Strickland**, 618 S.W.2d 496, 499 (Tenn. Ct. App. 1981), which involved an omission under the Tennessee Rules of Civil Procedure. The **Strickland** court stated:

> Generally, where a party has not given the name of a person with knowledge of discoverable matter, the court should consider the explanation given for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance. In the light of these considerations, the court may permit the witness to testify, or it may exclude the testimony, or it may grant a continuance so that the other side may take the deposition of the witness or otherwise prepare to meet the testimony.

In this case, the Court of Appeals applied the same **Strickland** criterion to enforcement of a local rule and found that the trial court had abused their discretion.

Finally, it was not reversible error to admit hearsay statements that the child made to various persons under *Tennessee Rule of Evidence* 803(25) because there was sufficient trustworthiness and there were claims of abuse.

Custody

(a) Child Abuse Considered.

Tabitha Caine v. Mark Caine, 2008 WL ______ (MS Tenn. App. May 16, 2008). Father was awarded primary residential time with the parties son, age 7, and daughter, age 3, and mother appealed. For 9 months while the divorce was pending, the parties had shared time with the children on a week-to-week basis. Mother alleged as error that the court did not make findings of fact about the allegations of abuse against her required by *Tenn. Code Ann.* Section 36-6-106(a)(8). On appeal, the Court of Appeals found that it was questionable whether or not that statute even applied in a divorce case where there was a determination of a final parenting plan and custody since factors including abuse are taken into consideration in

that decision. The Appellate Court agreed with the trial court's findings that it was in the children's best interest for father to be primary parent because (1) the mother had married men stay overnight in her home with the minor children present and those married men had criminal or pending criminal charges; (2) mother's testimony was that she did not even talk with the father and that they were incapable of dealing with one another; (3) the court was concerned about the bruising of the minor child in light of the tearful testimony of a neighbor who saw the beating of the minor son at the hands of the mother; and (4) the court was concerned that the minor son was left unattended at a swimming pool and allowed to start mother's vehicle outside of mother's present at the apartment complex where she resided.

(b) Worst parent of the year case.

Sampsel v. Sampsel, 2008 WL 1946986 (ES Tenn. App. May 5, 2008). Mother was designated primary residential parent of a 14-year old and within 8 months after the divorce was granted, father filed a petition to change custody claiming there was a material change in circumstance. The Appellate Court said that unfortunately this was one of those discouraging cases where the adults in the child's life are apparently so caught up in their anger for one another that they are either oblivious or unmoved by their negative consequences to the child. Here, mother had moved the child from Morgan County to Oak Ridge. The child's grades had drastically dropped to C's, D's, and F's when he had previously made A's and B's, he was exhibiting behavioral problems and had been suspended for fighting in school and had to be in after school detention for stealing. The child testified that he wanted to live with the father. Both parents had remarried and the child testified that he got along well with the step-mother but did not get along well with his stepfather. Father was a school teacher at the school where the child would attend and a youth minister at their church. Thus, a material

change of circumstance was found by the preponderance of the evidence due to the behavioral problems and decline in grades, the preference of the child as well as the apparent difficulty between the child and his stepfather.

(c) Frivolous Appeal.

Brady v. Gugler, 2008 WL 836089 (MS Tenn. App. March 27, 2008. Father appealed from the designation of the mother as the primary residential parent. Parties both moved to McMinnville from Memphis and had a child out of wedlock on July 5, 2002. The child remained with the mother and six months later, father filed a complaint contending that he was the father and asking that he have custody. The trial was conducted when the child was four years old. During the trial, the parties called numerous witnesses including experts in the field on psychiatry and family counseling and testified themselves. The Court-appointed psychiatrist, Dr. William Bernet, testified as a result of his psychiatric parenting evaluation and concluded that the mother was a better parent with regard to (1) her attitude toward the other parent; (2) her mental health; (3) substance abuse; and (4) continuity of placement. The Department of Children Services employee testified that the father had alleged that mother was abusing the child but that she could not corroborate that allegation and this case worker testified that mother appeared to have a very loving relationship with the child. The father appeared to be a very powerful, arrogant and demanding person both in the way he handled other matters and this litigation. On appeal, the Appellate Court awarded additional attorney's fees and found the appeal to be frivolous and awarded further fees to the mother for the appeal because the issue of law presented in this case is well-settled by the case law and the facts and actions of the trial judge showed no legitimate reason to change the law. The father failed to timely file the proper transcript and was subject to two show cause orders

from the trial for failing to meet deadlines. The trial court made references to these delays caused by father at the trial level and the pattern has continued into the Appellate Court.

Division of the Marital Estate

(a) Contribution to Appreciation.

Marciante v. Perry, 2008 WL 820502 (MS Tenn. App. March 26, 2008). After a 13-year marriage, husband was 40 years old and wife 36 years old. It was husband's second marriage and wife's first with no minor children. The appeal revolved around the classification of assets specifically premarital assets that have appreciated and substantial marital debts. Husband had owned several Florida condos and continued to own those during the marriage in his separate name. The condos were rented whenever possible and eventually paid off their mortgages. On many occasions during the marriage, husband went to Florida to work on the condos and improve them, adding to their value. The Court of Appeals affirmed the decision to classify the appreciation of those condos as marital assets stating that "although wife did not physically perform the work on the condos, her continued employment in Tennessee and her maintenance of the marital home while husband gone were 'real and significant,' though indirect contributions to the increased value of the property. Wife was ordered to pay to husband $125,000 for his interest in the marital home rather than the $38,000 which the trial court had ordered in order to make the distribution of assets equitable. This corrected distribution resulted in wife being awarded 57% of the assets and husband 43%. The Appellate Court also reversed the trial court on the division of debt finding it was equitable that the parties share the responsibility for the joint American Express account of $41,000 but that husband should pay the entire marital debt on the account that he charged $47,000 for his daughter's education.

Evidence

(a) Computer documents admitted.

Easterling v. Easterling, 2007 WL 4530831 (MS Tenn. App. December 21, 2007). American Express cardholder, Elaine Easterling, obtained a guest credit card for her future daughter-in-law with the understanding that the future daughter-in-law would reimburse her for any charges. Substantial debt was incurred on the account and the mother-in-law was forced to take out a $32,000 home equity loan to pay off the American Express leaving a balance of approximately $60,000 owed. At trial, the daughter-in-law had a judgment of $93,500 added against her. On appeal, she claimed that the American Express records, which had been printed out off the computer showing plaintiff's account activity, were inadmissible hearsay under Rule 801. The Middle Section of the Court of Appeals, Judge Bennett, in delivering the opinion, found that these records may represent the "computer's self-generated record of operation" rather than "computer stored human statements or assertions which have been retrieved from the computer." **State v. Meeks**, 867 S.W.2d 361, 375 (Tenn. Crim. App. 1993). There is Tennessee case law indicating that such self-generated computer records do not constitute hearsay and that their admissibility hinges upon the reliability of the computer system. See ***Meeks***, 867 S.W.2d at 375-376; and **State v. Hall**, 976 S.W.2d 121 (Tenn. Crim. App. 1998). In any case, the statement of evidence in the record is not clear as to whether any type of foundation was laid for this evidence. In this case, there was no need to decide if there was an error or not because the plaintiff independently testified to the amounts owed and the American Express records further supported plaintiff's testimony.

Grandparents' Visitation

(a) 78 days is not too much.

Carr v. McMillan, 2008 WL 2078058 (MS Tenn. App. May 14, 2008). Gay Carr was the mother of Eva McMillan, the mother of a 5-year old boy and wife of Scott McMillan. Eva had a prescription medication addiction and thus relied extensively on her mother to help with child care duties. Mr. McMillan was hard-working having two jobs at a time and his care also involved the husband, wife and grandson living at times with Mrs. Carr. Tragically, Eva McMillan died of a drug overdose and for a period of time Mrs. Carr continued to be very active in her grandson's life until Mr. McMillan developed a relationship with another woman and the former son-in-law and mother-in-law relationship soured. Mrs. Carr brought this present action in the Eighth Circuit Court for Davidson County to establish specific grandparent visitation pursuant to *Tenn. Code Ann*. Section 36-6-306. Mr. McMillan attacked the constitutionality of the grandparent visitation statute and the Appellate Court declined to review that issue since it had already been decided in **Larson v. Halliburton** (Tenn. Ct. App. Oct. 7, 2005) and the issue had been waived by Mr. McMillan's failure to raise it at the trial.

Mrs. Carr proved the existence of one of the six circumstances outlined in the statute for grandparent visitation because the mother was deceased, the child had resided in her home prior to the removal and there was a significant relationship between the grandchild and the grandparent. The trial court awarded Mrs. Carr 78 days of annual visitation which included a week long visit in May, June, July and August, some three-day weekends, and a portion of the Thanksgiving and Christmas holidays. The Appellate Court said that although 78 days a year appears to be on the high end of reasonable grandparent visitation, considering the facts of this case, the award of 78 days of visitation does not constitute abuse of discretion. The case

was remanded to the trial court to reconsider whether it was in the best interest of the minor child to be with the grandmother a week in May when the child's school is in Gallatin and the grandmother resides in Bellevue. The Appellate Court also modified Judge Soloman's injunction against "all of the parties involved including grandmother, the father, the two grandfathers, father's new wife and the extended family of each to say nothing about the other parties of the parties' families." The trial court limited this injunction to only those parties to the lawsuit and ruled that this had to be modified to delete the portion of the order that enjoins persons that were not parties to the action.

Grounds for Divorce

(a) Legal Separation disallowed.

Johnny Hill Sr. v. Connie Hill, 2008 WL 1822453 (MS Tenn. App. April 23, 2008). This case involved an appeal of a legal separation after a 43-year marriage where husband was 61 years old and had a trucking business and a high school education where wife was 59 years old with a G.E.D. and a spotty work history. Both parties had health issues and their marriage had been "peppered" with extramarital affairs and sometimes violent confrontations. Wife finally kicked the husband out of the house. The trial court awarded a legal separation because wife needed health insurance and prescription medication which would be prohibitively expensive if she were not covered by husband's health insurance and said that it reconsider this issue of divorce after wife became eligible for Medicare at age 65 in 6 years. The wife was awarded approximately 60% of the marital assets and husband was ordered to pay alimony *in futuro* of $2,000 per month. Husband appealed asking for an absolute divorce which was granted to him by the Appellate Court but the division of assets and alimony were

remanded since the wife would need more support to pay for her separate health insurance and medication. Thus, husband won his appeal but at a yet-to-be determined increased cost.

The Appellate Court denied the legal separation and ordered a divorce even though trial courts are generally given a certain amount of discretion in deciding which remedy of divorce or legal separation to grant. Generally, legal separations are granted only for a limited time and the Court noted that if there was no reconciliation within two years, then a divorce could be granted. In this instance, it was clear that reconciliation was extremely unlikely and there was no good reason to leave these parties in a married state for four more years until wife was eligible for Medicare. The Appellate Court cited on the reconciliation versus legal separation issue. **Haas v. Haas**, 2002 WL 1579717 and **Lingner v. Lingner**, 66 S.W.2d 749, 752 (Tenn. 1933) and **McCray v. McCray**, 1997 WL 431181 and **Edmistsen v. Edmistsen** 2003 WL 21077990.

Juvenile Court

(a) Parental Consent for 10-year old.

In re. J.M.N. Nix v. Cantrell, 2008 WL _____ (WS Tenn. App. June 13, 2008). This case involves a noncustodial parent's attempt to give consent to her 14-year old daughter to get married. After the parties were divorced, father is designated as the primary residential parent and mother had visitation. During one of mother's visitations and without telling the father, the mother took the daughter and her 18-year old boyfriend to Juvenile Court to seek permission to get married. At the Juvenile Court, the mother signed an affidavit consenting to the marriage. Based on the mother's affidavit, the Juvenile Court Judge signed an order granting the daughter and her boyfriend permission to marry. They immediately obtained a marriage license and got married. After learning of the marriage, the father filed a motion in

Juvenile Court asking to set aside its order giving the daughter permission to get married. After a hearing, the Juvenile Court granted the motion to set aside and it also set aside the prior order which rendered the daughter's married void. On appeal, it was concluded that the Juvenile Court did not abuse its discretion by setting aside the order giving the daughter permission to marry but that such marriage was voidable but not void. *See* **Coulter v. Hendrcks,** 918 S.W.2d 424, 426 (Tenn. Ct. App. 1995). A marriage between underage parties may be ratified or disaffirmed by them upon attaining the age of consent if the marriage is annulled before that time.

Jurisdiction

(a) Evidentiary Hearing Necessary.

Eugene Thomas v. Mina Thomas, 2008 WL 1899988 (ES Tenn. App. April 30, 2008). Husband and married in Washington state and lived there together for ten years. In May 1997, wife filed a petition for legal separation in Washington. While that action was pending, husband moved to Tennessee and wife remained in Washington state. The Washington state court entered the legal separation and retained jurisdiction to enter further orders as necessary to enforce the award to wife of husband's military retirement and found that wife needed continued medical coverage under husband's military retirement and specifically barred the husband from converting the legal separation to a dissolution without providing comparable, alternative health care coverage for the wife. In June 1998, husband filed his first complaint for divorce in Tennessee which was dismissed under the doctrine of prior suit pending. In June 1999, husband filed a second complaint for divorce in Tennessee which was dismissed for lack of personal jurisdiction. This was his third filing for divorce in May 2006 which was dismissed based on the Judge's discretion that jurisdiction remained in

Washington state. However, the Court of Appeals remanded the case for further proceedings to conduct an evidentiary hearing to determine the current facts of this matter because, although it might appear that husband is trying to obtain something in Tennessee that he cannot get in Washington, the facts may have changed over this long period of time, and the Court should exercise its discretion where there are two states that both have jurisdiction as to whether or not it will exercise jurisdiction, citing **Atchley v. Atchley**, 585 S.W.2d 614, 617 (Tenn. App. 1978).

Qualified Domestic Relations Orders

Cook v. Cook, 2008 WL 555692 (ES Tenn. App. February 29, 2008). This is a post-divorce action in which wife asked the court to order her ex-husband to execute a qualified domestic relations order dividing his retirement plan in accordance with their property settlement that was incorporated in the divorce decree more than 10 years ago. The parties had previously drafted, and the Court had approved several QDROs which were rejected by the plan's administrator. Wife maintained that she was supposed to receive one-third of the plan shares of stock which had appreciated considerably since the divorce. Husband asserted that she was entitled to a specific dollar amount instead. The MDA read as follows: "The wife shall receive from the husband's First Tennessee of Nashville Corporation Savings & Trust Plan one-third of this plan at First Tennessee Bank, Nashville Association. Husband will execute an assignment assigning his one-third of the plan to wife." Following a trial, the Court found that wife's portion of the plan was one-third of the cash value at the time of the divorce plus 6% interest for a total of $46,184. There was no provision in the MDA for her to share in any profit or losses or receive "in kind" stock. Had there been such a provision, the value would have been $165,014. The Appellate Court affirmed the trial court's decision.

<u>Prenuptials</u>

(a) What is necessary?

<u>Homra, et al v. Harold Nelson</u>, 2008 WL 684542 (WS Tenn. App. March 14, 2008). Husband and wife were married in 1993 in a second marriage for both and entered into an antinuptial agreement. After 10 years of marriage, Mrs. Nelson was diagnosed with Alzheimer's Disease and she had executed a durable power of attorney naming her two children from a prior marriage as her attorneys in fact. For approximately a year, Mr. and Mrs. Nelson lived in a retirement assisted living center but she eventually progressed to where she was no longer able to live there and her husband and children placed Mrs. Nelson at a nursing home in Jackson, Tennessee. The controversy arose over paragraph 3 of the parties' antinuptial agreement that required the husband "to be responsible for providing food and other daily necessities for the parties following the marriage." The trial court found that the expenses of being in a nursing home are daily necessities for Mrs. Nelson and ordered the husband to be responsible for same under the terms of the antinuptial agreement. On appeal, this was viewed as a mixed question of law and facts and Judge Crawford and Judge Kirby affirmed the trial court's opinion finding that the husband was responsible for paying the nursing home but there is a strong dissent by Judge John Everett Williams, stating that the antinuptial agreement should be reviewed in its entirety which also included that each of the parties would have separate Medicare supplements and pay for that separately as well as pay for debts separately and thus he would only hold that Mr. Nelson was obligated to provide such items as toothpaste, deodorant and toiletries but not extraordinary medical expenses.

Relocation

Billingham v. Downard, 2008 WL 565716 (WS Tenn. App. March 4, 2008). The mother sought to relocate out of state to a job transfer which would have resulted in a significant increase in pay. However, when the matter came to be heard, the job opportunity was no longer available. The trial court made some statements that they had lost the opportunity to move and if she came back in in two or three months to ask him to move "I would approve of a certain limitations or exceptions, whatever we need to do." Father appealed arguing that the trial court should have dismissed the petition due to its mootness, and the Court of Appeals agreed and remanded the case to the trial court for an order of dismissal.

Termination of Parental Rights

King v. King, 2008 WL 490657 (MS Tenn. App. February 22, 2008). In a case out of Cannon County, a mother and stepfather and two minor children filed a petition against the natural father to terminate his parental rights. In a claim that the father was not exercising his residential time during the four months' filing of the petition. Father was *pro se* and argued that he could not afford the cost of transportation between Giles County and Cannon County on his limited income. Mother and stepfather appealed contending that there is clear and convincing evidence that father's willful failure to visit because he had a vehicle that he could have afforded insurance for and the cost of driving was within his financial means. The Court of Appeals determined that the trial court committed reversible error when it did not appoint a guardian *ad litem* to represent the best interest of the minor children as mandated under *Tennessee Supreme Court* Rule 13, Section 1(d)(2) and in not finding that father was indigent and appointing counsel to represent him.

Vaughn v. Vaughn, 2008 WL 162543 (WS Tenn. App. January 18, 2008). Father had the audacity to appeal an upward deviation in child support of $500 per month for his special needs minor child who was not ambulatory, had seizures and required 24-hour care including being turned every two hours through the night. Mother was obviously unable to work full-time. The parties were divorcing because the father had an affair with his secretary, fathered a child out-of-wedlock, but at the same time, his wife became pregnant with their second child who was healthy and interacted with her older sister. The Appellate Court affirmed the award of *in futuro* alimony to the mother, of the upward deviation for child support of $500 a month and the $15,000 attorney's fees award to the mother. Father also raised the issue that he was not in arrears in child support. The parties executed a Marital Dissolution Agreement that said there would be review in six months. Nobody reviewed it, father continued paying child support for five months and then stopped. At the time of trial, he had a $4,756 arrearage. Father tried to claim that the MDA had expired, but the Court interpreted it as a contract and found part performance continued and that he had, despite the agreement to expire, continued to perform as before there was an implication of mutual consent to a new contract containing the same provisions as before.

Torts

Josh Newell v. Jeff Maitland, et al., 2008 WL 2122331 (WS Tenn. App. May 21, 2008). On October 12, 2005, John Newell was arrested by Gibson County Sheriff and charged with rape of an 11-year old victim. The victim had been interviewed by the Sheriff and an employee of the Tennessee Department of Children's Services. Initially, the victim insisted that she did not remember the alleged incident but eventually told interviewers that the incident did occur. Newell entered a plea of *nolo contendere* to the offense of aggravated

assault and the child rape charge was dismissed. He then turned around and sued the sheriff, the county mayor, the county itself, the Department of Children's Services, a supervisor and the District Attorney General. The trial court dismissed all the claims against state employees for lack of jurisdiction and dismissed the claim against the county employees pursuant to the Tennessee Governmental Tort Liability Act, *Tenn. Code Ann*. Section 29-20-101, *et seq*. The sheriff's deputy who was also named as a defendant in his individual capacity was dismissed on summary judgment and all of the dismissals were affirmed on appeal.