TENNESSEE
FAMILY LAW LETTER

A MONTHLY DIGEST OF TENNESSEE FAMILY LAW DEVELOPMENTS
W. WALTON GARRETT • EDITOR

Vol. 30, No. 3
January 2016

Highlight

- The parties, working together, formed a nonprofit corporation and a Christian radio station. The husband was the CEO, the wife the sales manager. This was initially their employer and income source. The business became valuable. The wife became less active. The husband sued for divorce. The wife's answer requested custody, child support, alimony, and equitable property division of the marital assets, including the corporation. She named the corporation as a party. The corporation moved to dismiss. The motion was granted. State and federal law prohibit the distribution of the assets of a nonprofit corporation to an individual other than as reasonable compensation for services. The trial judge awarded the wife transitional alimony and child support. The mother appealed. The denial of classifying the corporation as a marital asset was affirmed. The alimony award was vacated and remanded to the trial court for an award of alimony in solido. Considering the wife's contribution to the husband's earning ability, I believe this is the equivalent to restitution alimony recognized in other states. *Lubell v. Lubell,* 30 TFLL 3- 4

Table of Cases

Descriptive Word Index

TENNESSEE FAMILY LAW LETTER (ISSN 0890-5355) is published monthly for $297 per year plus sales tax by M. Lee Smith Publishers®, a division of BLR®—Business & Legal Resources, 100 Winners Circle, Suite 300, Brentwood, TN 37027, 877-826-5297 or cwatson@blr.com.

Court of Appeals
Eastern Section

THIS WAS A 30-YEAR MARRIAGE. BOTH OF THEIR CHILDREN WERE ADULTS. WHEN THE PARTIES WERE DIVORCED THE DECREE PROVIDED FOR REHABILITATIVE ALIMONY FOR 40 MONTHS. THE WIFE, A PHARMACIST, PLANNED TO UPDATE HER LICENSE. THE HUSBAND HAD A $1,200,000 LIFE INSURANCE POLICY. A CONSTRUCTIVE TRUST WAS IMPOSED ON THE INSURANCE POLICY WITH THE WIFE AS TRUSTEE. THE WIFE, THE CHILDREN, AND THE HUSBAND'S FATHER WERE DESIGNATED AS BENEFICIARIES. THE WIFE DID NOT ENROLL IN AN INSTITUTION FOR FURTHER TRAINING, THE HUSBAND REMARRIED, THE HUSBAND'S FATHER DIED. THE HUSBAND SOUGHT TERMINATION OF ALIMONY AND MODIFICATION OF THE INSURANCE TRUST. THE CHANCELLOR DENIED BOTH REQUESTS. THE HUSBAND APPEALED. THE COURT OF APPEALS AFFIRMED THE DENIAL OF ALIMONY MODIFICATION AND REVERSED THE ORDER DENYING A CHANGE OF BENEFICIARY OF THE ONE-THIRD INTEREST IN THE INSURANCE POLICY DESIGNATED TO THE HUSBAND'S FATHER. THE HUSBAND APPEALED. THE ORDER DENYING ALIMONY TERMINATION WAS AFFIRMED. THE WIFE WAS PREPARING FOR TRAINING TO RENEW HER LICENSE. THE ORDER DENYING MODIFICATION OF THE INSURANCE TRUST WAS REVERSED. IT WAS NOT PROPERTY DIVISION. THE HUSBAND RETAINED HIS INTEREST IN DESIGNATION OF

THE BENEFICIARY OF THE ONE-THIRD OF THE INSURANCE PROCEEDS. (***Helton v. Helton,*** 30 TFLL 3-1, 40 TAM 49-12, Tenn. Ct. App., E.S., Nov. 3, 2015, McClarty, 7 pp.) The parties were divorced in the Chancery Court for Anderson County following a 30-year marriage. There were two adult children of the marriage. Each party owned a life insurance policy. The amount of the husband's policy was $1,200,000. The wife was a pharmacist. Her license was not current. She needed to pursue additional education to update her license. The husband had the ability to pay.

The divorce decree provided the husband would pay $2,000 monthly rehabilitative alimony for 40 months following the sale of the residence. The husband's life insurance policy was held subject to a constructive trust, the wife as trustee. The wife was designated beneficiary of a one-third interest, each child was designated beneficiary of a one-sixth interest. The father designated his father as the beneficiary of the remaining one-third interest.

The husband remarried. His father died. The wife did not enroll in an institution for further training. The husband filed a motion requesting termination of the rehabilitative alimony and for modification of the insurance trust to designate his wife as beneficiary of the one-third interest in his insurance policy that was previously designated for his father. The trial judge, Chancellor Lantrip, Chancery Court for Anderson County, held the insurance policy trust was not subject to modification because it was property division. The wife had testified she was studying to prepare for pharmacy training. The chancellor found that she was rehabilitating herself and denied modification of the alimony award. There were no changed circumstances. The husband appealed. The Court of Appeals affirmed the denial of alimony modification and reversed the denial of modification of the husband's life insurance policy. The opinion holds the husband retained ownership of the life insurance policy, subject to the constructive trust. After the death of his father he could seek modification of the trust provision. The wife's request for a fee award for frivolous appeal was denied.

Comment: When the parties were divorced, the issue of potential change in beneficiary designation was not addressed. The wife argued this was not an issue because the policy was awarded to her. In a typical situation, the decree will require the insured to keep an insurance policy in effect and deny the insured the right to change the beneficiary. The named beneficiary holds a vested interest in the policy, not subject to modification. There is a need for a provision in the agreement for a change in the beneficiary designation if the beneficiary predeceases the insured.

THE PARTIES WERE MARRIED IN 1999. THE WIFE SUED FOR DIVORCE IN 2012. THERE WERE TWO CHILDREN OF THE MARRIAGE, AGES 11 AND 7 AT THE TIME OF THE TRIAL. BOTH PARENTS WERE EMPLOYED. THE WIFE HAD CHANGED JOBS WITH INCREASED INCOME. AFTER THE JOB CHANGE, THEIR INCOMES WERE RELATIVELY EQUAL. THE HUSBAND HAD NOT PAID CHILD SUPPORT WHILE THE CASE WAS PENDING. THE PARENTING PLAN WAS SUCCESSFULLY MEDIATED EXCEPT CHILD SUPPORT ARREARAGES AND EQUITABLE DIVISION OF THE ASSETS AND DEBT ALLOCATION. THE TRIAL JUDGE AWARDED THE WIFE BOTH TAX EXEMPTIONS AND RETROACTIVE CHILD SUPPORT TO THE DATE OF THE PETITION. DEBTS AND ASSETS WERE RELATIVELY EQUALLY DIVIDED EXCEPT ONE CREDIT CARD BALANCE. THIS WAS MODIFIED BY THE TRIAL JUDGE. THE HUSBAND APPEALED THE AWARD OF BOTH TAX EXEMPTIONS TO THE WIFE, THE CLASSIFICATION OF THE ELAN CREDIT CARD DEBT AS MARITAL, AND THE CALCULATION OF CHILD SUPPORT ARREARAGES. THE WIFE REQUESTED A FEE FOR THE APPEAL. THE TAX EXEMPTION ALLOCATION WAS HELD NOT AN ABUSE OF DISCRETION. THE ARREARAGES CALCULATION WAS MODIFIED. THE CREDIT CARD DEBT CLASSIFICATION AS MARITAL WAS AFFIRMED. THE WIFE'S REQUEST FOR A FEE AWARD WAS HELD WAIVED. IT WAS NOT RAISED IN THE APPEAL. (***Culpepper v. Culpepper,*** 30 TFLL 3-2, 40 TAM 49-14, Tenn. App., E.S., Nov. 4, 2015, Frierson, 13 pp.) The parties were married in 1999, separated in 2012, and divorced in 2014. There were two children, ages 11 and 7 at the time of the trial. The parenting plan was successfully mediated. The mother was designated the primary residential parent with 229 days of parenting time. The issues of child support and asset division were not successfully mediated.

At the time of the trial, the mother was earning $71,000 a year, the father $78,000. The mother had recently changed jobs. She previously earned $51,000 annually. The father had not paid child support while the case was pending. The mother requested retroactive child support to the date of filing the petition. Initially the debts were allocated relatively equally except for the Elan credit card balance of $13,000. The mother testified this was for family needs, the husband testified he was unfamiliar with it. Judge Thomas, Circuit Court for Hamilton County, held it was a marital debt and modified. Judge Thomas awarded both tax exemptions to the mother. The father was ordered to pay retroactive child support to the date of filing the petition. The applicable worksheet calculated arrearages based on the mother's higher income. This was held a calculation error and modified to $9,776. The father appealed. The Court of Appeals affirmed. The mother was denied a fee for the appeal. She had not raised this issue and it was held waived.

Comment: The father argued that the award of both tax exemptions to the mother was an abuse of discretion. His income was greater so the exemption would benefit him more. The guidelines presume the exemption will be awarded to the higher income parent. Their incomes were

similar. The exemption allocation was not an abuse of discretion and was affirmed.

THIS WAS A LONG-TERM MARRIAGE. THE PARTIES' RESIDENCE WAS ON A CATTLE FARM THAT HAD BELONGED TO THE WIFE'S FAMILY AND WAS GIFTED TO THEM BY THE WIFE'S MOTHER. THE WIFE SUED FOR DIVORCE. THE HUSBAND TOOK A SUBSTANTIAL SUM OF MONEY AND PLACED IT IN ANOTHER ACCOUNT. HE SOUGHT RECONCILIATION, THE WIFE SOUGHT A DEED FROM THE HUSBAND CONVEYING HIS INTEREST IN THE FARM TO HER. THEY NEGOTIATED FOR MARITAL COUNSELING AND RECONCILIATION. THE HUSBAND DEEDED HER THE FARM. SHE PROCEEDED WITH THE DIVORCE ACTION. THE TRIAL JUDGE CLASSIFIED THE FARM AS THE WIFE'S SEPARATE PROPERTY, THE OTHER ASSETS AS MARITAL. THE PARTIES HAD AGREED TO EQUAL DIVISION OF MARITAL PROPERTY. THE WIFE PREPARED A PROPOSED DECREE, THE TRIAL JUDGE APPROVED IT. THE HUSBAND APPEALED. THE COURT OF APPEALS AFFIRMED THE FINDING THE FARM WAS THE WIFE'S SEPARATE PROPERTY. THE TRIAL JUDGE HAD NOT CONSIDERED THE EQUITABLE DIVISION FACTORS. THE DECREE REVERSED AND REMANDED. THERE IS A VERY INTERESTING DISCUSSION OF THE HUSBAND'S ARGUMENT THAT THE PARTIES WERE IN A CONFIDENTIAL RELATIONSHIP, THAT THE WIFE NEGOTIATED THE POSSIBILITY OF RECONCILIATION IN BAD FAITH. THERE IS ALSO AN INTERESTING DISCUSSION OF THE ENTRY OF A TAPE RECORDING CONCERNING THEIR CONVERSATION RELATING TO COUNSELING AND THE WIFE'S RETURN TO THE HOME. (***Draper v. Draper,*** 30 TFLL 3-3, 40 TAM 50-11, Tenn. Ct. App., E.S., Nov. 5, 2015, McClarty, 13 pp.) The parties were married in 1973. There were three adult children. After 40 years the wife sued for divorce, alleging inappropriate marital conduct. The husband responded by removing $173,434 from a joint account. He filed an answer denying misconduct.

The wife's principal concern was retaining a 95-acre cattle farm where the marital home was located. It had been in her family for many years. The wife's mother had deeded it to the parties in 1989 and 2009. It was valued at $326,000.

Both were employed. The wife earned $114,000 a year with the same employer for 27 years. The husband had difficulty keeping a job. He earned $67,000 a year and was 64 years old. The wife testified he had a controlling nature and a bad temper and that she was afraid of him.

The husband wanted reconciliation. He offered to return the money and to deed her the farm if she would return to the home and enter counseling. The wife would not agree to his conditions but agreed to counseling. The husband transferred the farm to the wife. He testified the transfer was not a gift, but an exchange for counseling.

The case was tried in 2014. The wife testified she attended nine counseling sessions with the husband and that there were no conditions on the transfer of the farm to her. After she refused to return to the marital residence he became angry, signed the deed, and grabbed her arm.

The husband introduced a recording of a conversation with the wife where she requested ownership of the farm in exchange for continued counseling and dismissal of the divorce complaint. They did not reach an agreement at that time. The wife discontinued counseling after the husband deeded his interest in the farm to her. Ten days later he filed an action to set aside the quitclaim deed. At the trial, the husband testified he grabbed the wife's arm as a gesture of endearment. He denied ever physically or verbally abusing the wife.

The trial judge, Judge Thomas, Circuit Court for Hamilton County, classified the farm as the wife's separate property. The other assets were classified as marital and divided evenly. The husband appealed the classification of the farm as separate property and the equitable division. The Court of Appeals affirmed the classification of the farm as the wife's separate property and reversed the division of the other assets. The parties had agreed to an equal division of the marital assets. The trial court's memorandum decision did not address the effect of the classification of the farm as separate property on the remaining assets. The wife, pursuant to the court's order, prepared the decree. The appellate opinion states the trial judge did not consider the statutory factors as if the value of the farm increased because of the husband's alleged substantial contribution to its preservation.

The wife objected to the admission of a tape recording of her conversation with the husband. She argued it violated Rule 408, Tennessee Rules of Evidence, because it documented her offers of compromise. The husband was seeking to establish undue influence, bad faith, or fraud. The opinion holds the admission of the tape was not an abuse of discretion.

The more interesting issue in the opinion relates to the husband's argument that his quitclaim deed to the farm and marital residence should be set aside because the parties were in a confidential relationship and the wife had negotiated in bad faith by appearing to be open to reconciliation and willing to return to the home and engage in counseling when her interest was to get him to quitclaim the farm to her, then obtain a divorce. The trial judge held the farm was the wife's separate property. The Court of Appeals affirmed. Prior to the trial, the parties agreed the marital property would be equally divided. The property other than the farm was classified as marital and the wife was directed to prepare a judgment pursuant to the bench order. The decree divided the assets but did not address the statutory

factors. On appeal the husband alleged the property division was not equitable. The order dividing the assets was reversed and remanded for equitable division pursuant to the statutory factors.

Comment: Traditionally, parties are not found to be in a confidential relationship when they are negotiating for a divorce. Here the husband obviously believed he was negotiating for a reconciliation. Public policy favors reconciliation and enforcement of post-nuptial agreements where appropriate. The confidential relationship imposes a fiduciary duty to make full disclosure. It can be inferred here that the wife did not make a promise of reconciliation in good faith; her refusal to return immediately angered the husband and he immediately inappropriately responded by grabbing her arm.

THE PARTIES WERE MARRIED IN 1976. BOTH HAD EXPERIENCE IN THE RADIO BUSINESS. IN 1992 THEY FOUNDED A NONPROFIT CORPORATION THAT OWNED A CHRISTIAN RADIO STATION, THE HUSBAND AS CEO, THE WIFE AS SALES MANAGER. THEY ADOPTED TWO CHILDREN, ONE WITH SEVERE AUTISM. THE WIFE BECAME INACTIVE IN THE BUSINESS. THE HUSBAND SUED FOR DIVORCE. THE WIFE ANSWERED, REQUESTING CUSTODY, CHILD SUPPORT, ALIMONY, AND PROPERTY DIVISION. SHE ALLEGED THE CORPORATION SHOULD BE CLASSIFIED AS A TANGIBLE MARITAL ASSET SUBJECT TO EQUITABLE DIVISION AND NAMED THE CORPORATION AS A PARTY. THE CORPORATION'S MOTION TO DISMISS WAS GRANTED. THE TRIAL JUDGE AWARDED THE WIFE TRANSITIONAL ALIMONY FOR 10 YEARS WITH CHILD SUPPORT INCLUDED FOR EIGHT YEARS AND DENIED ALIMONY IN SOLIDO. THE WIFE APPEALED THE DISMISSAL OF THE CORPORATION AS A PARTY, THE TYPE, DURATION, AND AMOUNT OF ALIMONY, AND THE INCLUSION OF CHILD SUPPORT WITH A CAP. THE COURT OF APPEALS MODIFIED IN PART, AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR AN ALIMONY AWARD, BOTH IN FUTURO AND IN SOLIDO. THE SIGNIFICANT ISSUES ADDRESSED INCLUDED THE DENIAL OF THE CORPORATION AS A MARITAL ASSET, THE MODIFICATION OF TRANSITIONAL ALIMONY TO ALIMONY IN FUTURO, THE REMAND FOR AND AWARD OF ALIMONY IN SOLIDO, AND THE CALCULATION OF THE CHILD SUPPORT ORDER. (***Lubell v. Lubell,*** 30 TFLL 3-4, 40 TAM 49-13, Tenn. Ct. App., E.S., Nov. 12, 2015, Frierson, 33 pp.) The parties were married in 1976. The husband sued for divorce in 2012. There were two adopted children, both minors. They both attended private school; the son was autistic.

Both parties had radio station experience. In 1992 they formed a nonprofit corporation, Partners for Christian Radio Media, Inc. (Partners), and started a radio station. The husband was the CEO, the wife was the sales manager initially. By the time of the trial she no longer worked for the station. She was attending the Church of God Seminary and preparing to be a sales representative of a drug manufacturer.

The wife filed an answer and cross-petition. She sought divorce, custody, child support, alimony in solido and in futuro, and equitable distribution including Partners as a marital asset. She argued that the corporate veil should be pierced because Partners was an alter ego of the husband. She named Partners as a third party. Partners filed a motion to dismiss. State and federal law prohibits distribution of the assets of a nonprofit other than as reasonable compensation. The motion to dismiss was granted.

The case was tried in December 2013. Judge Sharp approved the agreed parenting plan. He ordered transitional alimony in decreasing amounts for 10 years, the first six to include child support with the combined support capped. Partners was held not a marital asset. Both parties filed motions to amend. Some modification was ordered and a final order entered. The mother appealed. The Court of Appeals reversed the alimony award, the child support calculation, and the denial of alimony in solido and remanded.

On appeal, the order dismissing Partners as a party was affirmed and Partners was held not a marital asset. The alimony award was modified from transitional for 10 years to in futuro and the combination of spousal support and child support was vacated, the amount of the monthly payment was affirmed, and the cap removed. The wife was held entitled to alimony in solido and this issue was remanded. The amount of the father's income for determining child support was calculated by deducting the private school expenses from his income. This was held error. This issue was remanded for recalculation with the private school expenses to be calculated as a deviation from the amount presumed from the guidelines.

Comment: Several states have recognized a fifth kind of alimony—restitution alimony, based on the reasonable expectation of future earnings from an intangible asset. The principal application has been when there is a relatively short-term marriage and one spouse attains a professional degree or license and the other spouse made a substantial contribution during the marriage. I believe this issue was resolved in the 1983 amendments to TCA 36-5-101 (d) including, as a factor, the contribution a spouse has made to the earning capacity of the other, *Adams v. Adams,* 1994WL543493, 9 TFLL 2-14 (TCA 1994). Although this was a long-term marriage, the wife was a co-founder of the corporation and had made a substantial contribution over the years and the business was valued at $1,294,516 with annual income of $2,157,980. Under the circumstances it seems appropriate that she receive something for her contribution.

THE PARTIES WERE MARRIED IN 1997. THEIR CHILD WAS BORN IN 2006. THE FATHER WAS INJURED IN A MINE ACCIDENT IN 2005. THEY WERE DIVORCED IN 2009. THE MOTHER GOT CUSTODY. THE FATHER GOT VISITATION. HE BECAME ADDICTED TO PAIN MEDICATION. HIS APPLICATION FOR SOCIAL SECURITY DISABILITY BENEFITS WAS DENIED. HE CITED THE MOTHER FOR CRIMINAL CONTEMPT FOR HER INTERFERENCE WITH VISITATION AND SHE WAS FOUND GUILTY. HE CITED HER FOR CRIMINAL CONTEMPT A SECOND TIME AND SHE AND HER HUSBAND REQUESTED TERMINATION OF THE FATHER'S PARENTAL RIGHTS. THE GROUNDS ALLEGED WERE ABANDONMENT FOR NONSUPPORT, NONVISITATION, AND CHILD'S BEST INTEREST. THE FATHER DENIED WILLFULNESS. THE MOTHER TESTIFIED THAT SHE TOOK THE CHILD TO THE PICK-UP PLACE FOR FOUR MONTHS AND THE FATHER DID NOT SHOW. HIS MOTHER AND SISTER WERE SUPPORTING THE FATHER. THE TRIAL JUDGE HELD THE PROOF OF WILLFUL NONSUPPORT WAS NOT PROVED. HE GRANTED TERMINATION FOR NONVISITATION AND CHILD'S BEST INTEREST. THE FATHER APPEALED. THE COURT OF APPEALS REVERSED THE FINDING THAT NONSUPPORT WAS NOT WILLFUL AND AFFIRMED THE FINDINGS OF ABANDONMENT BY NONVISITATION AND CHILD'S BEST INTEREST. (***In re Hope A.,*** 30 TFLL 3-5, 40 TAM 50-10, Tenn. Ct. App., E.S., Nov. 17, 2015, McClarty, 12 pp.) The parties were married in 1997. A child was born to the marriage in 2006. In 2005 the father's back was broken in a mine accident. The parents were divorced in 2009. The mother got custody. The father was awarded visitation. The mother interfered with visitation and was found guilty of criminal contempt. Both parties were remarried in 2010. The father filed a second criminal contempt citation. The mother and stepfather filed a petition to terminate the father's parental rights. The mother admitted terminating the father's visitation after a no-contact order was entered. She testified that she took the child to the pick-up location and the father did not come. He admitted no visits between November of 2013 and February of 2014. He admitted he had not paid child support. He testified he had been denied Social Security disability benefits and claimed inability to pay. His mother was providing him up to $1,500 a month for drugs and tobacco.

The trial judge, Judge Blackwood, sitting in the Juvenile Court for Campbell County by designation, granted termination of the father's parental rights for abandonment and child's best interest. He denied termination for nonsupport because willfulness was not proved by clear and convincing evidence. The Court of Appeals reversed the determination that nonpayment of child support was not willful. The findings of abandonment by nonvisitation and child's best interest were affirmed.

Comment: The father apparently believed he would eventually be awarded Social Security benefits if he did not get a job. He had allowed his house to become dangerous and was living with his sister. He was using gifts from his mother to purchase drugs on the street without paying any support for his child. He had been denied contact with the three children of his wife. There were changed circumstances and the father had a bad relationship with his daughter who became ill following visitation. After listening in on a telephone conversation between father and daughter, the guardian *ad litem* had obtained a no-contact order.

IN THIS POST-DIVORCE PROCEEDING, THE FORMER HUSBAND REQUESTED THE TRIAL JUDGE RECUSE HIMSELF. HE ALLEGED A PATTERN OF RULING DENYING HIM OF HIS RIGHTS COUPLED WITH OTHER BIAS AGAINST HIM. JUDGE PUCKETT DENIED THE FORMER HUSBAND'S MOTION TO RECUSE. THE FORMER HUSBAND FILED A RULE 10B EXPEDITED APPEAL. THE APPELLATE JUDGES REVIEWED THE RECORD AND SUPPORTING DOCUMENTS AND DETERMINED NO ANSWER OR ORAL ARGUMENT WAS REQUIRED. THE FORMER HUSBAND HAD NOT ALLEGED CONDUCT BY THE TRIAL JUDGE STEMMING FROM AN EXTRAJUDICIAL SOURCE LEARNED FROM SOMETHING OTHER THAN PARTICIPATION IN THE CASE. (***Westberry v. Westberry,*** 30 TFLL 3-6, 40 TAM 51-18, Tenn. Ct. App., E.S., Nov. 17, 2015, McClarty, 4 pp.) In this post-dissolution modification proceeding, the former husband filed a motion requesting the trial judge, Judge Puckett, Circuit Court for Bradley County, recuse himself. Judge Puckett declined and Mr. Westberry filed a Supreme Court Rule 10B appeal.

Appellant alleged that a number of incidents evidenced bias by Judge Puckett including failure to provide notice of wage assignment, error in computing the amount, requirement of direct payment, violation of privacy, and denial of a contempt motion. Judge Puckett's denial stated the appellant had stated no grounds for recusal in his motion to recuse that were sufficient to support recusal. The appellate judges reviewed the petition and supporting documents and determined that no answer was required and no oral argument was unnecessary. The record provided did not demonstrate error in the denial of the motion to recuse. To support disqualification of a trial judge the bias or prejudice alleged must be of a personal character that stems from an extrajudicial source resulting from something other than what the judge has learned in the case. Erroneous rulings without more do not justify disqualification.

Comment: When a party appeals the denial of a motion to recuse, the appellate judges will initially review the petition and supporting documents and determine whether an

answer is needed. If it is determined no answer is required, the court may act summarily on the appeal. Otherwise, the court may require an answer by other parties. It is intended the court will act on an expedited basis upon a de novo standard of review. In the exercise of discretion, the court may waive oral argument.

THE PARTIES WERE MARRIED IN 2012. THEY SEPARATED IN 2013. THE HUSBAND WAS CONVICTED OF ASSAULT ON THE WIFE AND SENTENCED TO PRISON IN ARKANSAS. THE WIFE SUED FOR DIVORCE IN TENNESSEE. ARRANGEMENTS WERE MADE FOR THE HUSBAND'S PARTICIPATION BY TELEPHONE. TRIAL WAS INITIALLY SCHEDULED FOR MAY 7, 2014. THE HUSBAND WAS RELEASED FROM PRISON. HIS REQUEST FOR A CONTINUATION WAS GRANTED; THE TRIAL WAS RESCHEDULED FOR MAY 21, 2014. THE MOTHER'S REQUEST FOR AN *EX PARTE* PROTECTION ORDER WAS GRANTED. THE HUSBAND WAS REQUIRED TO MEET WITH HIS PROBATION OFFICER. HE CALLED AND REQUESTED A CONTINUANCE. THIS WAS REFUSED. WHEN HE ARRIVED AT 10:15 THE TRIAL HAD ENDED. HE EMPLOYED AN ATTORNEY AND FILED A RULE 60.02 MOTION TO AMEND FOR ABUSE OF DISCRETION. THIS WAS DENIED. THE TRIAL JUDGE OBSERVED HE GOT THE ONLY ASSET WITH AN EQUITY, HIS MOTORCYCLE. HE WAS NOT PREJUDICED BY THE DENIAL OF A CONTINUANCE. THE HUSBAND APPEALED. THE TRIAL COURT DECISION DENYING THE RULE 60.02 MOTION WAS AFFIRMED. (***Hines v. Hines,*** 30 TFLL 3-7, 40 TAM 51-17, Tenn. Ct. App., E.S. at Nashville, Nov. 20, 2015, Susano, 8 pp.) The parties were married in February 2012. They separated in August 2013. The husband was found guilty of domestic abuse and sentenced to prison in Arkansas. The wife sued for divorce in December 2013 in the Circuit Court for Rutherford County. She made arrangements for the husband to participate by telephone. In March 2014, the husband requested a 180-day continuance to allow him time to employ an attorney. The wife filed a motion for default judgment that was denied. The husband was released from prison on May 1, 2014. The wife obtained an *ex parte* protection order that day. The husband's request for a continuance was granted. The trial date was May 21, 2014, at 9:00 a.m. The wife and her witness appeared. The husband called and requested a delay. This was denied. He appeared at 10:45. The trial was ended. The wife was granted the divorce for the husband's inappropriate conduct. The husband employed an attorney and filed a Rule 60.02 motion requesting a new trial. He alleged the property distribution and debt allocation were not equitable. Judge Taylor held the only asset with an equity was the husband's motorcycle and this was awarded to him. He got the property he requested and the asset distribution favored him.

The husband appealed. He alleged the denial of a continuance was an abuse of discretion. The wife's obtaining a protection order that resulted in his probation officer not allowing him to travel to Murfreesboro caused his late appearance and he was required to use public transportation. The opinion holds the husband failed to establish that the trial judge abused his discretion by conducting the trial in his absence after his failure to appear.

Comment: The opinion holds that an appellate court cannot interfere with a trial court decision to grant or deny a continuance unless the decision causes prejudice to the party seeking the delay. No injustice to the husband was caused. He got the property he requested. The grounds for divorce, inappropriate marital conduct, and imprisonment for a felony were obvious. The husband had been convicted of domestic assault on the wife and sentenced to prison.

THE PLAINTIFF FILED SUIT IN THE CHANCERY COURT FOR HAMILTON COUNTY TO DECLARE HIS PARENTS' 1958 DIVORCE IN THE CIRCUIT COURT FOR RHEA COUNTY WAS VOID FOR LACK OF JURISDICTION OVER THE PARTIES THAT HE ALLEGED TO BE RESIDENTS OF GEORGIA. HIS MOTHER HAD REMARRIED. SHE AND HER HUSBAND HAD ACQUIRED REALTY IN TENNESSEE AND HAD ADOPTED A DAUGHTER. THE MOTHER DIED INTESTATE. THE HUSBAND AND DAUGHTER HAD CONVEYED THE PROPERTY TO THE TURNERS WHO HAD OBTAINED A MORTGAGE. PLAINTIFF REQUESTED THE DIVORCE BE HELD VOID AND HE AND THE DAUGHTER BE HELD OWNERS OF THE PROPERTY BY INTESTACY. THE TURNERS AND THE MORTGAGE COMPANY FILED MOTIONS TO DISMISS FOR WANT OF A CAUSE OF ACTION. THE CHANCELLOR GRANTED THE MOTION. THE PLAINTIFF APPEALED. THE COURT OF APPEALS AFFIRMED. THE PLAINTIFF'S SUIT WAS A COLLATERAL ATTACK ON THE JURISDICTION OF THE DIVORCE COURT. THE DECREE DID NOT SHOW IT WAS VOID ON ITS FACE OR ON THE RULE DOCKET. VALIDITY OF DIVORCE IS PRESUMED. A TENNESSEE SUPREME COURT CASE IS CITED FOR A HOLDING THAT THE VALIDITY OF A DIVORCE DECREE CAN ONLY BE CHALLENGED FOR LACK OF JURISDICTION OF THE SUBJECT MATTER OR ON AN ISSUE OUTSIDE THE PLEADINGS. (***Kelley v. Varner,*** 30 TFLL 3-8, 40 TAM 51-11, Tenn. Ct. App., E.S., Nov. 23, 2015, Swiney, 8 pp.) The petitioner, Stephen L. Kelley, filed suit in the Chancery Court for Hamilton County to invalidate a 1958 divorce judgment in the Circuit Court for Rhea County. The MDA provided the wife, Mary J.L. Kelley, was awarded real property as alimony. The wife was awarded custody of her son, Stephen. Mrs. Kelley remarried to Kenneth D. Varner in Georgia in November 1958. They adopted a child, Aliceson. They purchased property

in Tennessee. Mrs. Varner died intestate in August 2011. After her death Mr. Varner and Aliceson conveyed property in Chattanooga to Noel and Jill Turner. The Turners mortgaged the property.

In July 2014, Stephen L. Kelley sued Mr. Varner, Aliceson Varner, the Turners, and the mortgage company requesting the Varner marriage be declared void and that he and Aliceson be determined to be the heirs of Mary J.L. Kelley. He argued that the Tennessee 1958 divorce was void because the Kelleys were residents of Georgia at time of the divorce. The Turners and the mortgage company filed motions to dismiss for failure to state a cause of action. The trial judge, Chancellor Fleenor, Chancery Court for Hamilton County, dismissed Mr. Kelley's suit and he appealed. The Court of Appeals affirmed. The judgment holds the suit was a collateral attack on the divorce judgment for want of jurisdiction over the parties and the record did not show the court did not have jurisdiction on the face of the decree or on the rule docket. There was a conclusive presumption that the divorce court had jurisdiction over the parties.

Comment: The opinion cites the Supreme Court case of *Gentry v. Gentry,* 19 TFLL 10-2, 924 SW2d 678 (Tenn. 1996), and Gibson's Suits in Chancery, Section 228, as authority that a divorce decree is only void and subject to attack when the trial court lacks general jurisdiction of the subject matter and rules on a matter wholly outside the pleadings. Decrees not appearing on their face to be void are absolute proof against collateral attack and parol proof is not admissible to show any defect in the proceeding or in the decree.

MEMORANDUM OPINION: THE PARTIES WERE MARRIED IN 1996. THE MOTHER FILED SUIT FOR DIVORCE IN 2009. THERE WERE THREE CHILDREN; THE OLDEST, LEANNA, WAS 10. IN JULY 2014, THE PARTIES APPEARED BEFORE THE TRIAL JUDGE TO ANNOUNCE A SETTLEMENT. BOTH PARTIES WERE SWORN AND TESTIFIED THEY AGREED TO THE TERMS OF THE SETTLEMENT. THE FATHER WAS DESIGNATED THE PRIMARY RESIDENTIAL PARENT OF THE YOUNGER CHILDREN WITH EQUAL PARENTING TIME. THE MOTHER WAS DESIGNATED THE PRIMARY RESIDENTIAL PARENT OF THE 17-YEAR-OLD WITH NO PARENTING TIME FOR THE FATHER. THE CHILD COULD VISIT AT HER DISCRETION. A FINAL ORDER WAS FILED IN OCTOBER 2014 AND THE FATHER APPEALED *PRO SE*. ON APPEAL HE ARGUED THE TERMS OF THE SETTLEMENT WERE INCONSISTENT WITH THE AGREEMENT, ESPECIALLY THE DENIAL OF PARENTING TIME WITH THE OLDER CHILD. THE FATHER'S STATEMENT OF THE ISSUES DID NOT CONCISELY STATE THE ISSUES APPEALED. HIS ARGUMENT DID NOT CONTAIN CITATION TO LEGAL AUTHORITY. THE MOTHER REQUESTED THE FATHER'S APPEAL BE DESIGNATED FRIVOLOUS AND SHE BE AWARDED A FEE. THE CHANCELLOR'S FINAL ORDER WAS AFFIRMED. THE CASE WAS REMANDED FOR A FEE AWARD FOR FRIVOLOUS APPEAL. (***Beeler v. Beeler,*** 30 TFLL 3-9, 40 TAM 51-12, Tenn. Ct. App., E.S., Nov. 21, 2015, Swiney, 6 pp., Memorandum Opinion.) The parties were married in 1996. There were three children, the oldest was age 17 in 2014. The mother sued for divorce in the Circuit Court for Knox County in 2009. In July 2014, the parties appeared before the trial judge, Chancellor Williams, sitting by interchange to announce an agreement. The terms were announced. The father was sworn and he testified to his assent to the agreement. The mother also assented. A final order incorporating the announced settlement was entered in October 2014. The father filed an appeal.

The settlement designated the father as the primary residential parent of the two younger children with equal parenting time for the mother. The mother was designated as the primary residential parent of the 17-year-old daughter, Leanna, with no parenting days for the father. She could visit at her discretion.

The father appealed *pro se*. He alleged the terms of the announced agreement were not complete and were not consistent with their agreement and were not in the best interest of the children, especially the failure to provide him parenting time with Leanna who had attained 18 years of age. His statement of the issues did not concisely state any particular error by the chancellor. His argument did not cite legal authority. The appellate opinion states that the appellate judges will not prejudice the mother by serving as the father's lawyer. The mother had requested the father's appeal be held frivolous and that she be awarded a fee. Her request was granted and the case remanded to the trial court to establish a fee award.

Comment: The opinion observes that the father's principal objection to the agreement was the denial of parenting time with Leanna. Because she had attained 18 years of age, this issue was now moot. The case had been pending for four years. Apparently the support and property issues had been worked out and there was no indication equal parenting time was not in the best interest of the two younger children.

THE CHILD HAD SEVERE HEALTH PROBLEMS. THE FATHER, A MEXICAN NATIONAL, WAS ARRESTED FOR DOMESTIC ASSAULT AND DEPORTED. THE CHILD WAS DETERMINED TO BE DEPENDENT AND NEGLECTED AND PLACED IN FOSTER CARE WHERE SHE WAS RECEIVING APPROPRIATE HEALTH CARE. NEITHER FATHER NOR DEPARTMENT MADE SUBSTANTIAL EFFORTS TO REUNIFY THE FAMILY. THE JUVENILE JUDGE GRANTED TERMINATION OF THE FATHER'S PARENTAL RIGHTS FOR PERSISTENT CONDITIONS AND CHILD'S BEST

INTEREST. THE COURT OF APPEALS AFFIRMED. DUE TO THE APPARENT LACK OF FAMILY SUPPORT TO PROVIDE APPROPRIATE HEALTH CARE IT WOULD NOT BE SAFE TO RETURN THE CHILD TO THE FATHER'S CARE. THE FOSTER PARENTS WISHED TO ADOPT. (***In re Analilia R.,*** 30 TFLL 3-10, 40 TAM 51-14, Tenn. Ct. App., E.S., Nov. 24, 2015, Swiney, 18 pp.) The child was born in June 2007 with severe medical problems. After the father assaulted the mother, the child, her three siblings, and the mother moved to a battered women's shelter. The child was placed in foster care in 2009 and adjudicated dependent and neglected in April 2010. A permanency plan was established. The father was furnished a copy written in English. He was not fluent in English. The father, after being deported to Mexico, obtained counseling. He did not visit or pay child support. He committed extortion in Mexico. He did not understand the child's health problems or make provision for necessary care. The Department petitioned the Juvenile Court for Hamblen County for termination of the father's parental rights. This case does not concern the mother's parental rights or the mother's other children. The grounds alleged were persistent conditions, noncompliance with the permanency plans, abandonment by wanton disregard and failure to pay support, and child's best interest. The trial judge held only persistent conditions and child's best interest were proved by clear and convincing evidence. The father appealed, the Department cross-appealed the failure to find noncompliance with the permanency plan.

The father was a citizen of Mexico. He was employed as a ranch foreman earning $230 a week. He testified his aunt would help to provide childcare. He had not learned how to properly care for the child or whether there were appropriate health care facilities available in Mexico. The child was seven years old, weighed 42 pounds, could not walk or stand without assistance, could not articulate words or swallow. She had to be fed through a feeding tube. She was diagnosed with cerebral palsy with seizure disorder. She was doing fairly well in foster care and the foster parents wished to adopt.

The Department's efforts to provide assistance in working the permanency plan were not substantial. Noncompliance with the permanency plan was held not proved by clear and convincing evidence. The finding of persistent conditions and child's best efforts were affirmed and termination of the father's parental rights were affirmed.

Comment: The father was in Mexico, the child in Tennessee. He was not able to return to Tennessee. It was not determined if the child would receive needed health care in Mexico. The Department had not made a significant effort to reunite the family. The father had not made a significant effort to work the plan or to ascertain if adequate health care would or could be provided in Mexico. The foster care family wished to adopt. Apparently the father did not appeal the finding of child's best interest, only grounds of persistent conditions. The Court of Appeals affirmed. It would not have been safe to return the child to the father.

THIS WAS A DIVORCE ACTION FOLLOWING A 24-YEAR MARRIAGE. THERE WERE FOUR CHILDREN. AN INITIAL ORDER PROVIDED THE MOTHER WOULD PAY THE MORTGAGE PAYMENTS AND THE HOUSE WOULD NOT BE SOLD PRIOR TO THE FINAL ORDER. THE MOTHER FAILED TO PAY THE MORTGAGE PAYMENTS. THERE WAS A NEED TO SELL THE HOUSE. THE TRIAL DOCKET WAS FULL. THE PARENTS SUBMITTED A MARITAL DISSOLUTION AGREEMENT GRANTING A DIVORCE, DIVIDING THE MARITAL ASSETS, AND INCLUDED A TEMPORARY PARENTING PLAN. THE PARTIES AGREED TO PROVIDE A TIMELY PERMANENT PARENTING PLAN. THEY DID NOT FILE PROPOSED PARENTING PLANS AS AGREED. THE MOTHER'S ATTORNEY WITHDREW AND SHE WAS ALLOWED A CONTINUANCE. THE FATHER FILED A PROPOSED PERMANENT PARENTING PLAN. THE TRIAL JUDGE CONDUCTED A HEARING AND ADOPTED THE FATHER'S PROPOSED PARENTING PLAN. THE MOTHER'S REQUEST FOR A NEW TRIAL WAS DENIED. SHE APPEALED. THE COURT OF APPEALS AFFIRMED. THE OPINION HOLDS THE INITIAL PARENTING PLAN COMPLIED WITH THE STATUTORY REQUIREMENT THAT PROHIBITS THE ENTRY OF A DIVORCE DECREE WITHOUT THE ENTRY OF A FINAL PARENTING PLAN. THE SECOND PARENTING PLAN PROPOSED BY THE FATHER AND ORDERED BY THE TRIAL JUDGE WAS VACATED AND THE FIRST PARENTING PLAN REINSTATED AS CONTROLLING. (***Rigsby v. Rigsby,*** 30 TFLL 3-11, 40 TAM 51-13, Tenn. Ct. App., E.S., Nov. 25, 2015, Frierson, 11 pp.) The marriage was of 24 years duration. There were four children, ages 17, 11, 8, and 7 in August 2014 when the divorce was granted. The father had sued for divorce in December 2012. A temporary order provided the residence would not be sold until there was a final order. The mother was to pay the mortgage payments. She did not pay all of the payments. There was an immediate need to sell the house. The trial court docket was overloaded and there was no time available for a hearing. The parties agreed to a marital dissolution agreement that provided divorce for irreconcilable differences, divided the assets, and included a temporary parenting plan designating the mother the primary residential parent with 215 days of parenting time. The parties promised to submit a proposed permanent parenting plan by January 7, 2014. The father submitted a proposed final parenting plan. The mother's attorney was allowed to withdraw. The mother was granted a continuance. There was a hearing on August 10, 2014. On August 15, 2014, the trial judge, Judge Bolton, Circuit Court for Hamilton County, entered an order adopting the father's proposed

permanent parenting plan designating the father as the primary residential parent with 213 days of parenting time. The mother filed a motion to alter or amend requesting a new trial. She argued the divorce was void because there was not a permanent parenting plan entered as required by TCA 36-4-103. Judge Bolton found the father's proposed parenting plan was in the children's best interest and denied the mother's motion. The mother appealed.

The mother argued on appeal that: (1) the decree was void because there was not a permanent parenting plan, (2) the temporary parenting plan should have been treated as a permanent parenting plan, and (3) there were no fact findings or conclusions of law. The opinion cites *Davidson v. Davidson,* 25 TFLL 3-12, 2010WL4629490 (Tenn. Ct. App., 2010), as authority that the approval of the temporary order was not a violation of the statute; there were provisions for child support and a parenting schedule. It was fair, just, and equitable and in the parties' best interest. The father had filed no modification petition. The second parenting plan entered by Judge Bolton was vacated. The initial parenting plan was reinstated as the controlling permanent parenting plan. The mother's request for a fee was held waived.

Comment: The statute prohibits a divorce decree when a permanent parenting plan is not included. Due to the circumstances the trial judge made an exception and granted a divorce and approved the temporary parenting plan and the divorce. Circumstances changed and a second parenting plan was approved without conducting a modification hearing. The appellate court responded by designating the first plan as controlling because the initial plan dealt with all of the necessary elements. Apparently the failure to follow the statute's mandate resulted in unnecessary work and delay but did not prejudice the children. That was a better alternative than holding the divorce decree void.

THE CHILD WAS BORN OUT-OF-WEDLOCK IN SEPTEMBER 2009. WHEN THE STATE SUED TO ESTABLISH PATERNITY AND A SUPPORT ORDER, THE MOTHER FAILED TO APPEAR. DUE TO THE MOTHER'S SUBSTANCE ABUSE PROBLEMS, THE MOTHER'S SISTER AND HER HUSBAND ASSISTED WITH CHILD CARE AND SUPPORT. THE FATHER WAS INCARCERATED MUCH OF THE TIME FOR PROBATION VIOLATION OF A GEORGIA ORDER OR WHILE AWAITING TRIAL ON A TENNESSEE CRIMINAL CHARGE. AFTER THE FATHER WAS RELEASED FROM JAIL, THE AUNT AND UNCLE SUED TO TERMINATE PARENTAL RIGHTS. COUNSEL WAS APPOINTED FOR THE FATHER AND A GUARDIAN *AD LITEM* WAS APPOINTED FOR THE CHILD. THE FATHER'S APPOINTED ATTORNEY WAS ALLOWED TO WITHDRAW AND ANOTHER APPOINTED. NEITHER FATHER NOR HIS ATTORNEY RECEIVED NOTICE OF THE CHANGE OR OF THE TRIAL DATE AND NEITHER APPEARED AT TRIAL. THE TRIAL JUDGE GRANTED TERMINATION *EX PARTE*. THE FATHER REQUESTED THE JUDGMENT BE SET ASIDE. THE TRIAL JUDGE CONDUCTED A HEARING ON THE FATHER'S MOTIONS AND GRANTED TERMINATION FOR ABANDONMENT BY NONSUPPORT AND CHILD'S BEST INTEREST. THE FATHER APPEALED. THE COURT OF APPEALS HELD WILLFULNESS WAS NOT PROVED BY CLEAR AND CONVINCING EVIDENCE. THE JUDGMENT GRANTING TERMINATION WAS REVERSED WITH PREJUDICE. (***In re C.J.A.H.,*** 30 TFLL 3-12, 40 TAM 52-17, Tenn. Ct. App., E.S., Susano, 29 pp.) The child was born on January 9, 2012, out-of-wedlock. The State, on the mother's behalf, petitioned for the establishment of paternity and a child support order. Blood testing confirmed paternity, the father appeared, the mother did not. The State gave up and moved to dismiss. The motion was granted. There was not a child support order.

In early 2012, her aunt M.D.H. and her husband T.S.H were caring for the child. The father was on probation from a drug conviction in Georgia. He was arrested in Tennessee and charged with theft. Because of the Tennessee arrest, his Georgia probation was revoked. He was in jail from March 13, 2012, until July 9, 2013, when the Tennessee criminal case was dismissed.

On September 10, 2012, M.D.H. and T.S.H. petitioned the Circuit Court for Hamilton County for termination of the father's parental rights so they could adopt. The mother waived her parental rights. The father was indigent. Attorney M. Rambo was appointed the father's attorney. A guardian *ad litem* was appointed for the child. The case was continued three times. Attorney Rambo was allowed to withdraw. Attorney T. Campbell was appointed in her stead. Ms. Campbell was not notified of her appointment as the father's attorney and did not know of it. The father was not notified. A hearing date was set on July 3, 2013. Neither father nor Ms. Campbell had notice of the hearing.

On July 3, 2013, the petitioner appeared for trial. Ms. Campbell's office was called. A recording indicated her office was closed until July 9, 2013. The case was heard *ex parte* in the absence of the father and his attorney. No reporter was present, there was no transcript. The guardian *ad litem* gave her report based on interviews with the father and the petitioner. She stated the father had no relationship with the child and had not paid child support. She favored termination.

The aunt testified regarding the mother's substance abuse problems and her reliance on the petitioners for support and child care. She also testified the father had no relationship with the child, had not paid child support, and had a lengthy criminal history. The petitioners were both employed and able to provide for the child's needs. Judge Thomas granted termination of the father's parental rights.

On July 11, 2013, Ms. Campbell filed a notice of limited appearance as attorney for the father and requested instructions. The father requested that she be appointed his attorney. The motion was granted, effective April 29, 2013. The father filed a motion to set aside the judgment. He alleged all the persons involved knew of his incarceration. He denied the failure to pay support was willful and alleged no evidence had been entered as to his ability to pay and no findings made relative to the critical four months. He requested a full hearing to set aside the decree of adoption.

Judge Thomas did not set aside the judgment terminating the father's parental rights and the grant of adoption. He set a hearing date on the father's motions. The matter was heard in March and August of 2014. Judge Thomas held there was clear and convincing evidence of abandonment by nonsupport over the period of the child's life including the four months prior to his incarceration. He had only seen the child briefly on one occasion since the summer of 2011. The fact he had money to purchase a motorcycle evidenced his ability to pay child support and his failure to do so was willful. The child had lived with petitioners two and one-half years. The father did not have a meaningful relationship with the child. The additional evidence presented at the hearing was held to reinforce what was originally found. Grounds of abandonment and child's best interest showed termination of the father's parental rights was in the child's best interest.

The father appealed. He alleged the trial judge erred by failing to set aside the judgment of July 3, 2013, and the findings that abandonment by failure to provide support and to maintain a relationship with the child was in the child's best interest.

The opinion states the only ground for termination of the father's parental rights is willful failure to support the child. The father argued his failure to provide support was not willful. He had testified to his inability to work for six months while recovering from a motorcycle accident and that he had provided support when requested by the mother. He had appeared in juvenile court for hearings on support and the mother failed to appear. Seven pages of the opinion are his testimony relative to his efforts to provide support. The appellate opinion holds the evidence preponderates against most of the findings regarding willfulness. Termination of the father's parental rights for abandonment by willful failure to pay child support was reversed.

Comment: A second ground for termination is discussed. The trial judge did not set aside the initial order based on evidence heard when the father and his attorney were not present because of failure to receive notice of the hearing date. The trial judge's opinion indicated the hearing on the father's motions supported the earlier testimony. To consider the earlier testimony is held to constitute a violation of his statutory rights pursuant to TCA 36-1-113 (f) requiring that before termination of the rights of an incarcerated person it must be affirmatively shown to the court that the incarcerated parent or guardian receive actual notice of the time and place of the hearing. Because the testimony at the *ex parte* hearing was not transcribed by a court reporter, it was not reviewable. *State v. Barnett,* 909 SW2d 423 (Tenn. 1995), is cited as authority this is the result of the due process guarantee of notice and an opportunity to be heard found in both the federal and state constitutions. The trial court judgment was reversed and the petition for termination of the father's parental rights dismissed with prejudice. The opinion does not express an opinion as to who should be designated the child's custodian.

Court of Appeals
Middle Section

WHEN THE PARENTING PLAN WAS ENTERED IN 2010, IT CONTAINED A PROVISION PROHIBITING DEROGATORY REMARKS TO A CHILD BY THE OTHER PARENT. SOCIAL CONTACT WAS PROHIBITED EXCEPT AT SCHOOL SPORTING EVENTS AND THERE THEY WERE TO MAINTAIN A 10-FOOT DISTANCE. CONTACT WAS LIMITED TO E-MAIL AND TEXT MESSAGE. IN FEBRUARY 2013, THE MOTHER CITED THE FATHER FOR SEVERAL CIVIL AND CRIMINAL CONTEMPTS. THE CASE WAS TRIED IN JUNE 2013. THE FATHER WAS FOUND GUILTY OF TWO COUNTS OF CRIMINAL CONTEMPT AND SENTENCED TO 10 DAYS INCARCERATION ON EACH COUNT, SUSPENDED AFTER 48 HOURS. THE FATHER APPEALED. THE COURT OF APPEALS AFFIRMED. ON ONE COUNT THE FATHER HAD TOLD A CHILD THE STEPFATHER WAS CHEATING ON TAXES AND THEY WOULD BE SENT TO JAIL. ON THE OTHER THE FATHER HAD REFUSED TO ALLOW THE CHILD TO CARRY HIS MEDICATION TO THE MOTHER, OR TO LEAVE IT IN THE MAILBOX FOR HER TO PICK UP. HE VIOLATED THE CONTACT PROHIBITION IN HIS EFFORTS TO SPEAK TO THE MOTHER. THE MOTHER DID NOT PREVAIL ON A THIRD COUNT IN THE TRIAL COURT AND DOUBLE JEOPARDY PRECLUDED AN APPEAL ON THAT ISSUE. (***Boren v. Rousos,*** 30 TFLL 3-13, 40 TAM 50-12, Tenn. Ct. App., M.S., Nov. 13, 2015, Bennett, 12 pp.) The parties were divorced in 2009. A permanent parenting plan was entered in 2010. There were three children, ages 11, 8, and 6 at the time of the divorce. The parenting plan included a mutual restraining order. Social contact was prohibited except at school sporting events and there they were to maintain a 10-foot separation. Neither was to speak badly of the other parent to a child. In February 2013, the mother cited the father for several counts of civil or criminal contempt for violation of the restraining order. The trial judge, Judge Beal, Chancery Court for Williamson County, found the father guilty of two counts of criminal contempt and

sentenced him to 10 days on each count, suspended after 48 hours. The father appealed. He was granted a stay.

The parties had exchanged tax returns. The father told a child the stepfather was cheating on taxes and they would be sent to jail. Believing the mother was not properly administering a child's ear medication, the father called and e-mailed the mother about delivery of the medicine. She requested he leave it in the mailbox. The father did not want the child to carry it to the mother. When she arrived, the father approached the mother's car in an attempt to speak with her. The father was held in contempt on these two counts and the presumption of guilt was not overcome. The father argued the testimony of the children was hearsay. The trial judge held it was not hearsay because it was offered only to prove the statement was made, not to prove it was true.

The mother appealed another issue. The opinion noted that the father was acquitted in the trial court and her appeal was barred by double jeopardy. The mother was denied a fee for the appeal. She did not prevail on all of the issues. Costs were divided equally.

Comment: The opinion notes the parties had a history of controversy. Both had agreed to the provisions of the mutual restraining order that supplemented and expanded the provisions of TCA 36-6-1010 regarding the parents' right to be free of derogatory remarks to the children of the parties.

THE FATHER REQUESTED REDUCTION OF CHILD SUPPORT BASED ON REDUCTION OF HIS INCOME. HE ALSO SOUGHT TO ELIMINATE A $150 MONTHLY DEVIATION FOR THE CHILD'S EXTRACURRICULAR ACTIVITIES. THE CASE WAS TRIED TWO WEEKS BEFORE THE CHILD'S 18TH BIRTHDAY. SHE HAD NOT GRADUATED FROM HIGH SCHOOL. THE MOTHER'S REQUEST THAT THE CHILD BE ALLOWED TO TESTIFY SHE WOULD NOT VISIT AFTER ATTAINING AGE 18 WAS DENIED. CHILD SUPPORT WAS REDUCED TO $1,044 PER MONTH RETROACTIVE TO THE DATE OF FILING THE PETITION. THE FATHER WAS AWARDED A $10,000 PARTIAL FEE. THE MOTHER'S MOTION TO ALTER OR AMEND WAS DENIED. SHE APPEALED. THE FEE AWARD WAS REVERSED AS NOT INCURRED ON THE CHILD'S BEHALF. THE DENIAL OF THE CHILD'S PROPOSED TESTIMONY AND THE MOTHER'S REQUEST THAT THE CHILD SUPPORT CALCULATION BE BASED ON ZERO PARENTING TIME FOR THE FATHER WAS AFFIRMED. CONSIDERATION OF THE CHILD'S FUTURE PLAN WAS TOO SPECULATIVE. (***Carter v. Carter,*** 30 TFLL 3-14, 40 TAM 51-15, Tenn. Ct. App., M.S., Nov. 18, 2015, Bennett, 7 pp.) The father petitioned for modification of the support order for the parties' child. He alleged decreased income. He requested the $150 month deviation for the child's activities be terminated. The case was heard in July 2014, two weeks prior to the child's eighteenth birthday. The mother requested the child be allowed to testify that she would not visit the father after attaining age 18. This was denied; no offer of proof was made. The husband's attorney stated he had not been informed of this issue until the day before the trial. The trial judge, Judge McClendon, Circuit Court for Davidson County, reduced the support order to $1,044 retroactive to the date of the petition. The mother's motion to alter or amend was denied. The father was awarded a $10,000 partial attorney fee. The mother appealed. The Court of Appeals affirmed.

Comment: Because the child had not graduated from high school, child support would continue after her 18th birthday. The child's proposed plan to stop visitation was held too speculative. The decision to continue to use the number of days provided in the existing parenting plan was affirmed as a proper exercise of discretion. In reversing the partial fee award, the opinion observes that the father's attorney fees were not incurred on behalf of the child. The father did not seek to enforce a support order or adjudicate custody. The request for a fee for the appeal was denied. The opinion suggests the fee award may have been based on the parties' history of litigation.

THE ISSUE IN THE TRIAL COURT WAS AN ATTORNEY FEE FOR THE MOTHER'S ATTORNEY AFTER HER PETITION FOR CHILD SUPPORT MODIFICATION WAS VOLUNTARILY DISMISSED. THE TRIAL COURT ENTERED A FINAL DECREE ON JULY 2, 2015, ORDERING THE FATHER'S ATTORNEY TO PAY PART OF THE MOTHER'S ATTORNEY FEE. THE FATHER'S ATTORNEY FILED NOTICE OF APPEAL ON AUGUST 5, 2015, FOUR DAYS AFTER THE ENTRY OF THE FINAL JUDGMENT. SHE ARGUED THE JUDGMENT DID NOT CONTAIN THE SIGNATURES REQUIRED BY TENN. RULES OF CIVIL PROCEDURE, R58. THE RECORD DISCLOSED THE JUDGMENT WAS PROPERLY SIGNED. THE TIME FOR FILING IS MANDATORY AND JURISDICTIONAL. THE APPEAL WAS DISMISSED. (***In re Raven P.,*** 30 TFLL 3-15, 40 TAM 51-21, Tenn. Ct. App., M.S., Nov. 25, 2015, Per curiam, 2 pp.) The mother petitioned the Juvenile Court for Davidson County to modify child support. Her petition was voluntarily dismissed. After dismissal of the child support issue, the parties continued to litigate the issue of a fee award. The trial judge, Judge Green, entered a final order on July 2, 2015, assessing part of the mother's fee award against the father's attorney. She filed a notice of appeal on August 5, 2015.

The issue on appeal was whether the appeal by the father's attorney was timely filed. She argued the decree was not effectively entered pursuant to Tenn. R. Civ. Proc., R58, that it did not contain the required signatures. The record showed the order did contain a certificate of service signed by a deputy clerk and was thus properly entered. The appeal was dismissed for failure to file a notice of appeal.

Comment: The time for filing notice of appeal is mandatory. Because the notice of appeal was not timely filed the Court of Appeals did not have jurisdiction.

THE FATHER FILED SUIT FOR DIVORCE. THE MOTHER ANSWERED AND REQUESTED SHE BE DESIGNATED THE PRIMARY RESIDENTIAL PARENT OF THE TWO MINOR CHILDREN. A FINAL ORDER GRANTED THE MOTHER CUSTODY AND ORDERED THE FATHER TO PAY CHILD SUPPORT. THE FATHER APPEALED. HE ALSO FILED PETITIONS REQUESTING REDUCTION OF CHILD SUPPORT. THE MOTHER ANSWERED AND FILED A PETITION CITING THE FATHER FOR CONTEMPT FOR FAILURE TO PAY THE CHILD SUPPORT AS ORDERED BY THE PARENTING PLAN. HE WAS FOUND IN CONTEMPT, INCARCERATED, AND RELEASED WHEN HE PAID THE ARREARAGES. A NO-CONTACT ORDER WAS ENTERED AFTER THE MOTHER TESTIFIED SHE WAS AFRAID OF THE FATHER. THE MOTHER RELAPSED, USED DRUGS, AND TESTED POSITIVE. THE FATHER REQUESTED AND WAS GRANTED EMERGENCY CUSTODY AND THEN DESIGNATED THE PRIMARY RESIDENTIAL PARENT. THE MOTHER APPEALED. THE APPEALS WERE CONSOLIDATED AND SOME OF THE ISSUES BECAME MOOT AFTER THE FATHER GOT CUSTODY. THE OPINION DISCUSSES AND RULES ON THE REMAINING ISSUES IDENTIFIED BY THE FATHER. (***Cisneros v. Cisneros,*** 30 TFLL 3-16, 40 TAM 51-16, Tenn. Ct. App., M.S., Nov. 25, 2005, Clement, 17 pp.) The father sued for divorce in the circuit court for Lincoln County. The mother cross-petitioned seeking divorce and designation as the primary residential parent of their two minor children. The mother had drug problems. She had completed a drug program and was continuing with after care. The husband was a carpenter employed by a company that specialized in repairs and remodeling of homes. His income was $21,000 in 2009, $28,000 in 2010, and $39,000 in 2011. He had built a complete house in 2011.

The trial judge, Judge Russell, designated the mother as the primary residential parent. Child support was based on annual income of $39,000. Judge Russell denied the father's motion that his income for child support be based on a three-year average. The father's appeal was denied because there was not a final order. Both parents submitted proposed parenting plans. The mother's proposed plan was adopted.

The father got behind on child support. The mother, *pro se,* cited him for contempt. He admitted arrearages and requested modification of the child support order. He owned a truck and a house. His request for modification was denied. The mother testified the father's conduct was threatening and she feared him. The father had enrolled in a domestic abuse program. His conduct was disruptive and he was dropped. The instructor expressed concern for the wife. Judge Russell entered a no-contact order. The mother was awarded a $16,000 attorney fee.

In June 2015, the father filed an emergency petition seeking temporary custody of the children. The mother had tested positive for drugs. A hearing was conducted, child support was suspended, and the father was designated the primary residential parent until further orders. The father's appeal of the order denying him custody was rendered moot. The father argued there were five issues that were not rendered moot. The appellate judges agreed to address those issues.

The father had alleged the trial judge was biased. He had not filed a motion to recuse. His appeal was held waived. The father had been denied averaging of his income. At that time the father's income was increasing. The failure to average was held not an abuse of discretion. The mother had testified her monthly earnings were $1,646. The father had requested income be imputed to her based on her lifestyle, living in a new house. The appellate judges held the evidence did not support the father's allegations. The no-contact order was held not an abuse of discretion. The mother had testified she was afraid. The order was held not an abuse of discretion. The father had testified he did not have the ability to pay child support as ordered. The opinion held he did not overcome the presumption he was in civil contempt. The incarceration order was affirmed. Judge Russell had found the father was underemployed and imputed income to him. The father had stated he was using time to prepare for litigation. The opinion held there was no abuse of discretion. The attorney fee for the mother was also held not an abuse of discretion.

Comment: In the statement of the opinion, it was observed that the procedural history was muddled, the record incomplete, and the briefs of little assistance. During most of the period, the parties were acting *pro se*. A footnote notes the order was not certified pursuant to Tenn. R. Civ. P., R 54.02. It did not contain an express finding there was no reason for delay. Post-judgment facts were considered. Many of the issues on appeal were rendered moot by the order changing custody to the father.

WHEN THE PARTIES WERE DIVORCED IN 2010, THEY WERE AWARDED EQUAL PARENTING TIME. NO PRIMARY RESIDENTIAL PARENT WAS DESIGNATED. BOTH WERE UNEMPLOYED. THEY AGREED THE MOTHER WOULD ACCEPT EMPLOYMENT OVERSEAS TO PROVIDE SUPPORT FOR THE FATHER AND TWO CHILDREN WHILE HE ATTENDED NURSING SCHOOL. AFTER HIS GRADUATION, HE DID NOT SEEK LOCAL EMPLOYMENT BUT ACCEPTED A JOB IN TUCSON, ARIZONA. HE NOTIFIED THE MOTHER OF HIS PLAN TO RELOCATE AND FILED SUIT TO MODIFY THE PARENTING PLAN. THE MOTHER OPPOSED RELOCATION. THE TRIAL JUDGE HELD THE PLAN TO RELOCATE

WAS NOT REASONABLE AND FOUND DESIGNATION OF THE MOTHER AS THE PRIMARY RESIDENTIAL PARENT WAS IN THE CHILD'S BEST INTEREST. THE ORDER DID NOT INCLUDE SPECIFIC FINDINGS AS REQUIRED BY THE RELOCATION STATUTE AND THE TRIAL JUDGE HAD NOT CONDUCTED A BEST INTEREST ANALYSIS. THE ORDER WAS VACATED AND THE CASE REMANDED TO THE TRIAL COURT FOR APPROPRIATE FINDINGS AND CONCLUSIONS. NO ADDITIONAL PROOF WAS TAKEN. BOTH PARENTS FILED PROPOSED FINDINGS. THE ORDER HOLDING THE RELOCATION PLAN WAS NOT REASONABLE AND THE DESIGNATION OF THE MOTHER AS PRIMARY RESIDENTIAL PARENT WAS REPEATED. THE FATHER APPEALED. THE COURT OF APPEALS AFFIRMED. THE EVIDENCE DID NOT PREPONDERATE AGAINST THE FINDINGS. (***Aragon v. Aragon,*** 30 TFLL 3-17, 40 TAM 52-15, Tenn. Ct. App., M.S., Nov. 30, 2015, Dinkins, 14 pp., McBrayer dissenting, 5 pp.) This is the second appeal. The parties were divorced in 2010 following a four-year marriage. Their child was born in July 2007. Their MDA provided equal parenting time. Neither was designated primary residential parent. Both were unemployed. They agreed the mother would work overseas and provide support for the father and two children so the father could attend nursing school. When the father graduated, he notified the mother he planned to move with their child to Tucson, Arizona, for better job opportunities and family support. The mother had purchased a house and planned to attend law school in Nashville. She opposed the relocation. The father filed a petition requesting modification of the parenting plan. The trial judge, Chancellor Hicks, Chancery Court for Montgomery County, held the plan to relocate was not reasonable and designation of the mother as primary residential parent was in the child's best interest. The father appealed. The Court of Appeals vacated and remanded. The chancellor had not made the specific findings required by the relocation statute and had not conducted a child's best interest analysis.

No additional proof was taken on remand. Both parents filed proposed findings of fact and conclusions of law. Judge Hicks entered an order that reviewed the statutory factors and made fact-findings relative thereto. He restated his earlier finding that the father's proposed relocation did not have a reasonable purpose and that the evidence weighed in favor of the mother being named the primary residential parent. The father appealed again. He argued that these findings erred and denial of relocation was not in the child's best interest.

The appellate opinion reviewed *Aragon v. Aragon*, 28 TFLL 8-27 (Tenn. Ct. App. 2014), the statutory factors, and the trial court's findings and affirmed. The father's brief did not point to evidence that preponderated against the trial court's findings and the determination that designation of the mother as the primary residential parent was in the best interest of the child.

Comment: The parties had planned that both would remain in the Nashville-Crossville areas before the mother accepted the overseas employment. The father had apparently done a good job of child care of their child and her half-sibling. The mother had argued the father's relocation plan was vindictive, intended to deprive her of visitation. If contract provisions were permitted to control child custody and visitation arrangements, this would be a good example and that essentially is the outcome of the litigation. Judge McBrayer filed a dissent. He would hold the father's purpose for relocation was reasonable. He had a job opportunity in Tucson, Arizona, and would have family support. The parents were not spending substantially equal time. This would give rise to the presumption favoring relocation. The testimony was that the father was a good father and had done a good job of caring for the children while the mother was overseas. There was no testimony that relocation would present a substantial risk of harm. In terms of child's best interest, the two most important factors, continuity and stability, favored the father. Judge McBrayer observed that permitting the move would cause the mother pain. This case may be a "do right" case when appellate judges correct a perceived trial court error where traditional rules would support the decision. There is no rule that provides the mother should be awarded custody because her sacrifice contributed to the father's earning capacity post divorce. From an outsider's viewpoint, she had "saved the day" by providing economic opportunity for the father and care for the children. After her sacrifice, should a court allow her to be punished by the loss of shared custody? The trial judge and appellate majority appear to have followed the "heart" instead of the "book." I would agree, the mother is my "hero."

THE PARTIES WERE DIVORCED IN FEBRUARY 2010. THE MOTHER WAS DESIGNATED THE PRIMARY RESIDENTIAL PARENT. THE FATHER WAS ORDERED TO PAY ALIMONY IN FUTURO AND CHILD SUPPORT BASED ON ANNUAL INCOME OF $373,000. HIS JOB WAS TERMINATED IN OCTOBER 2012, THE SEVERANCE PACKAGE CONTINUED HIS INCOME THROUGH 2013. HE NOTIFIED THE MOTHER BUT CONTINUED TO PAY THE SUPPORT ORDER. IN MAY 2013, THE FATHER PETITIONED FOR SUPPORT MODIFICATION DUE TO HIS REDUCED INCOME. HE HAD BEEN UNABLE TO FIND COMPARABLE EMPLOYMENT. NEITHER FATHER NOR MOTHER HAD MADE SUBSTANTIAL CHANGES IN LIFESTYLE. THE WIFE'S NET ASSET VALUE EXCEEDED THAT OF THE HUSBAND. THE CHANCELLOR IMPUTED INCOME OF $16,000 A MONTH TO THE HUSBAND AND $2,000 A MONTH TO THE WIFE. ALIMONY WAS REDUCED FROM $5,000 TO $4,000; CHILD SUPPORT FROM $2,100 TO $1,343. THE FATHER APPEALED. THE OPINION HOLDS THE CHANCELLOR IMPROPERLY TREATED THE FATHER'S OBLIGATIONS AS CONTRACTUAL AND

REMANDED FOR CORRECT CONSIDERATIONS. THE CHILD SUPPORT MODIFICATION WAS NOT BASED ON THE CHILD SUPPORT GUIDELINES FOR ASCERTAINING IMPUTED INCOME. THE DECISION TO MODIFY ALIMONY AND CHILD SUPPORT WAS AFFIRMED. BOTH WERE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THE OPINION. (***Cook v. Iverson,*** 30 TFLL 3-18, 40 TAM 52-20, Tenn. Ct. App., M.S., Nov. 30, 2015, McBrayer, 11 pp.) The parties were married in 1985 and divorced in February 2010. The mother was designated the primary residential parent. At the time of the divorce the father was employed, earning $31,121.88 gross monthly. Eight months later he was notified his employment would cease and that his severance pay would continue through May 2013. He notified the wife of his job loss. He did not reduce his monthly child support payments of $2,100 or his monthly alimony in futuro payment of $5,000. He also provided health insurance for the wife and paid premiums on a $1,000,000 insurance policy intended to protect the alimony. Both parties continued their pre-divorce lifestyle and the husband took a woman into his home and allowed her to use his credit card.

In May 2013, the husband petitioned for modification of alimony and child support. He alleged his search for comparable employment was not successful because of his age, 59, his health problems, and five surgeries resulting from a motorcycle accident. He stated his net assets to be $613,369. His two principal assets were his $89,000 equity in a five-bedroom home and a retirement plan valued at $334,777. The trial judge imputed monthly income of $16,000 to him.

The wife testified her net assets exceeded $1,000,000. She had no recent employment experience. She was needed at home to supervise their daughter who was suspected of marijuana use and potential alcohol abuse. Chancellor Beal imputed income of $2,000 a month to her. Alimony was reduced to $4,000 monthly, child support to $1,343. The father was to continue providing health insurance for the wife but could stop providing life insurance. The father appealed. He argued the chancellor had treated the in futuro alimony and health insurance as contractual obligations and had erred in imputing income of $16,000 to him. The father requested a fee award and alimony reduction be made retroactive to the date of the petition to modify. The wife requested a fee award.

The appellate opinion held the imputation of income to the father could not be affirmed. The trial court should first determine if there was a material change of circumstance, then whether the court considered the factors considered in making the initial alimony award, the most important being need of the disadvantaged spouse and the ability of the obligor to pay, ability to pay being given at least equal consideration. The discussion concludes the chancellor failed to apply the correct standard. Some of the father's obligations were improperly treated as contractual and not subject to modification. The finding the father had the ability to earn $16,000 a month was not supported by the evidence.

The chancellor had not granted the father's request that the alimony modification be made retroactive to the date of his petition. Because the alimony order was remanded, this issue was not addressed, leaving it to the trial court on remand.

Comment: In discussing the father's request for child support modification, the opinion examines the provisions of Tenn. Comp. R. & Regs. 1240-03-04-.(3)(a)(2) requiring (1) a finding of voluntary underemployment or unemployment; or (2) no reliable evidence of income, or (3) the parent owns substantial non-income-producing assets. There was no finding of willful or voluntary underemployment. The father had declined some employment to avoid devaluing his net worth in the marketplace. This was held not to constitute willful or voluntary unemployment or underemployment. These decisions should be evaluated as to whether they are made reasonably and in good faith. At some point, it will be necessary to determine whether these choices benefit the child. When that occurs the court must consider the parent's employment history and his or her education and training. In setting child support based on imputed income it is important the court consider the criteria in the child support guidelines. This could result in imputing different amounts of income for child support and alimony.

THE CHILD WAS BORN OUT-OF-WEDLOCK IN 2003. IN 2008 THE MOTHER SUED TO ESTABLISH PATERNITY, A CURRENT SUPPORT ORDER, AND A JUDGMENT FOR ARREARAGES. THE JUVENILE COURT MAGISTRATE SET CHILD SUPPORT AND DENIED ARREARAGES. THE MOTHER APPEALED TO THE JUVENILE JUDGE WHO ESTABLISHED INCOME FOR ASCERTAINING CHILD SUPPORT. THE CHILD SUPPORT ORDER OF $841 INCLUDED $443 FOR PRIVATE SCHOOL TUITION. THE FATHER APPEALED. THE COURT OF APPEALS HELD THE FINDINGS DID NOT SUPPORT THE DEVIATION FOR PRIVATE SCHOOL TUITION AND REMANDED. WHILE THE REMAND WAS PENDING, THE MOTHER PETITIONED FOR CHILD SUPPORT MODIFICATION. THE TRIAL JUDGE HELD THAT PRIVATE SCHOOL TUITION WAS NOT APPROPRIATE CONSIDERING THE PARTIES' FINANCIAL CONDITION. THE MOTHER APPEALED. THE FATHER REQUESTED A CREDIT FOR OVERPAYMENT AND A JUDGMENT FOR THE OVERPAYMENT. THE PARENTS' INCOME FOR CHILD SUPPORT AND THE DENIAL OF PRIVATE SCHOOL TUITION DEVIATION ISSUES WERE AFFIRMED. ALLEGED ERROR IN ADMISSION OF EVIDENCE WAS HELD HARMLESS. BOTH PARENTS WERE DENIED ATTORNEY FEE AWARDS. THERE IS AN INTERESTING DISCUSSION OF AWARDING CREDIT TO SUPPORT

OBLIGORS FOR OVERPAYMENTS TO OBLIGORS WHO EXERCISE CONTROL OVER THE FUNDS. A JUDGMENT FOR OVERPAYMENT WAS DENIED. (***In re Andrea R.,*** 30 TFLL 3-19, 40 TAM 52-19, Tenn. Ct. App., M.S., Nov. 30, 2015, Clement, 18 pp.) This is the second appeal. The child was born out-of-wedlock in May 2003. She had lived with her mother since birth. In August 2008, the mother sued to establish paternity, set current support, and determine arrearages. The juvenile court magistrate set pendente lite child support at $520 a month effective in January 2009. No support arrearages were due. The mother appealed to the juvenile court judge who found the mother's income to be $1,300 a month, the father's $2,239.45 per month. The child support order of $1487 included a deviation of $720 for private school tuition, medical expenses, and childcare. The mother requested clarification. Child support of $841 included a deviation of $443 for private school tuition. The father appealed the issue of the $443 deviation for private school tuition.

In the first appeal, *In re Andrea A. R.,* 26 TFLL 6-17 (Tenn. Ct. App. 2012), the case was remanded for findings relative to the parents' financial ability to afford private school and the child's activities. While the remand was pending in the trial court, the mother filed a petition seeking increased child support. The two cases were consolidated. No new proof was taken regarding the first trial. The trial judge, Judge Crawford, Juvenile Court for Davidson County, held private school education was inappropriate due to the parties' financial situation. No retroactive child support was ordered. The child support obligation was held to be $41,743, the father had paid $84,275. The father's financial information was held reliable, the mother's was held not reliable. She had not filed tax returns. There was no deviation from the child support guidelines. The mother appealed the denial of an upward deviation for private school tuition, the denial of retroactive support, and requested a fee for the trial court and the appeal. The findings that her income was $1,300 and the father's $2,239 from the first appeal were affirmed. Judge Crawford had held a deviation for private school was not warranted. That finding was affirmed on appeal.

Judge Crawford had established a child support obligation for each month and the total of the father's payments. The total obligation was $41,700, the total payments were $87,275. The payments were voluntary, frequently at the mother's request. Judge Crawford held no retroactive child support was owed. The mother argued that some of these payments were for her support. The father requested a judgment for the overpayments. This was denied. The appellate opinion holds the father was entitled to a credit against the support obligation on the theory of equitable consideration, the mother having requested the father's payments and exercised control over them. The father was not entitled to a judgment for voluntary overpayments.

The father had also argued he was entitled to a credit for the self-employment tax as provided by the child support guidelines. The opinion holds the denial was error but did not affect the outcome as no arrearages were due. The mother alleged error in the denial of leading questions to the father and the admission of his testimony from the first trial. The opinion holds the outcome was not affected by these evidentiary rulings. The mother requested a fee for the trial and the appeal. The father argued the mother's appeal was frivolous. Both denials for fee awards were affirmed. There was no abuse of the exercise of discretion.

Comment: Some parents are obsessed regarding the needs of children for a religious-related private school education and will struggle to make it possible. The related child support guidelines provide sensible criteria for imposing this obligation on an unwilling parent. The most interesting issue in the opinion is the discussion of the father's request for credit for overpayments. This discussion includes both the theory of necessaries and the equitable consideration doctrine applicable when the obligee exercises control over funds provided by the obligor. It was deemed important that the mother requested these funds.

AFTER THE PARTIES AGREED TO MARRY, THE HUSBAND EMPLOYED A FLORIDA ATTORNEY TO DRAFT A PRENUPTIAL CONTRACT AND HE PRESENTED IT TO THE WIFE TO SIGN THE DAY BEFORE THE MARRIAGE. THE CONTRACT WAS IN ENGLISH. SHE DID NOT READ OR SPEAK ENGLISH. IT WAS NOT INTERPRETED FOR HER. A TEENAGER EXPLAINED WHAT IT WAS. THE HUSBAND ARGUED THE REQUIREMENT THE WIFE BE KNOWLEDGEABLE WAS WAIVED BY HER STATEMENT THAT SHE DID NOT WANT MONEY, SHE WANTED A GOOD HUSBAND. THE HUSBAND SUED FOR DIVORCE. THE TRIAL JUDGE HELD THE PRENUPTIAL CONTRACT WAS NOT ENFORCEABLE. THE PARTIES' PROPERTY WAS CLASSIFIED, VALUED, AND EQUITABLY DIVIDED. THE HUSBAND APPEALED. THE COURT OF APPEALS AFFIRMED. (***Hollar v. Hollar,*** 30 TFLL 3-20, 40 TAM 52-21, Tenn. Ct. App., M.S., Nov. 30, 2015, Clement, 12 pp.) The parties began an on-line courtship in February 2002. The husband lived in Florida. He did not read or speak Spanish. The wife was a resident of Colombia, South America. She did not speak or read English. He visited in Colombia in April, a neighbor interpreted for them. They decided to marry. The husband returned to Florida. She was allowed to enter the U.S. 18 months later. They moved from Florida to Tennessee, then returned to Florida. They separated in December 2012 when the wife returned to Tennessee and moved into a "safe house" to avoid spousal abuse.

Prior to the marriage, the husband employed a Florida attorney to prepare a prenuptial contract. It was written in English. He presented it to the wife the day before the wedding. A 16-year-old boy either read from or described the document. The husband testified the wife stated she did not want money—she wanted a good husband. The

husband filed suit for divorce in the Circuit Court for Puckett County. He requested enforcement of the prenuptial contract. The wife cross-petitioned seeking divorce for inappropriate marital conduct. She contested enforcement of the antenuptial contract. Both parties requested a fee.

The trial judge, Judge Maddux, held the antenuptial contract was not enforceable. He classified, valued, and divided the marital assets. The husband appealed, the Court of Appeals affirmed. The husband was found not to be a credible witness. The credibility of the wife was questionable.

The principal assets were the residence, the husband's IRA, and his pension. The husband built the home for their residence. It was valued by the State's appraisal, less the mortgage resulting in a $60,000 equity that was held marital by transmutation. The mortgage was paid from joint funds, the wife's contribution as homemaker was substantial. Upon suing for divorce, the husband transferred funds from a bank account to an IRA. At that time the value was $35,423. The husband withdrew funds to purchase a boat and other expenses. The husband's pension paid $2,318 monthly. It had been earned over 12 years. The marriage lasted most of four years. One-third of the pension was held to be marital.

The husband argued the trial judge should have applied the rule from *Batson v. Batson,* 3 TFLL 1-10, 769 SW2d 848 (Tenn. Ct. App. 1988), and returned the wife to her premarital financial position. The opinion observed the trial judge could not have done this because the husband had not introduced evidence concerning her pre-marriage financial position. Both parties had requested a fee award. This was denied and the trial court judgment was affirmed.

Comment: Enforcement of the prenuptial contract was denied and the denial affirmed because the wife was not provided a document she could read or have explained to her by an attorney. She was not knowledgeable about the husband's income and assets. The opinion held that she did not waive this lack of knowledge about assets and income. The husband had been held not to be a credible witness. When a prenuptial contract is presented to the other party without time to consult an attorney, the opinions tend to presume the other party is not knowledgeable about the amount of assets or income or the effect of the proposed agreement, or the other party is put under such social pressure it is not presented in good faith. The best practice is to present it before the engagement is announced with an offer to pay a reasonable fee for appropriate legal advice and videotape the execution. The contract provided for construction under Florida law. That was done. There was little difference from applicable Tennessee law.

THE CHILD WAS BORN IN 2004. AN AGREED PARENTING PLAN WAS FILED IN 2009. THE PARENTS DID NOT COMPLY WITH THE PLAN. THE MOTHER SOUGHT MODIFICATION IN JUNE 2013. IN AUGUST 2013, THE MOTHER REQUESTED AN *EX PARTE* TEMPORARY RESTRAINING ORDER AND CUSTODY. SHE ALLEGED THE FATHER BEAT THE CHILD WITH A SHOE FOR GETTING ON THE WRONG SCHOOL BUS. HER REQUEST WAS GRANTED AND A HEARING BEFORE THE MAGISTRATE SCHEDULED. THE MAGISTRATE GRANTED THE MOTHER CUSTODY AND DENIED PARENTING TIME WITH THE CHILD UNTIL THE FATHER COMPLETED AN ANGER MANAGEMENT PROGRAM. THE FATHER APPEALED TO THE JUVENILE JUDGE. THE JUDGE FOUND CHANGED CIRCUMSTANCES FOR FAILURE TO FOLLOW THE PARENTING PLAN, GRANTED CUSTODY TO THE MOTHER, SET CHILD SUPPORT AND ARREARAGES, AND CONDITIONED THE FATHER'S PARENTING TIME. THE FATHER HAD NOT VISITED FOR MORE THAN A YEAR. THE FATHER WAS TO EXERCISE SUPERVISED VISITATION WITH THE SON AND WAS TO COMPLETE AN EIGHT-WEEK ANGER MANAGEMENT PROGRAM. THE FATHER APPEALED TO THE COURT OF APPEALS. THE FATHER HAD NOT FILED A TRANSCRIPT WITH THE APPELLATE RECORDS AND HIS *PRO SE* BRIEF DID NOT COMPLY WITH TENN. APP. PROC. RULE 27 (A)(7). (*In re Darius S.,* 30 TFLL 3-21, 40 TAM 52-16, Tenn. Ct. App., M.S., Nov. 30, 2015, Bennett, 6 pp.) The child was born in February 2004. An agreed parenting plan was entered in 2009. Parenting time was shared equally, no child support was owed. The parties did not comply with their agreed parenting plan. The father was denying the mother parenting time. She was afraid of him.

In August 2013, the mother filed an *ex parte* petition requesting a temporary restraining order and temporary custody. She alleged the father beat the child with a shoe for getting on the wrong school bus. Her request was granted and a hearing set before the juvenile court magistrate. The magistrate found changed circumstances, held continuity favored the mother, and denied parenting time until the father completed an anger management plan. The father appealed to the juvenile judge. The juvenile judge awarded custody to the mother and denied unsupervised parenting time until the father completed an eight-week anger management course. The father was granted supervised parenting time, not less than four hours or more than eight hours a week. The failure of the parents to comply with the 2009 parenting plan constituted changed circumstances. Child support was set at $292, support arrearages at $3,504. The father had not visited for more than a year. The father appealed to the Court of Appeals. He did not file a transcript. His brief did not comply with the requirements of Tenn. R. App. P. (a)(7). The mother requested the father's appeal be dismissed and that it be found frivolous. It was dismissed for failure to provide a proper record. It was not found frivolous.

Comment: The juvenile court judge described the father as a bully. The order requiring supervised visitation should

adequately protect the child until the anger management course is completed. The father had not visited with his son for more than a year. He claimed that financial matters and scheduling prevented visitation. In cases of child abuse, public policy encourages visitation if the child can be protected from both verbal and physical abuse—a poor parent is deemed better than an absent parent.

THE MOTHER HAD THREE CHILDREN. THE YOUNGEST, ROBERT S.B., WAS THE CHILD OF HER HUSBAND, ROBERT B. THE HUSBAND WAS ARRESTED FOR SEXUAL ABUSE OF HIS FIVE-YEAR-OLD STEPDAUGHTER. HE DIED IN PRISON. WHEN THE DEPARTMENT LEARNED THE MOTHER KNEW OF THE ABUSE, THE CHILDREN WERE PLACED IN FOSTER CARE AND A PERMANENCY PLAN ESTABLISHED. THE CHILDREN WERE ADJUDICATED DEPENDENT AND NEGLECTED, THE VICTIMS OF SEVERE ABUSE. THE DEPARTMENT WAS RELIEVED OF THE REASONABLE EFFORTS REQUIREMENT. THE MOTHER APPEALED THE JUVENILE COURT FINDING OF SEVERE ABUSE. SHE HAD KNOWLEDGE OF THE HUSBAND'S CONDUCT AND HAD FAILED TO PROTECT THE CHILDREN. THE DEPARTMENT FILED A PETITION TO TERMINATE HER PARENTAL RIGHTS IN THE CHANCERY COURT FOR LAWRENCE COUNTY. THE TRIAL JUDGE, CHANCELLOR HAMILTON, GRANTED TERMINATION FOR PERSISTENT CONDITIONS, SEVERE ABUSE, AND CHILD'S BEST INTEREST. THE MOTHER APPEALED THE FINDING OF CHILD'S BEST INTEREST TO THE COURT OF APPEALS. THE COURT OF APPEALS AFFIRMED. THE OPINION REVIEWS THE APPLICATION OF THE STATUTORY BEST INTEREST FACTORS AND AFFIRMS. THE MOTHER HAD NOT MADE AN ADJUSTMENT OF CIRCUMSTANCES, THE MOTHER DID NOT HAVE A SAFE HOME OR THE FINANCIAL ABILITY TO PROVIDE FOR THE CHILDREN'S NEEDS, SHE HAD NOT PAID CHILD SUPPORT DESPITE THE FACT SHE WAS WORKING. PERHAPS MOST IMPORTANT, SHE HAD NOT FOLLOWED RECOMMENDATIONS ABOUT MENTAL HEALTH THERAPY. (***In re Telisha B.,*** 30 TFLL 3-22, 40 TAM 52-18, Tenn. Ct. App., M.S., Nov. 30, 2015, Dinkins, 15 pp.) The mother had three children: Telisha, born in 2007; Ottis, born in 2008; and Robert S.B., born in 2009. She was married to Robert B., the father of Robert S.B. In April 2012, Robert B. was arrested for sexual abuse of Telisha, age 5. He died in prison in 2013. The Department learned that the mother knew her husband was abusing Telisha and took no action. The Department took custody and placed the three children in foster care. Two permanency plans were established. The plans required visitation, a safe home, transportation, legal income, and mental health evaluation. In January 2013, the children were adjudicated dependent and neglected for severe abuse. The Department was relieved of the duty of reasonable efforts. The mother appealed the juvenile court finding of severe abuse to the circuit court. A de novo trial was conducted and she was found guilty of severe abuse. She had knowledge of the husband's conduct and had failed to protect the children. the Department filed a petition to terminate her parental rights in the chancery court for Lawrence County. The trial judge, Chancellor Hamilton, granted termination for persistent conditions, severe abuse, and child's best interest. The mother appealed the finding of child's best interest to the Court of Appeals. The Court of Appeals affirmed. The Department had made reasonable efforts despite the fact it was relieved of the duty. The mother had associated with known sexual offenders, her boyfriend and grandfather. She had not followed through on mental health recommendations and this increased the risk of injury to the children. The children were doing well in foster care and the foster parents wished to adopt.

Comment: At the beginning of the termination proceedings, the mother's attorney requested the mother be given another chance. Some of the expert testimony had been favorable to the mother. The trial judge granted the request. The mother started off well but did not follow through. The hearing was continued and the mother's parental rights terminated. A similar thing had happened when the Department filed the petition to terminate her parental rights—she started off working to comply with the permanency plan but she didn't stay the course. It would not be reasonable to expect she would use good parenting skills over years when she was not able to work the plan a few months. Her ability to provide financially for the children was questionable. She was employed at a convenience store but failed to pay the court ordered support. When she got in financial trouble, her family bailed her out. She had allowed her food stamp plan to run out. Apparently she had not obtained Social Security benefits for the care of their child following the death of her husband.

Court of Appeals
Western Section

A DEPARTMENT STORE PETITIONED THE KNOX COUNTY JUVENILE COURT THAT THE CHILD, ADDISON M., WAS DELINQUENT AND IN NEED OF TREATMENT AND REHABILITATION. ADDISON ADMITTED THEFT AND WAS PLACED ON PROBATION IN 2010. ADDISON AND HER MOTHER SIGNED THE PROBATION PLAN. THERE WAS NOT A TERMINATION DATE; THE MATTER WAS LEFT OPEN INDEFINITELY. THERE WERE OTHER INCIDENTS, SOME DISMISSED, OTHERS UNRESOLVED. IN 2013 THE JUVENILE COURT MAGISTRATE REVOKED THE 2010 PROBATION ORDER. ADDISON APPEALED TO THE JUVENILE JUDGE, WHO TRANSFERRED

THE CASE TO THE CRIMINAL COURT. ADDISON TESTIFIED THAT SHE HAD COMPLETED THE 2010 PROBATION BUT HAD NEVER BEEN NOTIFIED IT WAS CLOSED. THE STATE ARGUED THE PROCEDURE OF JUDICIAL DIVERSION AND INDEFINITE SUPERVISION WAS AUTHORIZED BY LOCAL COURT RULE. THE STATE CONCEDED THE LOCAL RULE WAS NOT AUTHORIZED BY STATUTE OR RULES. THE CRIMINAL JUDGE AFFIRMED. ADDISON APPEALED, THE COURT OF APPEALS REVERSED AND REMANDED FOR DISMISSAL. THE LOCAL RULES WERE INCONSISTENT WITH THE APPLICABLE STATUTES AND RULES. (***In re Addison M.,*** 30 TFLL 3-23, 40 TAM 49-15, Tenn. Ct. App., W.S. at Knoxville, Nov. 9, 2015, 13 pp.) In November 2009 a department store petitioned the Knox County Juvenile Court that Addison was delinquent and in need of treatment and rehabilitation. A public defender was appointed to represent Addison. She admitted theft, "pled true" to the petition in January 2010, and a plan for probation was developed. The child and her mother signed it. It required 16 hours of community service, drug screens, school attendance, and cooperation with the probation officer and the probation counselor. Failure to cooperate with the probation officer could lead to confinement. It provided Addison would remain on probation until released by the court; the record did not show she was ever released.

There were other incidents, more probations, some were dismissed, others were unresolved. In September 2013 the magistrate, following a hearing on a traffic offense and the failure of a drug screen, conducted an adjudication hearing and revoked the 2009 probation order. Addison requested a hearing before the juvenile judge. The juvenile judge transferred the case to the criminal court.

Addison had testified she thought the June 2014 hearing was on a "call back" on her traffic offense. She testified that she had complied with the 2009 probation when she was placed on judicial diversion and there was nothing for the magistrate to revoke. In the criminal court proceeding, the State conceded there was no statutory provision authorizing judicial diversion in the juvenile court. A local rule of practice did provide for judicial diversion and the passing of a case indefinitely. The criminal court judge affirmed the orders of the juvenile court judge and the juvenile court magistrate. Addison filed a timely appeal. The Court of Appeals vacated and remanded for dismissal. The local rule was inconsistent because it conflicted with the general statutes and rules. The child has a right to notice regarding juvenile court adjudicatory and dispositional hearings.

Comment: The goal of juvenile court proceedings and the juvenile statutes is to protect children and youth from the taint of criminality and to provide appropriate instruction and assistance (also to protect the public). A child is entitled to an adequate and fair warning of the consequences of noncompliance with probation orders. There are time limits relative to hearings. The procedure in Knox County did not comply with those notice requirements. Juvenile court staff testified as to how the local rules and local procedures were applied to accomplish some of the legislative goals. The legislature may wish to revisit those statutes.

THE CHILD WAS BORN OUT-OF-WEDLOCK TO A MARRIED WOMAN. PATERNITY AND VISITATION WERE ESTABLISHED. THE MOTHER AND HER HUSBAND RECONCILED. THE CHILD LIVED WITH THEM. DURING THE SUMMER AND FALL OF 2004 THE CHILD ACTED-OUT SEXUAL CONDUCT. SHE SAID, "DADDY DID IT." THIS WAS REPORTED TO THE DEPARTMENT AND AN INVESTIGATION WAS MADE INCLUDING A FORENSIC INTERVIEW. BOTH MOTHER AND THE DEPARTMENT FILED DEPENDENCY AND NEGLECT PETITIONS IN THE JUVENILE COURT. THE MAGISTRATE HELD NEITHER PROVED SEXUAL ABUSE AND DISMISSED. THE DEPARTMENT APPEALED TO THE JUVENILE JUDGE WHO FOUND THE CHILD THE VICTIM OF THE FATHER'S SEVERE SEXUAL ABUSE. THE FATHER APPEALED TO THE CIRCUIT COURT. THE MOTHER AND HER HUSBAND FILED A PETITION IN THE CHANCERY COURT TO TERMINATE THE FATHER'S PARENTAL RIGHTS SO THE STEPFATHER COULD ADOPT. THE CHANCELLOR HELD PERSISTENT CONDITIONS, SEVERE ABUSE, AND CHILD'S BEST INTEREST WERE PROVED BY CLEAR AND CONVINCING EVIDENCE. THE FATHER APPEALED, THE COURT OF APPEALS REVERSED AND REMANDED FOR SPECIFIC FINDINGS ON GROUNDS. (***In re S.S.-G.,*** 30 TFLL 3-24, 40 TAM 50-8, Tenn. Ct. App., W.S. at Nashville, Nov. 12, 2015, Armstrong, 20 pp.) The mother (J.P.G.), while separated from her husband (K.J.G.), had an affair with J.M.S. (father) and became pregnant. The child was born in May 2006. The father's paternity was established in the Juvenile Court for Williamson County. The mother and her husband reconciled. The child lived with them. The father had visitation. During the summer and fall of 2008 the child's nannies observed the child place her finger in her vagina. This conduct was observed by the mother and she made a referral to the Department. The Department's investigation included a forensic interview. The father was found to be a risk for the child. Both the Department and the mother filed dependency and neglect petitions. The magistrate found neither proved sexual abuse by the father. The Department appealed to the juvenile judge who determined the child to be dependent and neglected, the victim of severe child abuse by her father. The father appealed to the circuit court. The mother and her husband filed a petition in the chancery court to terminate the father's parental rights so the husband could adopt. The father was granted a stay of his appeal in circuit court. The guardian *ad litem* in the juvenile court proceeding was appointed the guardian *ad litem* in the chancery court. The trial judge, Chancellor Beal, found grounds of severe abuse and persistent conditions

and child's best interest proved by clear and convincing evidence. The father appealed to the Court of Appeals.

The father raised six issues in his appeal. He alleged the evidence was not clear and convincing, the findings were inadequate, and the determination the judgment that the child was dependent and neglected was not final. He also argued the guardian *ad litem's* conduct was inadequate because she had not interviewed the child. The appellate opinion reverses the finding of persistent conditions because the trial court finding of dependency and neglect was not final. The finding of severe sexual abuse was reversed because it was not clear which statute was relied on. These findings were reversed and remanded for specific findings.

There is a three-page discussion of the duties of a guardian *ad litem* and Tennessee Supreme Rule 40A. The chancellor had praised the guardian *ad litem* and noted her services were invaluable. The opinion questions whether a guardian *ad litem's* services would be a ground for reversal, particularly the failure to interview a six-year-old child.

Comment: Because of the statutory stay of other proceedings while a petition for adoption is pending, it may be necessary to dismiss the petition to adopt so there can be a final adjudication of the issue of finality of the dependency and neglect determination. There is a very interesting discussion of the requirement of finality before a judgment can be relied on. Tennessee is in the minority on this issue.

WHEN THOMAS' AUNT AND UNCLE PETITIONED FOR TERMINATION OF PARENTAL RIGHTS IN 2014, THE FATHER WAS SERVING A SIX-YEAR TERM FOR AGGRAVATED BURGLARY. THE MOTHER'S PARENTAL RIGHTS WERE TERMINATED BY A DEFAULT JUDGMENT. THE GROUNDS ALLEGED WERE ABANDONMENT BY NONSUPPORT, NONVISITATION, WANTON DISREGARD, PERSISTENT CONDITIONS, AND CHILD'S BEST INTEREST. THOMAS HAD BEEN ADJUDICATED DEPENDENT AND NEGLECTED. PLACEMENT WITH OTHER FAMILY MEMBERS AND RETURN TO THE MOTHER HAD NOT WORKED OUT. THE CHILD WAS HAPPY AND WAS DOING WELL IN THE AUNT AND UNCLE'S HOME FOR THREE YEARS. THE FATHER HAD NOT VISITED DURING THE EIGHT MONTHS PRECEDING INCARCERATION. HE HAD A HISTORY OF DRUG ABUSE, DOMESTIC VIOLENCE, AND CRIMINAL CONDUCT. THE TRIAL JUDGE GRANTED TERMINATION. THE FATHER APPEALED. THE COURT OF APPEALS AFFIRMED. THOMAS HAD NO RELATIONSHIP WITH HIS FATHER. IT WOULD NOT BE SAFE TO RETURN HIM TO HIS FATHER'S CARE. THE AUNT AND UNCLE WERE ABLE TO PROVIDE FOR THOMAS' NEEDS AND WANTED TO ADOPT HIM. THE EVIDENCE WAS CLEAR AND CONVINCING. (***In re Thomas T.,*** 30 TFLL 3-25, 40 TAM 50-9, Tenn. Ct. App, W.S. at Knoxville, Nov. 16, 2015, Gibson, 12 pp.) The child was born out-of-wedlock in October 2008. His parents did not provide a safe and secure home. The Department placed him with family members several times. He had been returned to the mother in June 2010. She did not obey court orders and Thomas was placed in foster care. He was placed in the home of his great aunt and great uncle at age 3. When he was eight years old, the aunt and uncle petitioned the Juvenile Court for Knox County to terminate the parents' parental rights. The mother's parental rights were terminated by a default judgment. The father's case was tried in the fall of 2013 and 2014. The father was in prison, serving a six-year term for aggravated burglary. His expected release date was May 2016. The grounds alleged were abandonment by nonvisitation and wanton disregard, persistent conditions, and child's best interest. The father had not visited during the eight months prior to incarceration. He had a history of substance abuse and domestic violence. He testified he had attempted to visit and the child's aunt would not cooperate. The trial judge, Judge Irwin, found his credibility was low. A letter from prison to the aunt apologized for his failure to visit. The child was happy and enjoyed activities with his aunt and uncle, who wished to adopt and were able to provide for him.

Judge Irwin found the grounds proved for termination of the father's parental rights and that termination would be in the child's best interest. It would not be safe to return Thomas to his father's care because of the father's criminal history, drug abuse, and domestic violence. There was no relationship between father and son. The aunt testified that Thomas would not recognize his father. The conditions existing at the time Thomas was removed from the parents' home had continued to exist and it was likely they would continue. The finding of persistent conditions was also affirmed.

Comment: It was clearly in the child's best interest to terminate the father's parental rights. If the father were released from prison in May 2014, he would not have a safe and secure home. The father had not testified of efforts to deal with his drug problems. A transfer of custody from a stable loving family to a father he did not know would be a severe emotional problem for Thomas. It would appear likely the father would seek family help and that had not worked after Thomas was declared dependent and neglected.

Update Index
Tennessee Divorce, Alimony & Child Custody

10-9	Carter v. Carter, 30 TFLL 3-14
12-5	Boren v. Rousos, 30 TFLL 3-13
13-4	Lubell v. Lubell, 30 TFLL 3-4
13-9	Helton v. Helton, 30 TFLL 3-1
13-10	Helton v. Helton, 30 TFLL 3-1
13-11	Lubell v. Lubell, 30 TFLL 3-4
14-11(3)	Cook v. Iverson, 30 TFLL 3-18
14-11(7)	Cook v. Iverson, 30 TFLL 3-18
14-11(3)	Cisneros v. Cisneros, 30 TFLL 3-16
14-11(6)(D)(2)	In re Andrea R., 30 TFLL 3-19
14-11(7)(F)(2)	In re Andrea R., 30 TFLL 3-19
15-4	Culpepper v. Culpepper, 30 TFLL 3-2
	Draper v. Draper, 30 TFLL 3-3
	Hollar v. Hollar, 30 TFLL 3-20
	Westberry v. Westberry, 30 TFLL 3-6
15-6(1)	Hollar v. Hollar, 30 TFLL 3-20
15-6(2)	Hollar v. Hollar, 30 TFLL 3-20
15-6(17)	Draper v. Draper, 30 TFLL 3-3
15-6(24)	Draper v. Draper, 30 TFLL 3-3
15-13	Lubell v. Lubell, 30 TFLL 3-4
16-4(11)	Cisneros v. Cisneros, 30 TFLL 3-16
16-5	Boren v. Rousos, 30 TFLL 3-13
17-10	Kelley v. Varner, 30 TFLL 3-8
18-3	In re S.S.-G., 30 TFLL 3-24
18-5(b)	In re Raven P., 30 TFLL 3-15
18-8(a)(1)	Aragon v. Aragon, 30 TFLL 3-17
18-8(c)	Hines v. Hines, 30 TFLL 3-7
18-9	In re Darius S., 30 TFLL 3-21
18-10(4)	Beeler v. Beeler, 30 TFLL 3-9
18-10(7)	Beeler v. Beeler, 30 TFLL 3-9
18-12	Beeler v. Beeler, 30 TFLL 3-9
18-18	Beeler v. Beeler, 30 TFLL 3-9
	Cisneros v. Cisneros, 30 TFLL 3-16
20-3	Helton v. Helton, 30 TFLL 3-1
20-4(1)	Cook v. Iverson, 30 TFLL 3-18
20-4(3)	Cook v. Iverson, 30 TFLL 3-18
20-5(1)	Cook v. Iverson, 30 TFLL 3-18
20-5(10)	Cook v. Iverson, 30 TFLL 3-18
22-8	In re Addison M., 30 TFLL 3-23
22-9	In re Analilia R., 30 TFLL 3-10
	In re C.J.A.H., 30 TFLL 3-12
	In re S.S.-G., 30 TFLL 3-24
	In re Telisha B., 30 TFLL 3-22
	In re Thomas T., 30 TFLL 3-25
24-2(2)	In re Darius S., 30 TFLL 3-21
24-2(8)	In re Darius S., 30 TFLL 3-21
24-27	Aragon v. Aragon, 30 TFLL 3-17
	In re Hope A., 30 TFLL 3-5
25-2	Rigsby v. Rigsby, 30 TFLL 3-11
25-3	Rigsby v. Rigsby, 30 TFLL 3-11
26-4(10)	In re Darius S., 30 TFLL 3-21
26-16	Boren v. Rousos, 30 TFLL 3-13
27-4	In re Darius S., 30 TFLL 3-21
27-15	Aragon v. Aragon, 30 TFLL 3-17
28-5	Culpepper v. Culpepper, 30 TFLL 3-2

Permission to Appeal

Case	TFLL	SW3d	Result	Date
In re Neveah	29-8-22	870/807	Reversed	4/2/15

Note: If you have inquiries or comments concerning Tennessee Family Law Letter, you may contact:
W. Walton Garrett, P.O. Box 911, Lake Junaluska, NC 28745, 828-452-0230.