

THE BRIEF BOOK: MEMORANDA OF LAW ON ISSUES AFFECTING VICTIMS OF DOMESTIC VIOLENCE

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IN THE _____ COURT OF _____ COUNTY, TENNESSEE

_____	*	
Petitioner	*	No. _____
	*	
vs.	*	DIVISION _____
	*	
_____	*	
Respondent	*	

BRIEF CONCERNING EVIDENCE OF HABITUAL BEHAVIOR

It is important for a court to allow the Petitioner to present evidence of the pattern of behavior of the Respondent in an order-of-protection case. Otherwise, a crucial ingredient of the evidence will not be present. There is ample authority for allowing the Petitioner to present such evidence:

Evidence of the habit of a person ...whether corroborated or not and regardless of the presence of eye-witnesses, is relevant to prove that the conduct of the person ... on a particular occasion was in conformity with the ... routine practice..... A habit is a regular response to a repeated specific situation. (Rule 406 of the Tennessee Rules of Evidence)

All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules or other rules or laws of general application in the courts of Tennessee.... (Rule 402) (emphasis added)

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the act more probable or less probable than it would be without the evidence. (Rule 401) (emphasis added)

To illustrate the point that habitual behavior is a necessary part of the proof in an order-of-protection case, one can do no better than quote from Skaggs, *Tennessee Domestic Abuse Benchbook*, produced by The Administrative Office of the Courts and

the Tennessee Coalition against Domestic and Sexual Violence (2003) and furnished to every Tennessee trial judge. In the initial seven pages of the text, the author comments:

Domestic abuse is a pattern of behavior that consists of multiple, often daily, behaviors, including both criminal and non-criminal acts. While the legal process tends to focus on discrete behaviors, it is the entire pattern of abuse that shapes how the perpetrator and the victim function in Court and how each responds to interventions. Not only are the adults affected by the abuse, but so are the children in these families as they witness one parent abusing the other.

Domestic abuse is a pattern of violent and coercive behaviors whereby the perpetrator seeks to control the thoughts, beliefs, and conduct of his or her intimate partner and to punish the intimate partner for resisting the perpetrator's control over her or him. Perpetrators of domestic abuse can be found in all age, racial, socioeconomic, educational, occupational, sexual orientation, and religious groups.

Domestic abuse consists of a wide range of behaviors, including some of the same behaviors found in stranger violence. Some acts of domestic abuse are criminal (hitting, choking, kicking, assault with a weapon, shoving, scratching, biting, rape, unwanted sexual touching, forcing sex with third parties, threats of violence, stalking, destruction of property, etc.) while other behaviors may not by themselves constitute criminal conduct (degrading comments, interrogating children or other family members, suicide threats or attempts, controlling access to the family resources as well as controlling the victim's own time and activities, etc.). Domestic abuse perpetrators often act excessively jealous and possessive in order to isolate the victim. Whether or not there has been a finding of criminal conduct, evidence of these behaviors indicates a pattern of abusive control which has devastating effects on the family.

Domestic abuse is not an isolated, individual event. One battering episode builds on past episodes and sets the stage for future episodes. All incidents of the pattern interact with each other and have a profound effect on the victim. There is a wide range of consequences, some physically injurious and some not; all are psychologically damaging.

Domestic abuse is purposeful and instrumental behavior. The pattern of abuse is directed at achieving compliance from or control over the victim. It is directed at circumscribing the life of the victim so that independent thought and action are eliminated and so that the victim will become exclusively devoted to fulfilling the needs and requirements of the perpetrator. The pattern is not impulsive or out of control behavior. The perpetrator selectively chooses tactics that work to control the victim.

Some of the acts may appear to be directed against or involve the children, property, or pets when in fact the perpetrator is doing these behaviors in order to control or punish the intimate partner (e.g., physical attacks against a child, throwing furniture through a picture window, strangling the victim's pet cat, etc.). Although someone or something other than the victim is physically damaged, that particular assault is part of the pattern of abuse directed at the victim.

Not all verbal attacks or insults between intimates are psychological battering. Again, it is the pattern of attempts to establish and maintain power and control through psychological abuse that is important. Prior use or threat of physical force against person or property gives additional power to psychological abuse. In addition, psychological abuse, such as verbal abuse, isolation, threats of violence, etc., often escalates into and paves the way for physical abuse. The verbal abuse includes disparaging, degrading, and discrediting language. These verbal attacks are fabricated with particular sensitivity to the victim's vulnerabilities. Perpetrators are able to control victims by a combination of physical and psychological tactics since the two are so closely interwoven by the perpetrator.

Some mistakenly believe that both the perpetrator and the victim are abusive, one physically and one verbally. While some victims may resort to verbal insults, the reality is that verbal insults are not the same as a fist in the face. Furthermore, perpetrators use both physical and verbal assaults. Research indicates that perpetrators are more verbally abusive than either their victims or other persons in distressed but nonviolent relationships or in non-distressed intimate relationships (Margolin, Gleberman, John, & Ransford, 1987). In addition, what perpetrators report as abusive behavior of the victim are often acts of resistance by the victim. Victims are not passive recipients of violence, but often engage in strategic survival during which they sometimes resist demands of perpetrators that they see as immoral or inappropriate. Perpetrators respond to such resistance with escalating tactics of control and violence. The victim seeking separation is often seen by the perpetrator as engaging in the ultimate act of resistance. Consequently, the perpetrator may increase the violence during points of separation.

Sometimes it may seem that there is mutual battering where both individuals are using physical force against each other. Careful fact-finding often reveals that one party is the primary physical aggressor and the other party's violence is in self-defense (e.g., she stabbed him as he was choking her), or one party's violence is more severe (e.g., punching and choking versus scratching) (Saunders & Brown, 1990).

However, the majority of domestic abuse is not out of control behavior, but a pattern of behavior that is used by the perpetrator because it works.

Some perpetrators will batter only in particular ways, e.g., hit certain parts of the body, but not others; only use violence towards the victim even though they may be angry at others (their boss, other family members, etc.); break only the victim's possessions, not their own. They are making choices even when they are supposedly out of control. Such decision-making indicates they are actually in control of their behavior.

Domestic abuse is not caused by anger. The perpetrator chooses to use violence to get what he or she wants or get that to which he or she feels entitled. Displays of anger by the perpetrator are often merely tactics employed by the perpetrator to intimidate the victim.

Perpetrators choose those acts of abuse that work and which subject them to the least risk. They choose acts of abuse or violence which they believe the victim is particularly sensitive or responsive to. They choose times and places that are designed to have the most powerful impact with the least risk.

Domestic abuse is not caused by stress. We all have different sources of stress in our lives (e.g., stress from the job, stress from not having a job, marital and relationship conflicts, discrimination, poverty, etc.). We can respond to stress in a wide variety of ways (e.g., problem solving, substance abuse, eating, laughing, withdrawal, violence, etc.) (Bandura, 1973). People choose ways to reduce stress according to what has worked for them in the past.

It is important to hold people accountable for the choices they make regarding how to reduce their stress, especially when those choices involve violence. Just as we would not excuse a robbery or a mugging of a stranger simply because the perpetrator was under stress, we can no longer excuse the perpetrator of domestic abuse. Moreover, when we remember that domestic abuse is a pattern of behavior consisting of a variety of tactics repeated over time, then citing specific stressors becomes less meaningful in explaining the entire pattern (Pence & Paymar, 1993).

Domestic abuse is not caused by problems inherent in the relationship between the two individuals or by the victim's behavior. People can be in distressed relationships and experience negative feelings about the behavior of the other without responding with violence. Domestic abuse is a pattern of control that perpetrators bring into their intimate relationships. Without intervention, it is likely that they will be violent in each consecutive relationship with an intimate partner (Ganley, 1989).

Victims are often assaulted when they are not engaging in any behavior that could be construed as resisting the perpetrator. Other incidents occur when the victim is resisting the perpetrator's demands that she or he

engage in unethical or unlawful behavior. Looking at the relationship or the victim's behavior as a causal explanation for domestic abuse takes the focus off the perpetrator's responsibility for the violence, and supports the perpetrator's minimization, denial, externalization, and rationalization of the violent behavior. Blaming the victim or locating the problem in the relationship provides the perpetrator with excuses and justifications for the conduct. This reinforces the perpetrator's use of abuse to control family members and thus contributes to the escalation of the pattern. As a result, the victim is placed at greater risk.

Dated: _____

Signature
Printed Name: _____
Address: _____
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CERTIFICATE

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Dated: _____

Signature

IN THE _____ COURT OF _____ COUNTY, TENNESSEE

_____	*	
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_____	*	
Respondent	*	

BRIEF ON ORDERS OF PROTECTION AND DOUBLE JEOPARDY

I. Introduction

Issuing an order of protection never places a defendant in danger of double jeopardy, even if the defendant has been arrested for the acts that form the basis of issuing the order of protection. Indeed, public policy precludes punishing victims for reporting the crimes of their abusers.

An order of protection is purely a civil remedy. It is not a criminal proceeding and is not punishment within the meaning of the double jeopardy clause of either the federal or state constitutions. Therefore, double jeopardy never attaches to the issuance of an order of protection.

Furthermore, the Fifth Amendment serves as no bar to enforcing an order of protection. While a criminal defendant may invoke his Fifth Amendment rights to remain silent in a civil proceeding, his invocation of that privilege can be used against him in the civil proceeding. No factual finding in an order of protection hearing impacts a defendant’s criminal hearing, due to the different standards of proof utilized. Invoking the Fifth is not a license to avoid civil liability for one’s criminal acts.

In sum, orders of protection are a civil remedy, designed to protect victims from future harm. Abusers whose acts rise to the level of criminal conduct do not earn special exemption from the order of protection laws due to the criminal character of their conduct.

II. An Order of Protection Is Not Punishment for an Offense

The double jeopardy clauses of the Federal and Tennessee Constitutions have similarly defined protections:

[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb... (U. S. Const., Amend. V)

[N]o person shall, for the same offence, be twice put in jeopardy of life or limb. (Tenn. Const., Art. 1, Sec. 10)

These constitutional provisions have three separate elements: (1) prohibitions against consecutive punishments; (2) by a government; (3) for the same offense.

Punishment. A person, by committing a criminal act, does not evade the remedial provisions of the law. Civil remedies are not punishments. As the Tennessee Supreme Court recently established, in reciting earlier case law:

Not every deprivation visited upon one who violates the state's laws is to be considered "punishment" for purposes of applying the double jeopardy clause. Thus, it is recognized . . . that the double jeopardy clause did not prevent a second action that is "remedial in nature" and not intended to have the effect of inflicting "punishment" upon the individual in order to vindicate public justice.”¹

An order of protection is purely a civil remedy, initiated by victims not the state. Its provisions are remedial in nature, involve a standard of proof common to civil actions, and do not punish the defendant to vindicate state interests. Indeed, in well-established case law, the Pennsylvania Supreme Court rejected the very claim at issue here – that the mere issuance of an order of protection invoked the protection of the double jeopardy clause. As the court held, “[t]he primary purpose of [the Protection from Abuse Act authorizing orders of protection] is not retrospective punishment, but rather, advance prevention of physical and sexual abuse.”²

Recent case law upholds this interpretation. A federal court, in following Illinois state law nearly identical to that of Tennessee, held, in rejecting a defendant’s claims of double jeopardy:

¹ *Stuart v. State*, 963 S.W.2d 28, 32 (Tenn. 1998)(citing *State v. Conley*, 639 S.W.2d 435, 436-37 (Tenn. 1982)).

² *Commonwealth v. Smith*, 552 A.2d 292, 294 (Penn. 1988).

[A]n order of protection is an expedited proceeding, the focus of which is on the immediate protection of the abused family or household members, not the guilt of the accused and the more general protection of society, as is the focus in a criminal domestic battery prosecution.³

Tennessee case law follows this same pattern by direct implication. After finding a defendant in *criminal* contempt of an earlier order of protection, a trial court issued a new order of protection based on the conduct that the court had punished. The Tennessee Supreme Court upheld the second order of protection, and its inclusion of mandatory counseling, as purely remedial and within the scope of the court's statutory authority under the order of protection.⁴ If the same court can punish a defendant with criminal contempt and later issue a new order of protection based on the same conduct, then clearly any court can issue an order of protection when separate criminal charges are merely pending, as in the case now before the court.

Indeed, in the principal decision defining what constitutes punishment within the meaning of the double jeopardy clauses, the Tennessee Supreme Court looked to legislative intent and whether the proceedings are "so punitive in fact" that they must be labeled criminal.⁵ In ruling that forfeiture proceedings did not constitute punishment within the meaning of the double jeopardy clauses, the court highlighted the lower standard of proof (preponderance of the evidence) and the remedial benefits of the forfeiture proceedings.

In the case now before the court, the same analysis holds. Orders of protection utilize the standard of proof common to civil cases – a mere preponderance of the evidence. Similarly, orders of protection serve remedial purposes. They marry traditional legal relief (financial support, child custody) with conventional equitable relief (eviction, restraining orders). Indeed, orders of protection are far less drastic than the forfeiture proceedings in *Stuart*, which are initiated by the state and are intimately intertwined with criminal proceedings.

Finally, many orders of protection involve claims -- such as child support -- separate from the criminal charge of assault. The mere fact that a person is being

³ *Holiday v. Sheriff of DuPage County*, 152 F. Supp. 2d 1004, 1014 (N.D. Ill. 2001) (quoting from *People v. Wouk*, 739 N.E.2d 64 (Ill. App. Ct. 2000)).

⁴ *Cable v. Clemons*, 36 S.W.3d 39 (Tenn. 2001).

⁵ *Stuart v. State*, 963 S.W.2d at 32.

prosecuted concerning his conduct should not immunize him or her from civil proceedings involving *other* matters which are not the subject of criminal prosecution.

Involvement of the Government. Orders of protection are civil proceedings between individuals and do not involve a prosecutorial arm of government. Indeed, no part of the executive branch of government is a party, even one that deals with civil matters such as forfeiture. Thus, the second element of double jeopardy is not present.

Offense. In using the word alternately spelled “offense” and “offence,” the Federal and Tennessee constitutions invoke the criminal law. In their broadest sense, they contain three types of prohibition against: (1) a subsequent prosecution after an acquittal, (2) another prosecution after a conviction, and (3) multiple punishments for the same conduct.⁶ In all these circumstances, the criminal process is twice involved. But that is not true with an order of protection. It is not involved at all the first time when Petitioner and defendant appear in Circuit Court. On the second occasion, justice may not be obtained because of the lamentable tendency of prosecutors, judges, and – on occasion – victims to stop short of determinations of guilt and punishment in Criminal Court. Hence, the third element of double jeopardy is likewise absent.

III. The Respondent has a Remedy: Use of the Privilege against Self-Incrimination

If the Respondent has a concern that his testimony in the civil case will be used against him in the criminal proceedings, he need only invoke his privilege against self-incrimination. It is a privilege, not an exemption from sanctions imposed under law.

In essence, he is asking for **double relief** – dismissal of the civil proceedings and the privilege of not testifying against himself in the criminal case. By contrast, the Petitioner could easily become **doubly a victim**. Dismissal of the civil case could be followed rapidly by a finding of not guilty in the criminal case. A jury could easily find that there is insufficient evidence to convict when it can listen to only two witnesses – him and her – and he is unwilling to talk.

No scheme of justice, even ours with its manifold protections for defendants, should permit such a result to occur.

⁶ *State v. Denton*, 938 S.W.2d 373, 378 (Tenn. 1996).

Dated: _____

Signature
Printed Name: _____
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Dated: _____

Signature

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	*	
Respondent	*	

BRIEF CONCERNING POSTPONEMENT OF HEARINGS FOR ORDERS OF PROTECTION

The Petitioner has asked for an Order of Protection. Tennessee law requires a hearing on the Order of Protection within fifteen days of service of the Ex Parte Order.⁷ Process was served on _____. The hearing is scheduled for _____.

This memorandum has been filed in anticipation of legal issues that may arise during the hearing. That is, Petitioner believes that the Respondent will request a postponement or that rulings of the Court in other cases indicate that it may order a postponement in this case. She objects to a postponement for the following reasons:

1. The Respondent has had an adequate opportunity to prepare for the hearing. Service of process on the Respondent occurred more than five days before the date of the hearing.⁸ Thus, no postponement can be granted for this reason.
2. The Respondent has not requested counsel or has had an adequate opportunity to retain counsel. Again, no postponement can be granted for this reason.
3. Delay is a weapon that the Respondent may use so that the Petition will ultimately be dismissed by the Court because the Petitioner fails to appear at a later hearing. It is not uncommon for the Petitioner to appear *several* times in criminal proceedings as well as two *or more* times in the Order of Protection

⁷ Tenn. Code Ann. § 36-3-605(b).
⁸ Tenn. Code Ann. § 36-3-605(c).

civil case. This creates a financial as well as an emotional burden that cannot be justified.

4. Continuation of an Ex Parte Order provides much less relief than the grant of an Order of Protection. Tenn. Code Ann. § 36-3-606(b) states: “Relief granted pursuant to subdivisions (a)(4)-(8) [relating to housing, custody, visitation, child support, financial support for the petitioner, and counseling] shall be ordered only after the petitioner and respondent have been given an opportunity to be heard by the court.” In other words, the non-safety relief to which a petitioner may be entitled can be granted when the Ex Parte Order is extended but only if the parties are permitted to give their arguments for and against such relief. However, it is a common practice for judges to refuse to grant a hearing about such temporary relief and, thus, to decline to order any of the following prior to a final hearing which may be weeks or months away:

- custody of children and visitation
- child support
- financial support for the Petitioner
- requiring the Respondent to move out of the parties’ home
- alternative housing for the Petitioner paid for by the Respondent
- prohibiting the Respondent from disconnecting utilities for a residence the parties have shared
- requiring the Respondent to attend counseling programs

5. The fact that the Respondent may face prosecution for a criminal offense arising out of the same facts giving rise to the Petition for an Order of Protection does not justify postponement. The concept of double jeopardy does not apply when one case is civil in nature and the other is criminal. It applies only when both cases are criminal. As the Tennessee Supreme Court has established, in reciting earlier case law:

Not every deprivation visited upon one who violates the state's laws is to be considered "punishment" for purposes of applying the double jeopardy clause. Thus, it is recognized . . . that the double jeopardy clause did not prevent a second action that is "remedial in nature" and not intended to have the effect of inflicting

"punishment" upon the individual in order to vindicate public justice.”⁹

The Pennsylvania Supreme Court has rejected the claim that the mere issuance of an order of protection invokes the protection of the double jeopardy clause, saying “[t]he primary purpose of [the Protection from Abuse Act authorizing orders of protection] is not retrospective punishment, but rather, advance prevention of physical and sexual abuse.”¹⁰

6. Postponement of the hearing in this case until a criminal case is concluded, with a provision that the entry of a guilty plea or a finding of guilt in the criminal case will result in the automatic entry of the Order of Protection, is unfair to the *Respondent*. He should have a hearing in this civil case, regardless of what happens in the criminal case arising out of the same facts. The doctrine of collateral estoppel does not prevent his re-litigating the same issue. To invoke the doctrine successfully, a party in the later case (in other words, the Petitioner in this case) must show all of the following:¹¹

- The issue in the later case is identical to the issue decided in the earlier one.
- The issue was actually litigated and decided on its merits in the earlier suit.
- The judgment in the earlier suit has become final.
- *The party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier suit.* This is the problem. The parties are different: the State is the plaintiff in the criminal case, not this Petitioner. There is no “privity” between the two of them because one did not succeed to the contractual or legal status of the other. They are independent and unrelated persons litigating the same facts with the same defendant in two separate cases.

⁹ *Stuart v. State*, 963 S.W.2d 28, 32 (Tenn. 1998) (citing *State v. Conley*, 639 S.W.2d 435, 436-37 (Tenn. 1982)).

¹⁰ *Commonwealth v. Smith*, 552 A.2d 292, 294 (Penn. 1988).

¹¹ *Beaty v. McGraw*, 15 S.W.3d 819 (Tenn. App. 1998).

- The party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier case to litigate the issue.
7. Postponement of the date for the hearing *without* continuation of an Ex Parte Order creates a still harsher fate for the Petitioner than continuation with such an order. Even if a “No Contact” Order is in effect in a criminal case, it is not sufficient protection. For one thing, the criminal case may be dismissed. For another, the Respondent may be held in jail, and such an order does not apply while incarceration occurs. He can still contact the Petitioner by mail or telephone.

Dated: _____

Signature
Printed Name: _____
Address: _____
Telephone: _____

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BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RELIEF

The wife requests an expedited hearing on her proposed Temporary Parenting Plan, as well as alimony and attorneys’ fees.

Under T.C.A. 36-6-403, the court can require an expedited hearing on a Temporary Parenting Plan whenever dispute resolution is unavailable. Dispute resolution cannot be ordered whenever one parent is unable to afford the costs thereof. Given the affidavit of indigency filed in this case, it is apparent the Petitioner cannot afford the costs of dispute resolution.¹² Therefore, the proper procedure is for the Court to conduct an expedited hearing on the Temporary Parenting Plan proposed by the Petitioner.¹³

The wife is without assets sufficient for her own support. The court may award alimony pendente lite to assist a needy spouse pending the outcome of the divorce.¹⁴ In particular, rehabilitative alimony is favored under the law where a spouse is economically disadvantaged relative to the other spouse.¹⁵

This is particularly true where rehabilitative support is needed for a spouse taking care of children.¹⁶ Indeed, such awards reduce the burden on the state, giving economically disadvantaged spouses, especially those responsible for minor children, a means of acquiring self-sufficiency without depending on state support.

¹² T.C.A. 36-6-409.

¹³ T.C.A. 36-6-403.

¹⁴ See *Anderton v. Anderton*, 988 S.W.2d 675 (Tenn. Ct. App. 1998).

¹⁵ See T.C.A. 36-5-101 (“It is the intent of the General Assembly that a spouse who is economically disadvantaged relative to the other spouse be rehabilitated whenever possible by a granting of an order for payment of rehabilitative, temporary support and maintenance.”)

¹⁶ See *Anderton*.

In a similar vein, whenever a spouse lacks the resources to pay for legal expenses, the court may award those attorneys fees as part of temporary alimony.¹⁷ Again, the same logic applies. Needy spouses should not forego legal counsel due to their financially disadvantaged status.

In conclusion, the wife moves the court to approve her temporary parenting plan and require the husband to pay rehabilitative alimony, attorneys fees and costs pendente lite.

Dated: _____

Signature
Printed Name: _____
Address: _____
Telephone: _____

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¹⁷ See *Houghland v. Houghland*, 894 S.W.2d 619 (Tenn. Ct. App. 1992).

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**BRIEF CONCERNING THE EFFECT OF A TORT CLAIM IN A PROCEEDING
TO DISSOLVE A MARRIAGE**

The wife has a potential tort recovery against her husband by virtue of *Davis v. Davis*, 657 S.W. 2d 753 (Tenn. Sup. Ct. 1983). This brief is directed to the question of how to divide the property of the spouses, including the tort claim which has particular significance because no civil trial has yet taken place concerning the assault by the husband upon the wife.

The Court can award the tort claim to the wife as a part of the marital property's division.¹⁸ (This presumably means that the claim is to be resolved in later litigation between the parties.) Or it can determine liability and damages as a part of the divorce action.¹⁹

The opinion in *Melton* is not instructive as to how the trial court should make the determination. One way for it to occur is within the same proceeding with witnesses and proof after the divorce has been granted. In other words, severance would occur, the divorce would be granted initially, and later the tort claim and other property issues would be determined. Secondly, the Court could assess now the value of the claim, realizing that it is contingent and that an actual trial could establish its value at a greater or lesser sum, but concluding that justice requires a faster and less exact resolution of value.

¹⁸ *Griffin v. Griffin*, 12 TAM 43-10 (Tenn. App. 1987), cited in Garrett, Tenn. Divorce, Alimony & Child Custody (1999 ed.), Sec. 19-4.

¹⁹ *Melton v. Melton*, 2001 Tenn. App. LEXIS 141.

This brief concludes that the appropriate course for the Court to follow is the use of the second approach. The lawsuit by one spouse against another would be treated in the same way as other assets whose actual value must be determined by subsequent events but are a part of the property to be allocated in a divorce proceeding. In so doing, the Court would take note of the increasing occurrence of rapid diminution of value in assets where no apparent contingency is involved – for examples, the sudden and sharp declines in value of publicly traded stocks like Enron and Global Crossing and in the value of private businesses like Arthur Andersen and Wheland Foundry. The Court would take into account the necessity of valuing assets – such as patent applications and pharmaceutical claims before the Food and Drug Administration – where events can endure for years, far past a reasonable time for the completion of divorce proceedings. The Court could acknowledge that supposedly stable structures can lose almost all of their value in a hurricane, fire or other sudden occurrence. In other words, the fact that an asset is subject to a contingency should not preclude its valuation and allocation during a divorce case. In a broad sense, all property is subject to contingencies that can alter its value in a heartbeat.

Based on the property values discussed below, the use of this approach would likely result in the award to the wife of all property owned by either spouse or by both of them. In another context, the property awarded to the wife might more suitably be treated as a partial payment of what might later be awarded in a separate proceeding. However, the wife is willing to bring matters to a close by executing a full release of the tort claim. The significance of this release should not be overlooked or minimized. It represents not just an acceptance of the inevitable – the husband is likely to spend time in prison and could never pay off a judgment – but also a belief that no legal proceeding can offer what the wife wants most, a life without looming fear that someday her former husband will try to assault her again.

We believe that, initially, the court should identify the property owned by the parties. This consists of the following:

1. _____ (the separate property of the husband)
2. _____ (the separate property of the wife)

3. _____ (the marital property of both parties)
4. The tort claim of the wife against the husband, which her counsel believes to have a value in excess of all of the other property combined.

Hopefully, the Court will award all of the marital property to the wife. But, even if not, its value cannot affect the ultimate necessity of deciding the matter addressed in the next paragraph.

The result of this analysis is that property awarded to the husband should have a value of \$_____ at most. The tort claim against him should have a value many times that of his separate property as supplemented by his share of the marital property. The Court could then offset the two, award all property to the wife and accomplish substantial justice in a way that no separate and later trial involving these parties could.

Another option would be the ordering of the sale of mortgaged property so that she can be relieved of mortgage payments and so that the property will not decline unnecessarily in value while her husband's likely incarceration continues. The Court's determinations about the characterization and award of the proceeds of sale of the mortgaged property could either take place now (preferably) or later. Again, the essential ingredient of this approach is the sale of assets that the wife does not want and the husband cannot use, at least for the time of his incarceration.

If, however, the Court does not accept either of these two preferred alternatives, we believe that it would be appropriate for the Court to grant the divorce at the time of the scheduled trial and set a later date for a hearing on the tort claim of the wife. Then a trial within a trial can be conducted. Later still, a final allocation of marital property can be made and the tort claim can be offset against the assets that would otherwise pass to the husband as his separate property and his share of the marital property. Once again, the result of this procedure is likely to be the same as that in the other two – the wife will receive all the property because the magnitude of her potential tort claim against her husband is greater than the value of all other assets combined.

Dated: _____

Signature
Printed Name: _____
Address: _____
Telephone: _____

CERTIFICATE

I certify that I have served a copy of this brief upon each party to this proceeding or upon counsel of record for each party. I did so on or before the date below by personal delivery or by first class mail with postage prepaid.

Dated: _____

Signature