INSTAGUIDE TO FAMILY LAW IN TENNESSEE

by Whitney Durand

Copyright © 2010, Southeast Tennessee Legal Services, www.selegal.org.
Non-commercial use permitted.

INSTAGUIDE TO FAMILY LAW IN TENNESSEE

Contents

DIVORCE **1**

Grounds and the Defenses to Them 1
Irreconcilable Differences 3
Stipulated Grounds and Defenses 4
Complaints 4
Answers 6
Mediation 7
Trials 7
Final Decrees 8
Other Matters 9

DIVISION OF PROPERTY AND DEBTS **10**

Types of Property 10
Equitable Division of Property 11
Division of Debts 14

ALIMONY **14**

Types of Alimony 14
Standards for Alimony Awards 16
Pleadings 19
Modification and Enforcement 20

CHILD SUPPORT **21**

The Obligation 21
Child Support Guidelines 22
Definition of Gross Income 22
What Constitutes Support 23
Jurisdiction 24
Proceedings 24
Enforcement of Child Support Orders 25
Sanctions 26
Income Withholding 27
Enforcement by the Department of Human Services 28
Interstate Enforcement 28
Intercounty Enforcement 29
Enforcement without Transfer of Jurisdiction 30

CHILD CUSTODY AND VISITATION **30**

Custody 30
Rights of Noncustodial Parents 35
Parenting Plans 35
Visitation 37
Jurisdiction and Enforcement 39
Foreign Decrees 41
Parental Relocation 42

DIVORCE

Grounds and the Defenses to Them

GROUNDS FOR DIVORCE. Under T.C.A. § 36-4-101(a), **t**he chief grounds for divorce are (1) cruel and inhuman treatment or conduct towards the spouse that renders cohabitation unsafe and improper, which may also be described in pleadings as inappropriate marital conduct; (2) adultery; (3) willful or malicious desertion or absence of either party, without a reasonable cause, for one year; (4) refusal to move with a spouse to Tennessee, without a reasonable cause, and being willfully absent from the spouse residing in Tennessee for two years; (5) abandoning the other spouse or turning the spouse out of doors for no just cause, and refusing or neglecting to provide for the spouse while having the ability to do so; and (6) for a continuous period of two or more years, living in separate residences and not cohabiting as man and wife, when there are no minor children of the parties. In the absence of a written marital dissolution agreement, a trial court lacks statutory authority to grant a divorce on the ground of irreconcilable differences.[1] A court may award a divorce to both parties without determining who was more at fault.[2]

GROUNDS FOR LEGAL SEPARATION. Under T.C.A. § 36-4-102, a person who alleges grounds for divorce may, as an alternative, file a complaint for legal separation. It must state the grounds for legal separation in substantially the language of T.C.A. § 36-4-101 but pray only for legal separation and not divorce. The other party may deny the existence of grounds for divorce but, unless he or she specifically objects to the granting of an order of legal separation, the court must declare the parties to be legally separated. The court may provide for matters such as child custody, visitation, support, and property issues during a legal separation. Despite this statute, someone who can establish a ground for divorce pursuant to T.C.A. § 36-4-101 is entitled to a divorce. When reconciliation is not possible, the court is not restricted by a request for a legal separation and may grant a divorce.[3]

CRUEL AND INHUMAN TREATMENT (INAPPROPRIATE MARITAL CONDUCT). Inappropriate marital conduct is established when either or both of the parties have engaged in a course of conduct which caused pain, anguish or distress to the other party and rendered continued cohabitation improper, unendurable, intolerable, or unacceptable.[4] Cruel and inhuman treatment may be shown by an actual physical lack of safety, danger, and indignity to the wife or husband. It may be accomplished in subtle and insidious ways through continuous mistreatment and indignity of a much more refined character.[5] Cruelty as a cause for divorce is the willful, persistent causing of unnecessary suffering, whether in realization or apprehension, whether of body or mind, in such a way as to render cohabitation dangerous and unendurable.[6] Cruelties warranting a divorce may result from a continuing course of abusive and humiliating treatment of one spouse by another as in the case of conduct calculated to torture the complaining spouse's mental or emotional health and affecting his or her bodily health.[7] A wife's holding a gun on her husband and threatening to kill him under such circumstances that he was justified in believing that she intended to kill him constituted cruel and inhuman treatment or conduct even though the gun contained blanks.[8] Where a

---

[1] *Blackburn v. Blackburn*, 270 S.W.3d 42 (Tenn. 2008).
[2] *Boyatt v. Boyatt,* 248 S.W.3d 144 (Tenn. App. 2007).
[3] *Haas v. Haas*, 2002 WL 1579717 (Tenn. App. 2002).
[4] *Chaffin v. Ellis*, 211 S.W.3d 264 (Tenn. App. 2006).
[5] *Harwell v. Harwell,* 612 S.W.2d 182 (Tenn. App. 1980).
[6] *Stone v. Stone,* 409 S.W.2d 388 (Tenn. App.1966).
[7] *Elrod v. Elrod,* 296 S.W.2d 849 (Tenn. App.1956).
[8] .*Schwalb v. Schwalb,* 282 S.W.2d 661 (Tenn. App.1955).

spouse's actions in pursuing the parties' child with a firearm ultimately caused the child's death, the actions constituted cruel and inhuman treatment toward the spouse.[9] When the mother testified to the father's cursing, rages, and throwing of personal property in front of the mother and her daughter by a previous marriage, she was entitled to a divorce due to the father's inappropriate marital behavior.[10] A wife was properly granted a divorce on the ground of inappropriate marital conduct when she proved that her husband had a volatile temper and vented his anger at her in public places and in front of other individuals, he called her vile names and threatened to use a shotgun or baseball bat on her, he threatened to kill her, and he got so violent that the police took him into custody.[11]

ADULTERY. Adultery may be proved by circumstantial evidence.[12] It is no longer a complete bar to a spouse's right to seek a divorce.[13] Adultery may also be the basis for a divorce on the ground of cruel and inhuman treatment.[14] Even false charges of adultery constitute cruel and inhuman treatment as a ground for divorce.[15] A court can grant a divorce on the ground of cruel and inhuman treatment despite the fact that both parties have committed adultery.[16]

DESERTION. It must be charged and proved that desertion was intended and willful.[17] When a wife is living separate and apart from her husband under a decree of separate maintenance, she may refuse to reconcile and be granted a divorce.[18]

CONVICTION OF A FELONY. A sentence to serve time in the penitentiary imposed for a felony conviction constitutes a ground for divorce.[19]

REFUSAL OF SPOUSE TO MOVE TO TENNESSEE. When a husband had made one telephone call years before the time of trial and asked his wife to come to Memphis, there was not sufficient proof to establish a refusal to remove to Tennessee without reasonable cause, especially when he had not supported his wife and child and had failed to visit them when he could have done so.[20]

SEPARATION. When parties with no minor children have lived separately for more than two years, there is no statutory defense to the granting of a divorce on this ground.[21]

ABANDONMENT. The abandoned spouse need not solicit reconciliation when the abandonment was willful.[22] It is not necessary that a petition for divorce based on the charge of abandonment allege that the abandonment was premeditated, intended or willful.[23]

---

[9] *Bolin v. Bolin,* 99 S.W.3d 102 (Tenn. App. 2002).
[10] *Buss-Flinn v. Flinn,* 2003 121 S.W.3d 383 (Tenn. App 2003).
[11] *Nigro v. Nigro*, 2003 WL 21634320485 (Tenn. App. 2003).
[12] *Canning v. Canning,* 443 S.W.2d 502 (Tenn. App.1968), *overruled on other grounds, Fox v. Fox,* 676 S.W.2d 956 (Tenn. 1984).
[13] *Thompson v. Thompson,* 797 S.W.2d 599 (Tenn. App. 1990).
[14] *Farrar v. Farrar,* 553 S.W.2d 741 (Tenn. 1977).
[15] *Reitano v. Reitano,* 373 S.W.2d 213 (Tenn. App. 1963).
[16] *Stanfill v. Stanfill,* 742 S.W.2d 267 (Tenn. App. 1987).
[17] *Page v. Turcott,* 167 S.W.2d 350 (Tenn. 1943).
[18] *Perrin v. Perrin,* 299 S.W.2d 19 (Tenn. 1957).
[19] *Pendergrass v. Neil,* 338 F. Supp. 1198 (M.D. Tenn. 1971), *mod. on other grounds*, 456 F.2d 469 (6th Cir. 1972), *vac. on other grounds*, 412 U.S. 935 (1973).
[20] *Greene v. Greene,* 48 Tenn. App. 636, 349 S.W.2d 186 (1960).
[21] *Edmisten v. Edmisten*, 2003 WL 21077990 (Tenn. App. 2003).
[22] *Bailey v. Bailey,* 6 Tenn. App. 272 (1927).
[23] *Page v. Turcott,* 167 S.W.2d 350 (Tenn. 1943).

Irreconcilable Differences

INITIAL PROCEDURE. Under T.C.A. § 36-4-103, irreconcilable differences may either be asserted as a sole ground for divorce or as an alternate ground with any other cause set out in T.C.A. § 36-4-101 or § 36-4-102. If the defendant is a nonresident, personal service may be effectuated by service upon the secretary of state pursuant to T.C.A. § 20-2-215. In lieu of service of process, the defendant may enter into a written notarized marital dissolution agreement that makes specific reference to a pending divorce by a court and docket number, or states that the defendant is aware that one will be filed in Tennessee and that the defendant waives further service and waives filing an answer to the complaint. The waiver of service is valid for a period of 180 days. The agreement may include the obligation and payment of alimony, in solido or in futuro, to either of the parties. The signing of a marital dissolution agreement is in lieu of service of process for the period the waiver is valid. It constitutes a general appearance before the court, is an answer which gives the court personal jurisdiction over the defendant, and constitutes a default judgment for the purpose of granting a divorce on the grounds of irreconcilable differences.

MARITAL DISSOLUTION AGREEMENTS. Marital dissolution agreements may take effect even before a divorce is granted.[24] They become absolutely binding after approval by the trial court, but the parties may be permitted to withdraw from an agreement before it has been approved by the court, as long as one or both parties have not relied on the agreement to their detriment.[25]

THE WAITING PERIOD. Complaints for divorce on the ground of irreconcilable differences must have been on file for 60 days before being heard if the parties have no unmarried child 18 years of age, or at least 90 days if the parties have an unmarried child less than 18 years of age. The requirement that a complaint be on file 90 days before being heard does not mean necessarily that a decree entered upon a hearing held less than 90 days subsequent to the filing is void; moreover, even if voidable, the decree cannot be reversed through a collateral attack by the children of the parties to the divorce suit.[26] A trial court is correct in refusing to declare a final divorce decree void because of noncompliance with the 90-day requirement. It can only be attacked directly and not by the spouse over the spouse's child support obligation.[27]

THE FINAL DECREE. There is no requirement of a hearing prior to divorce where the parties have signed a marital dissolution agreement. Nor is the court required to make an independent investigation prior to signing the parties' divorce decree.[28] The court must find in its decree that the parties have made adequate and sufficient provision by written agreement for the custody and maintenance of any children of that marriage and for the equitable settlement of any property rights between the parties. A final decree may be entered, despite the provisions of T.C.A. §§ 36-4-107 and 36-4-114 to the contrary, without the plaintiff being required to testify as to the material facts constituting irreconcilable differences or any attempts to reconcile such differences. If there has been a contest or denial of the grounds of irreconcilable differences, no divorce may be granted on the grounds of irreconcilable differences. However, a divorce may be granted on the grounds of irreconcilable differences where there initially has been a contest or denial but later a properly executed marital dissolution agreement is presented to the court.[29]

---

[24] *Barnes v. Barnes,*193 S.W.3d 495 (Tenn. 2006).
[25] *Altman v. Altman*, 181 S.W.3d 676 (Tenn. App. 2005).
[26] *Gentry v. Gentry,* 924 S.W.2d 678 (Tenn. 1996).
[27] *Pardue v. Pardue*, 2002 WL 1416930 (Tenn. App. 2002).
[28] *Vaccarella v. Vaccarella,* 49 S.W.3d 307 (Tenn. App. 2001).
[29] *Lew v. Lew*, 2003 Ten 2003 WL 21780979 (Tenn. App. 2003).

Stipulated Grounds and Defenses

Under T.C.A. § 36-4-129, in both actions for divorce and legal separation, the parties may stipulate the grounds, the defenses to them, or both. An appellate court has ruled that the trial court should have found that both parties engaged in an inappropriate course of conduct over many months that rendered continued cohabitation as husband and wife unacceptable pursuant to one statute, rather than cruel and inhuman treatment under another statute, when the parties' relationship had disintegrated and their love and affection had been extinguished.[30] A court may, upon stipulation to or proof of any ground for divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than award a divorce to either party alone. The trial court is not required to make a written finding that both parties were at fault or which party was less at fault in its order awarding a divorce to one spouse alone.[31] The trial court should find that both parties have engaged in an inappropriate course of conduct over many months that rendered continued cohabitation as husband and wife unacceptable pursuant to T.C.A. § 36-4-129, rather than cruel and inhuman treatment pursuant to T.C.A. 36-4-101, where the parties relationship has disintegrated and their love and affection has been extinguished.[32] A trial court is not required to state with specificity a finding that both parties are entitled to a divorce or exactly what one spouse's inappropriate marital conduct is, given that spouse's admitted adultery and the fact both parties admit in the divorce proceeding to conduct which would entitle the other to a divorce.[33] Because T.C.A. § 36-4-129 gives trial courts the power to grant a divorce if either or both parties are entitled to a divorce, the trial court only need hear sufficient proof during the fault portion of the trial to determine if the parties are entitled to a divorce. Rule 403 of the Tennessee Rules of Evidence specifically states that a court may exclude relevant evidence if presentation of it would be a waste of time or a needless presentation of cumulative evidence.[34]

Complaints

STATEMENT OF GROUNDS FOR DIVORCE. Under T.C.A. § 36-4-106, the complaint must set forth the grounds for the divorce in substantially the language of T.C.A. § 36-4-101 or T.C.A. § 36-4-102. On motion of the defendant, the court must require the plaintiff to file a bill of particulars, setting forth the facts relied on as grounds for the divorce, with reasonable certainty as to time and place. The legislative intent in requiring pleadings to set forth the grounds for the divorce in substantially the language of the statute was to avoid the insertion of scurrilous matter in divorce complaints.[35]

IDENTIFICATION OF THE PARTIES AND EACH CHILD. Under T.C.A. § 36-4-106, the complaint must also allege the full name of the husband, the full maiden name of the wife, their mailing addresses, the dates and places of their birth, the race or color of each spouse, the number of previous marriages of each spouse, the date and place of the marriage of the parties, the number of their children who are minors at the time of the filing of the complaint, and (by a separate document filed under seal) the social security numbers of the parties and all children born of the marriage. In lieu of a mailing address, either party may designate an agent for the service of process throughout the proceedings. If either party shows to the satisfaction of the court that the residential address of

[30] *Earls v. Earls,* 42 S.W.3d 877 (Tenn. App. 2000).
[31] *Varley v. Varley,* 934 S.W.2d 659 (Tenn. App. 1996).
[32] *Earls v. Earls,* 42 S.W.3d 877 (Tenn. App. 2000).
[33] *Fulbright v. Fulbright,* 64 S.W.3d 359 (Tenn. App. 2001).
[34] *Mumford v. Mumford,* 2003 WL 21673675 (Tenn. App. 2003).
[35] *Farrar v. Farrar,* 553 S.W.2d 741 (Tenn. 1977).

the other party is relevant and necessary in order to prove the allegations contained in the complaint, to defend against the allegations, to ascertain information necessary to determine value or ownership of property, or to ascertain other data necessary to evaluate and agree upon a property division or custody, the court may order either party to reveal the residential address to the other party.

OTHER PROCEEDINGS. Under T.C.A. § 36-4-106, the complaint must also recite other litigation concerning the custody of a child of the marriage in which either party has participated in Tennessee or any other state.

VERIFICATION OF THE COMPLAINT. Under T.C.A. § 36-4-107, the complaint must be verified by an affidavit that the facts stated in the complaint are true to the best of the plaintiff's knowledge and belief for the causes mentioned in the complaint. The statute implies, and older cases hold, that the complaint must also state that that it is not made out of levity or in collusion with the defendant.[36] A person seeking a divorce must strictly comply with the statute including the taking of an oath.[37] However, if the defendant is not prejudiced by the delay, an amendment offered during the trial is not too late.[38]

RESIDENCE REQUIREMENTS. Under T.C.A. § 36-4-104, a divorce may be granted: (1) if the acts complained of were committed while the plaintiff was a bona fide resident of Tennessee, even if he or she is not now a resident; (2) so long as the plaintiff has resided in Tennessee six consecutive months prior to the filing of the complaint, even if the acts complained of were committed out of the state and the plaintiff resided out of the state at the time; or (3) so long as the defendant has resided in Tennessee six months next preceding the filing of the complaint, even if the acts complained of were committed out of the state and the plaintiff resided out of the state at the time. Where a husband who resided in South Carolina brought suit in that state for divorce and the wife who at time was residing in Tennessee appeared specially in the South Carolina action to contest jurisdiction alleging she was resident of Tennessee, the determination of the South Carolina court as to residency on the date of such determination was binding in Tennessee. However, where a wife charged a specific act of cruel and inhuman treatment occurring after such date in Tennessee, the wife could bring divorce action in Tennessee regardless of an allegation of residence for six months.[39] A verified answer and counterclaim filed by a plaintiff in Texas in which she asserted that she resided in that state did not mean that Tennessee was without jurisdiction. Subject matter jurisdiction was not based upon the wife's domicile, but upon the fact that the defendant was domiciled in Tennessee for six months preceding the filing of the complaint in Tennessee.[40] Facts which warrant notice by publication are jurisdictional and must appear on the face of the complaint; otherwise the decree of divorce is void.[41] Where a trial judge has granted a divorce, it must be treated on appeal as a finding of fact that either the plaintiff, the defendant, or both were domiciled in the county and the court had jurisdiction.[42] The word "reside" involves the idea of a domicile, and the word "residence" as used in divorce statutes should be construed as equivalent to "domicile."[43]

[36] *DeArmond v. DeArmond,* 92 Tenn. 40, 20 S.W. 422 (1892).
[37] *Turner v. Bell,* 279 S.W.2d 71 (Tenn. 1955).
[38] *Fitzpatrick v. Fitzpatrick,* 173 S.W. 444 (Tenn. 1914).
[39] *Atchley v. Atchley,* 585 S.W.2d 614 (Tenn. App. 1978).
[40] *Vermillion v. Vermillion,* 892 S.W.2d 829 (Tenn. App. 1994).
[41] *Copeland v. Green,* 4 Tenn. App. 463 (1927).
[42] *Bernardi v. Bernardi,* 302 S.W.2d 63 (Tenn. App. 1956).
[43] *Brown v. Brown,* 261 S.W. 959 (Tenn.1923).

THE COUNTY IN WHICH THE TRIAL MAY OCCUR. Under T.C.A. § 36-4-105, the complaint may be filed: (1) in the county where the parties resided at the time of their separation; (2) in the county in which the defendant resides, if a resident of the state; or (3) if the defendant is a nonresident of the state or a convict, then in the county where the applicant resides. The limitation on the county of trial is a personal privilege, does not affect the court's jurisdiction over the subject matter, and may be waived.[44] If a plaintiff does not object to venue, the objection is waived.[45] When the defendant had a summer residence in Giles County, where he was living at the time of the separation, but his domicile, when the wife filed her complaint and for 30 years previously, was in Davidson County, a decree dismissing her complaint, filed in Giles County, was proper because she should have filed in Davidson County.[46] Venue was proper in the county in which the parties resided at the time of their separation because the husband's incarceration in another county did not establish that he was a resident of that county.[47]

MINORS AS PARTIES. Minors may bring and defend divorce actions without the necessity of a next friend or a guardian ad litem because the statute makes no distinction between adults and minors.[48]

TEMPORARY MUTUAL INJUNCTIONS. Because of T.C.A. § 36-4-106, upon the filing of a complaint for divorce or legal separation, except on the sole ground of irreconcilable differences, temporary injunctions are in effect. They affect both parties until the final decree of divorce or order of legal separation is entered, the complaint is dismissed, the parties reach agreement, or the court modifies or dissolves the injunction. Written notice of the injunctions must be served with the complaint. The injunctions restrain both parties from transferring marital property, ending insurance coverage, disparaging the other party, or relocating a child outside Tennessee or more than 100 miles from the marital home.

Answers

VERIFICATION OF ANSWER. Under T.C.A. § 36-4-110, the defendant "may appear according to the rules of the court and answer the bill upon oath or affirmation." Thus, an answer which does *not* seek a divorce need not be verified.[49]

THE DEFENSE OF THE OTHER PARTY'S ADULTERY. Under T.C.A. § 36-4-112, it is a good defense if the defendant alleges and proves that the plaintiff has been guilty also of adultery. But a defense to a divorce on ground of adultery is not a defense to a divorce on another ground.[50]

THE DEFENSE THAT ADULTERY HAS BEEN FORGIVEN. Condonation of adultery in divorce cases will be available, though not relied on in the pleadings, if it appears in the proof that the injured party, with full knowledge of the facts, has forgiven the offense or has procured or connived at its commission.[51]

[44] *Kelley v. Kelley,* 263 S.W.2d 505 (Tenn. 1953).
[45] *Kane v. Kane,* 547 S.W.2d 559 (Tenn. 1977).
[46] *Brown v. Brown,* 261 S.W. 959 (Tenn. 1923).
[47] *Ferguson v. Ferguson*, 2002 WL 31443205 (Tenn. App. 2002).
[48] *Talley v. Talley,* 371 S.W.2d 152 (Tenn. App. 1962).
[49] *Canning v. Canning,* 443 S.W.2d 502 (Tenn. App. 1968), *overruled on other grounds*, *Fox v. Fox,* 676 S.W.2d 956 (Tenn. 1984).
[50] *Fox v. Fox,* 676 S.W.2d 956 (Tenn. 1984).
[51] *McClanahan v. McClanahan,* 56 S.W. 858 (Tenn. 1900).

THE DOCTRINE OF UNCLEAN HANDS. Unclean hands is not listed as statutory defense to an action for divorce and, except for fraud and deceit upon the court, which are always available as defenses in any court, the clean hands principle does not apply in divorce litigation.[52]

DEFENSE TO ALLEGATION OF CRUEL AND INHUMAN TREATMENT. Acts constituting cruel and inhuman treatment, even though forgiven, are not wiped out but may be revived by a new act of cruel and inhuman treatment.[53]

DEFENSE TO ALLEGATION OF FAILURE TO MOVE TO TENNESSEE. Under T.C.A. § 36-4-117, if the divorce is sought by one spouse on the ground of the other's refusal to remove with the plaintiff to this state, and of the defendant's willful absence for two years without reasonable cause, the plaintiff must prove endeavors to induce the defendant to live with him or her after the separation, and that the plaintiff did not move from the state where he or she resided for the purpose of obtaining a divorce.

Mediation

REQUIREMENT. Under T.C.A. § 36-4-131(a), mediation is generally required unless a divorce is to be granted because of irreconcilable differences. The court may waive it because, for examples, either party is unable to afford the cost of the mediation; the parties have entered into a written marital dissolution agreement; or there is a substantial likelihood that mediation will result in an impasse.

DOMESTIC ABUSE. Under T.C.A. §§ 36-4-131(d) and 36-6-107, if an order of protection is in effect or if there is a court finding of domestic abuse or any criminal conviction involving domestic abuse within the marriage, the court may order mediation or refer either party to mediation only if: (1) the victim of the abuse agrees to mediation; (2) mediation is provided by a certified mediator who is trained in domestic and family violence; and (3) the victim is permitted to have in attendance at mediation an attorney or advocate of the victim's choice.

CONFIDENTIALITY. Under T.C.A. § 36-4-130, when the parties to a divorce action choose to mediate their dispute, all records, reports, and other documents developed for the mediation are confidential and privileged. Communications made during a mediation may be disclosed only: (1) when all parties to the mediation agree, in writing; (2) in a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation; (3) when documents are otherwise subject to discovery and were not prepared specifically for use in and actually used in the mediation; (4) when the parties to the mediation are engaged in litigation with a third party and the court determines that fairness to the third party requires that the fact or substance of an agreement resulting from mediation be disclosed; or (5) when the disclosure reveals abuse or neglect of a child by one of the parties. The mediator may not be compelled to testify.

Trials

JURIES. Under T.C.A. § 36-4-113, issues may be tried by a jury, but the jury does not try the whole case or render a verdict for one party or the other. A trial judge has the authority to determine which issues should be submitted to the jury but may not deprive a litigant of the right to have substantial disputes as to matters of fact passed upon by a jury.[54]

PROOF. Under T.C.A. § 36-4-114, even if the defendant admits the facts, the court must, except in a divorce on the ground of irreconcilable differences, hear proof and either dismiss the

[52] *Chastain v. Chastain,* 559 S.W.2d 933 (Tenn. 1977).
[53] *Murrell v. Murrell,* 323 S.W.2d 15 (Tenn. App. 1958).
[54] *Wright v. Quillen,* 909 S.W.2d 804 (Tenn. App. 1995).

complaint or grant a divorce. Even if one spouse admits to allegations of adultery in a divorce complaint, the court should hear proof of the facts prior to granting the divorce.[55]

RECONCILIATION AGREEMENTS. Under T.C.A. § 36-4-126, during the pendency of any suit for divorce or legal separation, the court may, upon the written stipulation of both the husband and wife that they desire to attempt a reconciliation, enter an order suspending any and all orders and proceedings for such time as the court may determine advisable under the circumstances, so as to permit the parties to attempt such reconciliation without prejudice to their respective rights. During the period of the suspension, the parties may resume living together, and their acts and conduct in so doing will not amount to condonation of any prior misconduct. A reconciliation agreement a property settlement binding in the future is not promotive or conducive of separation of the parties and is valid.[56]

GUARDIANS AD LITEM. Under T.C.A. § 36-4-132, in a case for divorce, but not one for legal separation, the court may appoint a guardian ad litem for any minor child of the marriage. The statute does not specify the precise role of the guardian: investigator of the child's circumstances, reporter to the court of his or her conclusions about a child's best interest, advocate for a particular result in behalf of a child, or a combination of the three. The reasonable fees or costs of the guardian must be borne by the parties and may be assessed by the court as it deems equitable. The guardian is immune from liability while acting within the scope of the appointment.

Final Decrees

THE FINAL DECREE OF DIVORCE. Under T.C.A. § 36-4-119, the court may pronounce the marriage void from the beginning, dissolve it forever, or decree separation for a limited time. Yet, a decree awarding a husband a divorce on grounds of cruel and inhuman treatment and awarding wife a divorce on grounds of desertion is self emasculating and cannot stand.[57] Under T.C.A. § 36-4-134, every final decree of divorce granted on grounds of fault and every marital dissolution agreement must contain a notice that the decree does not necessarily affect the ability of a creditor to proceed against a party or a party's property, even though the party is not responsible under the terms of the decree for an account or a debt associated with an account. The notice must also state that it may be in a party's best interest to cancel, close or freeze any jointly held account.

THE DECREE OF LEGAL SEPARATION. Under T.C.A. § 36-4-120, the court may annul the marriage, order a separation, or grant other relief. In an action for separate maintenance where none of the statutory grounds for divorce are pleaded, a divorce may not be decreed merely because it appears that there is no hope of reconciliation between the parties.[58]

ATTORNEY FEES. Under T.C.A. § 36-4-122, the court may decree costs against either party. If property is sequestered, either in the power of the court or in the hands of a receiver, the court may order the costs to be paid out of such property. Costs include attorney fees. The trial court has wide discretion in determining whether to require one spouse to pay for the other's legal expenses incident to divorce litigation.[59] In determining compensation for attorneys, the amount and character of service rendered, labor, time and trouble involved, character and importance of litigation, amount of money or value of the property involved, professional skill and experience

[55] *Hyneman v. Hyneman*, 152 S.W.3d 549 (Tenn. App. 2003).
[56] *Hoyt v. Hoyt,* 372 S.W.2d 300 (Tenn. 1963).
[57] *Brewies v. Brewies,* 178 S.W.2d 84 (Tenn. App. 1943).
[58] *Stephenson v. Stephenson,* 298 S.W.2d 717 (Tenn. 1957).
[59] *Loyd v. Loyd,* 860 S.W.2d 409 (Tenn. App. 1993).

called for, and character and standing of the attorneys are questions which should be determined by the court having original jurisdiction.[60]

Other Matters

PARENTAGE. Under § T.C.A. 36-2-304, a man is *rebuttably* presumed to be the father of a child if: (1) the man and the child's mother are married or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce; (2) before the child's birth, the man and the mother have attempted to marry each other; (3) after the child's birth, the man and the mother have married or attempted to marry each other *and* the man has acknowledged his paternity of the child in a writing filed under the putative father registry established by the Department of Children Services, or the man has consented in writing to be named the child's father on the birth certificate, or the man is obligated to support the child under a written voluntary promise or by court order; (4) while the child is under the age of majority, the man receives the child into the man's home and openly holds the child out as his natural child; or (5) genetic tests have been administered as provided in T.C.A.§ 24-7-112, an exclusion has not occurred, and the test results show a statistical probability of parentage of 95% or greater.

AGREEMENTS BETWEEN SPOUSES ABOUT PROPERTY. Under T.C.A. § 36-3-501, a prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage is binding if it has been entered into by the spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse. The knowledge element of T.C.A. § 36-3-501 means that the spouse seeking to enforce a prenuptial agreement must prove, by a preponderance of the evidence, either that a full and fair disclosure of the nature, extent, and value of his or her holdings was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent spouse's holdings.[61] When one does not disclose the full extent of his or her estate prior to signing a prenuptial agreement, it is ineffective.[62] A voluntary and knowing waiver or limitation of alimony in a prenuptial agreement is not unenforceable unless enforcement will render one spouse a public charge.[63] However, a prenuptial agreement cannot overcome the statutory definition of marital property, which includes the increase in value of separate property during the marriage if each party substantially contributed to its preservation and appreciation.[64] Even though marriage itself would not be sufficient consideration, a couple's waiver of rights to each other's estate will support a *postnuptial* agreement.[65]

SUITS AGAINST THE OTHER SPOUSE. Tort claims by one spouse against the other may be litigated as a part of a divorce proceeding or separately.[66]

---

[60] *Folk v. Folk,* 357 S.W.2d 828 (Tenn. 1962).
[61] *Randolph v. Randolph,* 937 S.W.2d 815 (Tenn. 1996).
[62] *Williams v. Williams,* 868 S.W.2d 616 (Tenn. App. 1992).
[63] *Cary v. Cary,* 937 S.W.2d 777 (Tenn. 1996).
[64] *Wilson v. Wilson,* 987 S.W.2d 555 (Tenn. App. 1998).
[65] *In re Estate of Wiseman,* 889 S.W.2d 215 (Tenn. App. 1994).
[66] *Davis v. Davis,* 657 S.W.2d 753 (Tenn. 1983).

DIVISION OF PROPERTY AND DEBTS

Types of Property

MARITAL PROPERTY. Only "marital property" is subject to division; "separate property" remains with the owner. Under T.C.A. § 36-4-121, the term "marital property" means: (1) all property acquired by either or both spouses during the marriage up to the date of the final divorce hearing, owned by either or both spouses as of the date of filing of a complaint for divorce, and valued as of a date as near as reasonably possible to the final divorce hearing date; (2) income from, and any increase in value during the marriage of, property determined to be separate property if each party substantially contributed to its preservation and appreciation; (3) the value of vested and unvested pension, stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage; and (4) the recovery in personal injury, workers' compensation, social security disability, and other similar actions for wages lost during the marriage, reimbursement for medical bills incurred and paid with marital property, and property damage to marital property. Property is considered to be marital property for the sole purpose of dividing assets upon divorce or legal separation and for no other purpose. Assets distributed as marital property are not considered as income for child support or alimony purposes, except to the extent they will create additional income after the division. Marital property and jointly-owned property are not equivalent terms.[67]

SEPARATE PROPERTY. Under T.C.A. § 36-4-121, the term "separate property" means: (1) all property owned by a spouse before marriage; (2) property acquired in exchange for property acquired before the marriage; (3) income from and appreciation of property owned by a spouse before marriage unless both parties substantially contributed to its preservation and appreciation; (4) property acquired by a spouse at any time by gift, bequest, devise or descent; (5) pain and suffering awards, victim of crime compensation awards, future medical expenses, and future lost wages; and (6) property acquired by a spouse after an order of legal separation where the court has made a final disposition of property. There is a presumption that adding the other spouse's name to an account makes it marital property, but that presumption can be overcome by other proof.[68] When inherited property is not commingled with marital property or the other spouse's separate property or treated in any manner indicating an intent for it to become marital property, it remains separate property.[69]

PRESUMPTIONS ABOUT CLASSIFICATION OF PROPERTY. In making an equitable division of property, there is a presumption that the ownership of the property is equal.[70] Under T.C.A. § 36-4-121(b)(2), it is also presumed that separate property which is commingled with marital property becomes marital property.[71] Still another presumption exists that one spouse makes a gift to the marital estate when the couple assumes joint title to the property.[72] However, despite the fact that property is acquired during the marriage, a party may rebut the presumption that it is marital by demonstrating that it is separate property under T.C.A. § 36-4-121(b)(2).[73] Income from or appreciation of premarital separate property is presumed to be separate; an increase in its value

[67] *Spence v. Allstate Ins. Co.,* 883 S.W.2d 586 (Tenn. 1994).
[68] *Smith v. Smith,* 93 S.W.3d 871 (Tenn. App. 2002).
[69] *Flannary v. Flannary,* 181 S.W.3d 647 (Tenn.2003).
[70] *Salisbury v. Salisbury,* 657 S.W.2d 761 (Tenn. App. 1983).
[71] *Mays v. Mays*, 2002 WL 31640565 (Tenn. App. 2002).
[72] *Eldridge v. Eldridge,* 137 S.W.3d 1 (Tenn. App. 2002).
[73] *Goulet v. Heede,* 2002 WL 126279 (Tenn. App. 2002).

that accrues during the marriage may be deemed marital property if each party substantially contributed to its preservation and appreciation.[74]

Equitable Division of Property

STATUTORY FACTORS. Under T.C.A. § 36-4-121, in cases seeking either divorce or legal separation, the court may divide the marital property without regard to fault in proportions the court deems just. In making equitable division of marital property, the court must consider all relevant factors including: (1) the duration of the marriage; (2) the age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties; (3) the tangible or intangible contribution by one party to the education, training or increased earning power of the other party; (4) the relative ability of each party for future acquisitions of capital assets and income; (5) the contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role; (6) the value of the separate property of each party; (7) the estate of each party at the time of the marriage; (8) the economic circumstances of each party at the time the division of property is to become effective; (9) the tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset; (10) the amount of social security benefits available to each spouse; and (11) such other factors as are necessary to consider the equities between the parties. (d) The court may award the family home and household effects, or the right to live therein and use the household effects for a reasonable period, to either party, but shall give special consideration to a spouse having physical custody of a child or children of the marriage. There is substantial overlap between the statutory factors which a trial court should consider in determining spousal support and those relating to the division of marital property.

DISCRETION OF THE TRIAL JUDGE. The court has wide discretion to adjust and adjudicate the respective rights and interests of the parties in all jointly owned property, and the statute should be broadly construed and liberally applied to accomplish its objective.[75] The court has jurisdiction to do what may be just and reasonable under the circumstances regardless of which party obtains the divorce.[76] An equitable property division is not necessarily an equal one, and it is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case. It is not necessary that both parties receive a share of each piece of property. The overall division must be equitable.[77] To illustrate, when a husband had greater earning potential than the wife, had greater ability to acquire assets in the future, had a significant educational background that was obtained during the marriage that the wife lacked, and was five years younger than the wife, the division of the marital assets may not have been equal, but it was just and equitable pursuant to T.C.A. § 36-4-121(c).[78]

METHOD OF DETERMINATION. A trial court must conduct an evidentiary hearing to determine whether property is marital or separate.[79]

[74] *Snodgrass v. Snodgrass*, 295 S.W.3d 240 (Tenn. 2009).
[75] *Evans v. Evans,* 558 S.W.2d 851 (Tenn. App. 1977).
[76] *Langford v. Langford,* 421 S.W.2d 632 (Tenn. 1967).
[77] *Barlow v. Barlow*, 2003 WL 1442430 (Tenn. App. 2003).
[78] *Dube v. Dube,* 104 S.W.3d 863 (Tenn. App. 2002).
[79] *Korthoff v. Korthoff*, 2001 WL 34151700 (Tenn. App. 2001).

NEED. Need can be considered in adjusting the interests of the parties in jointly owned property.[80] The division of marital property is a favored means of meeting the needs of an economically disadvantaged spouse.[81]

FAULT. The equitable division of joint property is designed to preserve the property of the wronged spouse.[82] T.C.A. § 36-4-121(c)(5) specifically allows a court to consider the contribution a party has made to the dissipation of marital property, while T.C.A. § 36-4-121(a)(1) only forbids consideration of fault that led to the dissolution of the marriage.[83]

TAX CONSEQUENCES. T.C.A. § 36-4-121(c)(9) requires a trial court to consider the tax consequences to each party of the property division; it does not, however, require the court to assign tax liability to either party.[84]

CONTRIBUTION TO PRESERVATION AND APPRECIATION OF THE OTHER SPOUSE'S SEPARATE PROPERTY. To be considered substantial, a spouse's contribution to the preservation and appreciation of separate property must be real and significant.[85] However, the contributions need not be monetarily commensurate to the appreciation in the separate property's value, nor must they relate directly to the separate property.[86] A wife's work outside the home, her assistance in managing the couple's money, and her help with household and child-rearing functions substantially contributes to preservation and appreciation.[87]

PROFESSIONAL PRACTICES. A professional practice may be a marital asset, but the value placed on it does not include the goodwill of the firm.[88] A professional license is not itself an item of marital property subject to division; however, one spouse's contribution to the other's professional education is a factor to be considered in equitably dividing a marital estate.[89]

EFFECT OF INFLATION. The statute clearly states that "any increase in value during the marriage" of certain property shall be included as marital property subject to division. The word "any" does not allow an exception based on inflation.[90]

GIFTS. Gifts by one spouse to another of property that would otherwise be classified as marital property are the separate property of the recipient spouse.[91] To illustrate, where undisputed evidence demonstrates that jewelry and an organ were gifts to the wife, they must be classified as separate property.[92] When a spouse fails to present sufficient evidence to the contrary, property acquired as joint tenants is a gift to the marital estate.[93] Inherited property becomes marital property when it is used it as part of the down payment for a home that is titled in the names of both spouses.[94]

---

[80] *Fisher v. Fisher,* 648 S.W.2d 244 (Tenn. 1983).
[81] *Goldberg v. Goldberg,* 2003 WL 132460 (Tenn. App. 2003).
[82] *Duncan v. Duncan,* 686 S.W.2d 568 (Tenn. App. 1984).
[83] *Smith v. Smith,* 2003 WL 135056 (Tenn. App. 2003).
[84] *Rinner v. Rinner*, 2003 WL 253252 (Tenn. App. 2003).
[85] *Mitts v. Mitts,* 39 S.W.3d 142 (Tenn. App. 2000).
[86] *Wright-Miller v. Miller,* 984 S.W.2d 936 (Tenn. App. 1998).
[87] *Avery v. Avery,* 2001 WL 775604 (Tenn. App. 2001).
[88] *Hazard v. Hazard,* 833 S.W.2d 911 (Tenn. App. 1991).
[89] *Beeler v. Beeler,* 715 S.W.2d 625 (Tenn. App. 1986).
[90] *Ellis v. Ellis,* 748 S.W.2d 424 (Tenn. 1988).
[91] *Batson v. Batson,* 769 S.W.2d 849 (Tenn. App. 1988).
[92] *Dortch v. Dortch,* 2001 WL 799752 (Tenn. App. 2001).
[93] *Kincaid v. Kincaid,* 912 S.W.2d 140 (Tenn. App. 1995).
[94] *Norman v. Norman,* 2003 WL 724677 (Tenn. App. 2003).

RETIREMENT BENEFITS. Contributions to accounts in retirement accounts that were made during the marriage, and the net gains on those contributions realized during the marriage, meet the definition of marital property because they were acquired during the course of the marriage.[95] On the other hand, the portion of a spouse's pension or other retirement benefit attributable to service prior to the marriage is separate property.[96] There are four principles to assist in the process of valuing and distributing pension rights: (1) rights accrued during marriage will be classified as marital property even though the nonemployee spouse did not make direct contributions to the increase in the pension's value; (2) only pension rights accruing during the marriage will be considered marital property; (3) difficulty in valuing pension rights has no bearing on the classification of the pension as marital property; and (4) pension rights must be valued as of a date as near as possible to the final divorce hearing date.[97] Classification of retirement benefits as marital property does not mean the employed spouse must be awarded them. Even though the husband claimed that he should have been awarded one-half of the increase in value of the former wife's retirement account, the trial court's distribution of the full retirement account to the wife was an equitable distribution under the overall distribution of the assets made by the trial court.[98]

SOCIAL SECURITY BENEFITS. Although T.C.A. § 36-4-121(c)(10) requires that a trial court consider the amount of social security benefits available to each spouse. Anticipated social security benefits are not part of the marital estate because they are not vested as required by T.C.A. § 36-4-121(b)(1)(B).[99]

DISABILITY BENEFITS. Disability benefits replace lost income and are not marital property subject to distribution upon divorce.[100]

WORKERS' COMPENSATION. An award of workers' compensation is marital property when there is no evidence it was intended to replace post-divorce income.[101]

MILITARY RETIREMENT BENEFITS. When a marital dissolution agreement divides military retirement benefits, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree, which cannot thereafter be unilaterally diminished by an act of the military spouse.[102] However, a marital dissolution agreement which states that spousal support and alimony are specifically in consideration of a wife's waiving any right to the husband's military retirement is not subject to modification by a court.[103]

DISSIPATION. Dissipation of marital property occurs when one spouse uses marital property, frivolously and without justification, for a purpose unrelated to the marriage and at a time when the marriage is breaking up.[104] Dissipation requires proof of more than spending money on grand scale. The expenditures must be atypical of those during the marriage and not a use of discretionary funds.[105]

POSTNUPTIAL AGREEMENTS. Because of the confidential relationship which exists

---

[95] *Snodgrass v. Snodgrass*, 295 S.W.3d 240 (Tenn. 2009).
[96] *Batson v. Batson,* 769 S.W.2d 849 (Tenn. App. 1988).
[97] *Kendrick v. Kendrick,* 902 S.W.2d 918 (Tenn. App. 1994).
[98] *Williams v. Williams*, 2003 WL 1523282 (Tenn. App. 2003).
[99] *Reymann v. Reymann,* 919 S.W.2d 615 (Tenn.App.1995).
[100] *Gragg v. Gragg,* 12 S.W.3d 412 (Tenn. 2000).
[101] *Bilyeu v. Bilyeu*, 196 S.W.3d 131 (Tenn. App.2005).
[102] *Johnson v. Johnson,* 37 S.W.3d 892 (Tenn. 2001).
[103] *Towner v. Towner,* 858 S.W.2d 888 (Tenn. 1993).
[104] *Fickle v. Fickle*, 287 S.W.3d 723 (Tenn.App. 2008).
[105] *Larsen-Ball v. Ball*, 301 S.W.3d 228 (Tenn. 2010).

between husband and wife, postnuptial agreements are subjected to close scrutiny by the courts to ensure that they are fair and equitable. The marriage itself cannot act as sufficient consideration because past consideration cannot support a current promise.[106]

LIENS TO ENFORCE THE DIVISION OF PROPERTY. Under T.C.A. § 36-4-121, in cases seeking either divorce or legal separation, the court may impose a lien upon the marital real property assigned to a party, upon the party's separate real property, or both, as security for the payment of child support, the payment of alimony, the payment pursuant to property division of property, or the payment of an award that is payable over time.

Division of Debts

Marital debts should be apportioned by considering the reason for the debt, the party who benefited from the debt, and the party better able to assume the debt.[107] Marital debts need not be divided in precisely the same manner as the marital assets, although they frequently follow their related assets.[108] In the case of debt incurred between separation and divorce, one spouse should not be held responsible for the debts the other spouse incurs unless the debts were for a marital purpose or for the joint benefit of the parties.[109] One spouse may be assigned credit card debts after learning of but not objecting when the other spouse uses the credit cards to benefit both parties as well as the other spouse's two children. [110]

ALIMONY

Types of Alimony

Alimony is the allowance which one spouse pays by order of court to the other spouse living separate and apart for maintenance. [111] Its purpose is to aid the disadvantaged spouse to become and remain self-sufficient and, when economic rehabilitation is not feasible, to mitigate the harsh economic realities of divorce.[112] In Tennessee, there are four types of spousal support: rehabilitative alimony, transitional alimony, periodic alimony, and alimony in solido, also called alimony in gross. (Spousal support may also be granted during a legal separation, as well as a divorce.) The distinctions among them – not always addressed in the case law or even in legislation -- are chiefly based upon (1) whether they are one-time only or of indefinite duration; (2) whether the court may later modify the terms; (3) whether they terminate on the death of the obligor, the recipient, or both; (4) whether payments terminate upon remarriage of the recipient; (5) whether they are intended to be dischargeable if the obligor bankrupts; and (5) the federal income tax consequences of the payments. More than one type of alimony may be awarded in the same case.

REHABILITATIVE ALIMONY. T.C.A. § 36-5-101 clearly reflects a bias in favor of rehabilitative alimony; however, it is also clear that rehabilitative alimony is favored only where rehabilitation is feasible.[113] While in most cases only temporary support and maintenance should be awarded, when rehabilitation is not feasible the court may grant an order for support and maintenance on a long-term basis.[114] Where rehabilitative support is awarded, it may be made

[106] *Bratton v. Bratton*, 136 S.W.3d 595 (Tenn. 2004).
[107] *King v. King,* 986 S.W.2d 216 (Tenn. App. 1998).
[108] *Kinard v. Kinard,* 986 S.W.2d 220 (Tenn. App. 1998).
[109] *Goodman v. Goodman,* 8 S.W.3d 289 (Tenn. App. 1999).
[110] *Smith v. Smith,* 93 S.W.3d 871 (Tenn. App. 2002).
[111] *Livingston v. Livingston,* 429 S.W.2d 452 (Tenn. App. 1967).
[112] *Kinard v. Kinard,* 986 S.W.2d 220 (Tenn. App. 1998).
[113] *Mitts v. Mitts,* 39 S.W.3d 142 (Tenn. App. 2000).
[114] *Franklin v. Franklin,* 746 S.W.2d 715 (Tenn. App. 1987).

subject to conditions imposed by the court or agreed to by the parties. But where the rehabilitative award has been made for a fixed amount, it must be considered nonmodifiable, even if it is to be paid in installments and not in a lump sum.[115] To illustrate, when only a relatively small amount of marital property had been awarded to wife and she had been absent from the workforce for 23 years, lacked liquid assets or an income stream, and her plans for successfully reentering the workforce were indefinite, four years of rehabilitative alimony, as opposed to 14 months, was appropriate despite the fact that wife was 46 years old and in good health.[116] Although the alimony statute refers to the parties' relative earning capacity and their standard of living as factors to be considered, these factors are of only marginal relevance to the issue of whether the recipient spouse can be rehabilitated.[117]

TRANSITIONAL ALIMONY. Under T.C.A. § 36-5-101, transitional alimony means a sum payable by one party to, or on behalf of, the other party for a specific period of time. It terminates upon the death of the recipient and upon the death of the payor unless otherwise specifically stated. The court may, at the time of entry of the order to pay transitional alimony, order that it will terminate upon the occurrence of other conditions such as the remarriage of the party receiving transitional alimony. Transitional alimony may not be modified unless the parties otherwise agree in an agreement incorporated into the initial order. It is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce or legal separation.

PERIODIC ALIMONY. Under T.C.A. § 36-5-101(a), periodic alimony is not calculable on the date when the final decree is entered because it depends upon events yet to occur. It generally terminates automatically when the recipient dies or remarries. Where the recipient lives with a third person, a rebuttable presumption is raised that the recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.[118] Courts often consider whether to award periodic alimony instead of rehabilitative alimony. While the legislature has expressed a preference for rehabilitative alimony, when a wife's possibilities to rehabilitate herself are extremely limited, a trial court may award her permanent alimony as opposed to rehabilitative alimony.[119] A trial court's award of periodic alimony is not an abuse of discretion considering the disparity in the parties' incomes, the relative education and training of the parties, the long duration of the marriage, the relative fault of the parties, and the wife's educational background in music and a very limited work history.[120] A husband was properly ordered to pay wife alimony in futuro rather than rehabilitative alimony after the trial court held that an award of rehabilitative alimony would not be appropriate due to the length of the parties' marriage (38 years), the wife's age (58), her education (GED), and her job skills (teacher's assistant).[121] Periodic alimony should not be awarded in addition to alimony in solido if the amount awarded in solido is considered sufficient.[122] Still, a court may award both.[123]

ALIMONY IN SOLIDO. Alimony in solido is an award of money or other property in a specific amount or portion, usually by a one-time payment, and is not subject to modification. It

---

[115] *Isbell v. Isbell,* 816 S.W.2d 735 (Tenn. 1991).
[116] *Mitts v. Mitts,* 39 S.W.3d 142 (Tenn. App. 2000).
[117] *Goldberg v. Goldberg,* 2003 WL 132460 (Tenn. App. 2003).
[118] *McKee v. McKee,* 655 S.W.2d 164 (Tenn. Ct. App. 1983).
[119] *Dube v. Dube,* 104 S.W.3d 863 (Tenn. App. 2002).
[120] *Bowie v. Bowie,* 101 S.W.3d 420 (Tenn. App. 2002).
[121] *Williams v. Williams,* 2001 WL 766994 (Tenn. App. 2001).
[122] *Raskind v. Raskind,* 325 S.W.2d 617 (Tenn. App. 1959).
[123] *Mount v. Mount,* 326 S.W.2d 493 (Tenn. App. 1959).

should be awarded generally only out of a spouse's estate, not out of an expectation of future earnings.[124] It does not terminate automatically as a result of remarriage, even when it is spread out over the course of ten years.[125] Another form of alimony may be recharacterized as alimony in solido that is not subject to subsequent modification. To illustrate, a rehabilitative alimony award payable monthly for 48 months or until the remarriage or death of the wife, whichever should occur first, was really alimony in solido.[126]

MAINTENANCE DURING LEGAL SEPARATION. To entitle a spouse to an allowance for separate maintenance, it is not necessary to establish sufficient grounds to justify divorce.[127] A court of equity has inherent jurisdiction independent of divorce statutes to decree separate maintenance even when a spouse's conduct is not a statutory ground for divorce.[128]

DEATH OF THE OBLIGATED SPOUSE. When an agreement approved by a court provides for the payment of a monthly sum as alimony for a period of ten years, the estate of the husband is liable for such payments upon his death prior to the end of the ten-year period.[129] Alimony of an ex-wife should be continued, until she remarries or dies, from the estate of an ex-husband, instead of an award of a lump sum.[130]

REMARRIAGE. The statutory presumption that further spousal support is not needed when the recipient is living with "a third person" is rebuttable and will not cut off automatically the right to receive periodic alimony payments. Moreover, the remarriage may be to a spouse who earns less, is diseased, disabled, unemployed, retired, or just plain lazy. As a result, the remarriage may be a source of financial drain, not support.[131]

BANKRUPTCY. A discharge in bankruptcy does not automatically relieve an individual of a debt to a former spouse which is "actually in the nature of alimony, maintenance, or support."[132] Instead, the bankruptcy court applies a four-part test for determining dischargeability.[133]

Standards for Alimony Awards

TEMPORARY ORDER. Under T.C.A. § 36-5-101(i), the court may compel a spouse to pay any sums necessary for the support and maintenance of the other spouse and to enable such spouse to prosecute or defend the suit. Spousal support may include expenses of job training and education. In making the order, the court must consider the financial needs of each spouse and the children, and the financial ability of each spouse to meet those needs and to prosecute or defend the suit.

FINAL DECREE. Under T.C.A. § 36-5-101(a), the court may order the suitable support and maintenance of either spouse by the other spouse, or out of either spouse's property, according to the nature of the case and the circumstances of the parties. On application of either party for spousal support, the court may decree an increase or decrease of such allowance only upon a showing of a substantial and material change of circumstances.

---

[124] *Goodman v. Goodman,* 8 S.W.3d 289 (Tenn. App. 1999).
[125] *Grissom v. Grissom,* 15 S.W.3d 474 (Tenn. App. 1999).
[126] *Self v. Self,* 861 S.W.2d 360 (Tenn. 1993).
[127] *Bevil v. Bevil,* 8 Tenn. App. 490 (1929).
[128] *Folk v. Folk,* 355 S.W.2d 634 (Tenn.App.1962).
[129] *Smith v. Phelps,* 403 S.W.2d 747 (Tenn. 1966).
[130] *Edwards v. Edwards,* 713 S.W.2d 642 (Tenn. 1986).
[131] *Isbell v. Isbell,* 816 S.W.2d 735 (Tenn. 1991).
[132] 11 U.S.C. § 523(a)(5)(B).
[133] *In re Calhoun,* 715 F.2d 1103 (6th Cir. 1983).

FACTORS TO BE CONSIDERED. Under T.C.A. § 36-5-101(d), the court must consider all relevant factors including: (1) the relative earning capacity, obligations, needs, and financial resources of each party; (2) the relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level; (3) the duration of the marriage; (4) The age and mental condition of each party; (5) The physical condition of each party; (6) the extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage; (7) the separate assets of each party; (8) the provisions made with regard to the marital property; (9) the standard of living of the parties established during the marriage; (10) the extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party; (11) the relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and (12) such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties. There is substantial overlap between the statutory factors which a court should consider in determining the proper form and amount of spousal support and the factors relating to the proper division of marital property.[134]

DISCRETION OF TRIAL JUDGE. Child support decisions should precede decisions about spousal support because a spouse's ability to pay spousal support may be directly and significantly influenced by the amount of child support he or she has been ordered to pay.[135] The trial court in awarding alimony may consider a property settlement between the parties but is not required to do so.[136] A trial court must weigh all relevant facts including the obligations of both parties in awarding alimony and adjusting property interests.[137] A trial court abused its discretion in awarding a wife a percentage of her husband's bonus because the amount of the bonus was uncertain and could vary from year to year.[138]

NEED. In making determinations with regard to alimony, the need of the spouse is the single most important factor followed by the ability of the obligated spouse to pay and, to a lesser degree, the relative degree of fault.[139] When a husband's residence is owned by his mother and is not a part of his separate estate, the fact that he may continue to live there rent-free and might be able to experience the benefits of appreciation, while his wife is forced to rent a two-bedroom apartment for her and their daughter, goes directly to the needs of the parties and the husband's ability to pay.[140] If a wife's monthly expenses exceed the combined amount of her income and the amount of spousal support she receives, she will not be compelled to spend the liquid assets she receives in the property settlement to support herself, and she may receive an award of rehabilitative alimony.[141]

ABILITY TO PAY. Although one spouse earns more than the other spouse, the other spouse may be obligated to pay alimony because he or she has the greater earning capacity.[142]

---

[134] *Nash v. Nash,* 2003 WL 21706297 (Tenn. App. 2003).
[135] *Anderton v. Anderton,* 988 S.W.2d 675 (Tenn. App. 1998).
[136] *Brown v. Brown,* 198 Tenn. 600, 281 S.W.2d 492 (1955).
[137] *Newberry v. Newberry,* 493 S.W.2d 99 (Tenn. App. 1973).
[138] *Franklin v. Franklin,* 746 S.W.2d 715 (Tenn. App. 1987).
[139] *Hazard v. Hazard,* 833 S.W.2d 911 (Tenn. App. 1991).
[140] *Lindsey v. Lindsey,* 976 S.W.2d 175 (Tenn. App. 1997).
[141] *Davidson v. Davidson,* 2002 WL 31769205 (Tenn. App.2002).
[142] *Yount v. Yount,* 91 S.W.3d 777 (Tenn. App. 2002).

UNDEREMPLOYMENT. The trial court may award alimony to a disabled wife when it finds that the husband has either lied about his income or is grossly underemployed.[143] However, a trial court exceeds its discretion when it does not find that a husband is underemployed.[144] When a husband's criminal actions result in significantly lowering his monthly income, a court may find that he is willfully and voluntarily underemployed.[145]

FAULT. The court, in fixing alimony, may consider the conduct of the parties and the comparative responsibility of each spouse.[146]

POTENTIAL FOR REHABILITATION. When rehabilitation of a wife is not feasible due to her age, health, lack of schooling or vocational skills, and limited work history, permanent periodic alimony may be awarded instead of rehabilitative alimony.[147] However, a wife may be denied rehabilitative alimony when the marriage is of short duration, the value of items received by her during the marriage offsets the value of her contributions, and, even though she is 65 years old, her age and physical condition do not disqualify her from seeking employment.[148]

CONTRIBUTIONS OF SPOUSE RECEIVING ALIMONY. In awarding alimony a trial court should consider the extent, if any, that one spouse contributed to the other's estate.[149] However, contributions made by a wife from her earnings or separate estate are only one factor to be considered in awarding alimony, and except under unusual circumstances there is a well-nigh conclusive presumption that contributions of each party to the family needs and welfare are made out of love and a sense of duty with no expectation of reimbursement.[150]

TYPES OF SUPPORT THAT MAY BE AWARDED. A simultaneous award of both rehabilitative alimony and periodic alimony is inconsistent because at the time of the decree, a trial court must necessarily find that the recipient either can or cannot be rehabilitated, even though that determination is subject to later modification. However, another form of spousal support may be awarded for the same period when the facts warrant long-term or more open-ended support; alimony in solido is not inconsistent with a concurrent award of rehabilitative alimony.[151] Appellate courts may alter the type of award made by a trial court. For example, when a wife had secured work and nothing indicated that she would not be able to enjoy her current job for many years, the award of periodic alimony was changed to rehabilitative alimony for four years.[152]

AMOUNT AWARDED. When a court awards rehabilitative alimony, it must determine the amount of time it will take to rehabilitate the economically disadvantaged spouse, and a temporary award may be overturned if its duration bears little relationship to the factors set forth in the statute.[153] Although a wife was economically disadvantaged, the trial court's award of rehabilitative alimony was somewhat excessive, especially in light of the financial resources the wife was awarded and also in light of the undisputed brevity of the marriage.[154] Although none of the reasons, taken by itself, would be sufficient to terminate alimony, a combination of the husband's

[143] *Hutcheson v. Hutcheson,* 2002 WL 31247078 (Tenn. App. 2002).
[144] *Goodman v. Goodman,* 8 S.W.3d 289 (Tenn. App. 1999).
[145] *Wilson v. Wilson,* 43 S.W.3d 495 (Tenn. App. 2000).
[146] *Massey v. Massey,* 621 S.W.2d 728 (Tenn. 1981).
[147] *Davis v. Davis,* 2001 WL 914010 (Tenn. App. 2001).
[148] *Crain v. Crain,* 925 S.W.2d 232 (Tenn. App. 1996).
[149] *Newberry v. Newberry,* 493 S.W.2d 99 (Tenn. App. 1973).
[150] *Stone v. Stone,* 409 S.W.2d 388 (Tenn. App. 1966).
[151] *Burlew v. Burlew, 40 S.W.3d 465 (Tenn. 2001).*
[152] *Hopkins v. Hopkins,* 2002 WL 31387297 (Tenn. App. 2002).
[153] *Perry v. Perry,* 114 S.W.3d 465 (Tenn. 2003).
[154] *Nash v. Nash,* 2003 WL 21706297 (Tenn. App. 2003).

decreased income, the wife's relationship with another man, and her ability to secure some gainful employment required a decrease in alimony paid to the wife.[155] When a wife received a portion of her husband's fees in the division of property, her adultery had been the precipitating factor in the divorce, and no other statutory factor entitled her to alimony, denial of alimony was proper.[156]

Pleadings

PRAYER FOR ALIMONY. A prayer for general relief is not sufficient to support an award of alimony in a case in which judgment is taken by default.[157]

JURISDICTION OVER THE DEFENDANT ORDERED TO PAY ALIMONY. A judgment awarding alimony against a defendant who has not been served with process and who has not appeared before the court is usually void.[158] However, a court does have power to award alimony to be paid from Tennessee real estate owned by a nonresident spouse.[159]

INTEREST. An alimony decree ordering transfer of stock to a wife in value of $75,000 was tantamount to a money decree, and she was entitled to recover interest from the date of decree until paid.[160]

AGREEMENTS BETWEEN THE PARTIES ABOUT ALIMONY. A voluntary and knowing waiver or limitation of alimony in a prenuptial agreement will be fully enforced, unless enforcement will render one spouse a public charge.[161] By contrast, courts may refuse to enforce postnuptial agreements they determine to be in conflict with divorce statutes.[162]

INCOME WITHHOLDING. Under T.C.A. § 36-5-501, for any order of alimony in solido, in futuro or for rehabilitation, the court may order immediate assignment of the obligor's income, including but not limited to wages and salary. The order of assignment may issue regardless of whether support payments are in arrears on the effective date of the order. The court's order may include an amount sufficient to satisfy an accumulative arrearage, if any, within a reasonable time. Withholding may not exceed fifty percent (50%) of the employee's income after FICA, withholding taxes, and a health insurance premium which covers the child, if any, are deducted.

ATTORNEY FEES. An attorney's fee may be allowed as part of the alimony awarded.[163] It may be ordered to be paid during the case.[164] But when a spouse has adequate sums for his or her needs and payment of an attorney's fee, there is no occasion for the court to fix a fee.[165] A wife's attorneys could recover fees from her husband for services after the reconciliation of parties and dismissal of suit when they alleged that the wife needed the services for the protection and relief of herself and the minor children.[166]

---

[155] *Richardson v. Richardson,* 598 S.W.2d 791 (Tenn. App. 1980).
[156] *Wilder v. Wilder,* 863 S.W.2d 707 (Tenn. App. 1992).
[157] *Qualls v. Qualls,* 589 S.W.2d 906 (Tenn. 1979).
[158] *Overby v. Overby,* 457 S.W.2d 851 (Tenn. 1970).
[159] *Terrell v. Terrell,* 241 S.W.2d 411 (Tenn. 1950).
[160] *Ballard v. Ballard,* 455 S.W.2d 592 (Tenn. 1970).
[161] *Cary v. Cary,* 937 S.W.2d 777 (Tenn. 1996).
[162] *Bratton v. Bratton,* 2003 WL 1191185 (Tenn. App. 2003).
[163] *Raskind v. Raskind,* 325 S.W.2d 617 (Tenn. App. 1959).
[164] *Crouch v. Crouch,* 385 S.W.2d 288 (Tenn. App. 1964).
[165] *Franklin v. Franklin,* 746 S.W.2d 715 (Tenn. App. 1987).
[166] *Law v. Wilhite,* 470 S.W.2d 8 (Tenn. 1971).

Modification and Enforcement

JURISDICTION. The Circuit Court which granted divorce and entered order as to custody of children, alimony and support, had exclusive jurisdiction of the matter, and the Probate Court could not punish for contempt, even though by statute it had concurrent jurisdiction on domestic relations matters.[167] When a husband and wife were divorced in Georgia, the husband moved to Tennessee, and the wife sued in Tennessee for an increase in support, the courts of Tennessee acquired jurisdiction of the subject matter of complaint and jurisdiction of the husband by personal service of process.[168] If a divorce decree specifically retains jurisdiction for future orders about the payment of alimony, the court may thereafter attach property for contempt for failure to pay.[169]

DECREE FROM ANOTHER STATE. A judgment in another state for alimony can be enforced by the remedies of sequestration and attachment if it is enforceable by the same equitable remedies in the state where the judgment was originally entered.[170]

MODIFICATION. Termination or modification of an alimony award depends on the type of the original award. For example, alimony in solido is not subject to change after the decree becomes final.[171] Final judgments for delinquent alimony are not subject to forgiveness or modification in amount.[172]

BURDEN OF PROOF. In contempt proceedings for failure to pay alimony, the burden of proof is on the obligated spouse to show inability to pay.[173]

CHANGED CIRCUMSTANCES. According to one court, a temporary award of rehabilitative spousal support may be extended without proof of a substantial and material change in circumstances.[174] According to another court, when an alimony award is rehabilitative and temporary, it is subject to modification, and a wife's remarriage is a substantial change of circumstances warranting termination of the award.[175] Changed circumstances must be shown to have occurred after the entry of the divorce decree, and must not have been foreseeable when the decree was entered into or in the contemplation of the parties when they entered into the support and alimony agreement.[176] The fact that a spouse was unemployed at the time of an alimony award but was fully employed at the time of hearing for modification of alimony did not alone warrant a reduction in alimony.[177] The voluntary assumption of financial obligations does not constitute a change of circumstances.[178] Changes in tax laws are not a material change in circumstances.[179] When an ex-wife had been living with another individual with whom she had been intimate, who contributed to utility expenses, groceries, and vacations, and who performed chores around the home, she still needed alimony in a reduced amount.[180]

---

[167] *Mayhew v. Mayhew,* 376 S.W.2d 324 (Tenn. 1963).
[168] *Parker v. Parker,* 497 S.W.2d 572 (Tenn. 1973).
[169] *Clark v. Clark,* 278 S.W. 65 (Tenn. 1925).
[170] *Thones v. Thones,* 203 S.W.2d 597 (Tenn. 1947).
[171] *Phillips v. Webster,* 611 S.W.2d 591 (Tenn. App. 1980).
[172] *Zeitlin v. Zeitlin,* 544 S.W.2d 103 (Tenn. App. 1976).
[173] *Leonard v. Leonard,* 341 S.W.2d 740 (Tenn. 1960).
[174] *Perry v. Perry,* 114 S.W.3d 465 (Tenn. 2003).
[175] *Struck v. Struck,* 958 S.W.2d 352 (Tenn. App. 1997).
[176] *Elliot v. Elliot,* 825 S.W.2d 87 (Tenn. App. 1991).
[177] *Seal v. Seal,* 802 S.W.2d 617 (Tenn. App. 1990).
[178] *Jones v. Jones,* 784 S.W.2d 349 (Tenn. App. 1989).
[179] *Elliot v. Elliot,* 825 S.W.2d 87 (Tenn. App. 1991).
[180] *Lea v. Lea,* 2003 WL 22002601 (Tenn. App. 2003).

STATUTE OF LIMITATIONS. A divorced wife's claim for past due installments of alimony would not be considered because the claim was barred by the ten-year limitation of T.C.A. § 28-3-110 when the claim was not brought until 18 years later.[181]

LACHES, WAIVER, AND ESTOPPEL. While a spouse may not use the defenses of laches, waiver, or estoppel to defend against a petition to be held in contempt for failure to pay child support, the spouse can use those defenses to defend against a petition for spousal support.[182] The fact that the husband paid part of periodic alimony payments after being threatened with contempt and waited 11 months after entry of the divorce decree did not estop him from seeking relief when the decree was entered by default and the complaint did not contain a prayer requesting alimony.[183]

PUNISHMENT FOR CONTEMPT. The public policy of Tennessee is to punish for contempt those spouses who, through willful disobedience or obstinacy, refuse to comply with a court order to pay alimony.[184] A decree of contempt is not void because it contains no finding that the defendant is able to comply with the decree and willfully refuses to pay the amount of alimony in arrears.[185] Enforcement of an order to pay alimony by contempt proceedings does not violate the federal constitutional provision against involuntary servitude.[186]

OTHER REMEDIES. Under T.C.A. § 36-5-103, a court may enforce its orders for alimony by (1) requiring the obligated spouse to post a bond or give sufficient personal surety to secure past, present, and future support, (2) sequestering the income from the property of the obligated spouse, appointing a receiver, and causing the income to be applied for the benefit of the recipient spouse, or (3) other lawful means which the court deems necessary to assure compliance with its orders, including the imposition of a lien against the property of the obligated spouse.

ATTORNEY FEES. The fact that the prevailing party is unable to pay his or her attorney fees is not a prerequisite for ordering them to be paid by the other party.[187]

CHILD SUPPORT

The Obligation

LIABILITY OF PARENT FOR CHILD SUPPORT. Agreements, whether incorporated in court decrees or otherwise, which relieve a natural or adoptive parent of an obligation to provide child support are void as against public policy.[188] A divorced parent's obligation to support a child includes medical expenditures.[189]

STATUTORY STANDARDS FOR CHILD SUPPORT. Under T.C.A. § 36-5-101(a), in cases of both divorce and legal separation, the court may order child support according to the nature of the case and the circumstances of the parties. On application of either party, the court may decree an increase or decrease of the allowance but only upon a showing of a substantial and material change of circumstances.

---

[181] *Daugherty v. Dixon,* 297 S.W.2d 944 (Tenn. App. 1956).
[182] *State ex rel. Buchanan v. Buchanan,* 2002 WL 75932 (Tenn. App. 2002).
[183] *Qualls v. Qualls,* 589 S.W.2d 906 (Tenn. 1979).
[184] *Thones v. Thones,* 203 S.W.2d 597 (Tenn. 1947).
[185] *Leonard v. Leonard,* 341 S.W.2d 740 (Tenn. 1960).
[186] *Clark v. Clark,* 278 S.W. 65 (Tenn. 1925).
[187] *Gaddy v. Gaddy,* 861 S.W.2d 236 (Tenn. App. 1993).
[188] *Witt v. Witt,* 929 S.W.2d 360 (Tenn. App. 1996).
[189] *Stair v. Shumate,* 39 Bankr. 808 (Bankr. E.D. Tenn.), *modified*, 42 Bankr. 462 (Bankr. E.D. Tenn. 1984).

Child Support Guidelines

Under T.C.A. § 36-5-101(e), the court must apply the child support guidelines of the Department of Human Services as a rebuttable presumption about what must be paid. If the court finds that evidence is sufficient to rebut this presumption, it must make a written finding that the application of the guidelines would be unjust or inappropriate in order to provide for the best interests of the child or the equity between the parties. Exception: the trial judge is not limited to the guidelines' schedule in calculating the amount of support to be paid by a wealthy noncustodial parent.[190] The child support guidelines apply not only in divorce cases but also in proceedings in which one unmarried parent is seeking child support from the other.[191] They apply whether or not a child is a recipient of governmental benefits under Title IV-D of the Social Security Act.

DEVIATIONS FROM CHILD SUPPORT GUIDELINES. Under T.C.A. § 36-5-101(a), the court must decree an increase or decrease in child support when it finds a significant variance between the guidelines and the amount of support currently ordered. Exception: the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances which caused the deviation have not changed. The necessity to provide for a child's health care needs are also a basis for modification of the amount of the order, regardless of whether a modification in the amount of child support is necessary. Under T.C.A. § 36-5-101(e), when the presumption of the application of the guidelines is rebutted by clear and convincing evidence, the court must reduce retroactive support by making a written finding that application of the guidelines would be unjust or inappropriate in order to provide for the best interests of the child or for equity between the parties.

OTHER CHILDREN. Under T.C.A. § 36-5-101(e), calculations must take into consideration other children the obligated parent is legally responsible to support. Children who are not included in a decree of child support, but for whom the parent is legally responsible to provide support and actually is supporting, must be considered also.

DOMESTIC VIOLENCE. Under T.C.A. § 36-5-101(e), deviations may not be granted in circumstances where, based upon clear and convincing evidence: (1) the spouse remaining in the marital home has a demonstrated history of violence or domestic violence toward the spouse who has abandoned it, toward the child's caretaker, or toward the child; (2) the child is the product of rape or incest of the mother by the father of the child; (3) the abandoning spouse has a reasonable apprehension of harm from the spouse remaining in the home or those acting on the remaining spouse's behalf toward the abandoning spouse or the child; or (4) the remaining spouse, or those acting on the remaining spouse's behalf, has abused or neglected the child.

Definition of Gross Income

BONUSES. Bonuses are included in the definition of gross income.[192]

MILITARY PAY AND ALLOWANCES. When a military member receives pay or allowances which are not subject to taxation, an amount must be imputed on top of the amount actually received in calculating his or her gross income under the guidelines, but the trial court need not make a written or specific finding that the application of the guidelines would be unjust or inappropriate.[193]

---

[190] *Nash v. Mule,* 846 S.W.2d 803 (Tenn. 1993).
[191] *State ex rel. Vaughn v. Kaatrude,* 21 S.W.3d 244 (Tenn. App. 2000).
[192] *Renner v. Renner*, 2003 WL 253252 (Tenn. App. 2003).
[193] *Wade v. Wade,* 115 S.W.3d 917 (Tenn. App. 2002).

VETERANS' BENEFITS. The federal prohibition against attachment, levy, or seizure of veterans' benefits does not protect a veteran's disability benefits from an otherwise valid order of child support.[194]

FLUCTUATIONS IN INCOME. It is appropriate to average income for three years in order to determine if there has been a significant variance for purposes of calculating child support under the guidelines.[195] Seven months is too short a period.[196] It is not appropriate to set future support payments based on a potentially reduced work schedule.[197]

ALIMONY. The amount of a wife's child support obligation must take into consideration the amount of alimony she receives from the husband.[198]

INCOME OF CUSTODIAL PARENT. It is appropriate to consider the income of the custodial parent in deciding whether a downward deviation from the total child support will achieve equity.[199]

SHAREHOLDINGS. Where a business is solely owned, but not otherwise, the business' accumulation of retained earnings can be considered in determining a parent's income for the purpose of child support.[200]

CAPITAL GAINS. Capital gain resulting from a sale of an asset to fund a division of property in a divorce should not be considered in calculating child support.[201]

WILLFULL UNEMPLOYMENT OR UNDEREMPLOYMENT. Although a person has a right to pursue happiness and to make reasonable employment choices, a parent will not be allowed to lessen his or her child support obligation as a result of choosing to work at a lower paying job.[202] When a parent voluntarily leaves employment to accept a lower paying position, courts are inclined to find willful and voluntary underemployment for purposes of modifying child support. A judge is required to consider the parent's education, prior work experience, and reason for accepting the lower paying position to determine whether the decision was made in good faith.[203]

What Constitutes Support

PRIVATE SCHOOL. School tuition may not be considered as a portion of child support under the guidelines[204] unless a parent's income is in excess of $10,000 per month.[205]

COLLEGE EDUCATION. Establishing a program of savings for a college education is a proper element of child support when the resources of the noncustodial parent can provide the necessary funds without hardship to that parent. However, its establishment does not require the noncustodial parent to support the child past minority.[206]

---

[194] *Rose v. Rose,* 481 U.S. 619 (1987).
[195] *Alexander v. Alexander,* 34 S.W.3d 456 (Tenn. App. 2000).
[196] *Gore v. Gore,* 2001 WL 1660827 (Tenn. App. 2001).
[197] *Dube v. Dube,* 104 S.W.3d 863 (Tenn. App. 2002).
[198] *Walker v. Walker,* 2002 WL 1063948 (Tenn. App. 2002).
[199] *Barnett v. Barnett,* 27 S.W.3d 904 (Tenn. 2000).
[200] *Mitts v. Mitts,* 39 S.W.3d 142 (Tenn. App. 2000).
[201] *Alexander v. Alexander,* 34 S.W.3d 456 (Tenn. App. 2000).
[202] *Willis v. Willis*, 62 S.W.3d 735 (Tenn. App. 2001).
[203] *Demers v. Demers*, 149 S.W.3d 61 (Tenn. App. 2003).
[204] *Dwight (Redditt) v. Dwight,* 936 S.W.2d 945 (Tenn. App. 1996).
[205] *Turner v. Yovanovitch,* 2003 WL 22098033 (Tenn. App. 2003).
[206] *Nash v. Mulle,* 846 S.W.2d 803 (Tenn. 1993).

SUMMER CAMP. Summer camp and school supplies do not constitute child support under the child support guidelines.[207]

Jurisdiction

JURISDICTION OF TRIAL COURT. A Circuit Court which grants a divorce, and enters an order regarding custody of children, alimony and support, has exclusive jurisdiction; a Probate Court cannot punish for contempt, even though by statute it has concurrent jurisdiction on domestic relations matters.[208] The trial court is without jurisdiction during the pendency of an appeal to modify child support when the petition does not allege a change in circumstances.[209]

CONTINUING JURISDICTION OF TRIAL COURT. In cases where the custody and support of children are decreed, the decrees are final in the sense that they apply conclusively to the facts then existing. However, they are not final in the sense that they preclude a later decree in the same case upon new or changed conditions.[210] For example, a trial court may employ its continuing statutory power to modify the apportionment of medical and dental expenses between the mother and the father.[211]

CONTINUING JURISDICTION OF APPELLATE COURT. An appellate court has continuing jurisdiction over subsequent issues in domestic matters, such as child support.[212]

Proceedings

DISCRETION OF TRIAL COURT. The trial court is vested with wide discretion in awarding support for minor children, and the Court of Appeals will not interfere except upon a clear showing that the trial court erred in exercising its discretion.[213]

TEMPORARY ORDERS. Under T.C.A. § 36-5-101(i), the court may make any order that may be proper to provide for the custody and support of the minor children of the parties during the pendency of the suit. The court must consider the financial needs of each spouse and the children, and the financial ability of each spouse to meet those needs and to prosecute or defend the suit.

DEFENSES. Equitable defenses (e.g., laches, estoppel, waiver, and acquiescence) may not be used in cases brought to recover child support arrearages.[214]

PORTION OF ESTATE THAT MAY BE AWARDED. Under T.C.A. § 36-5-102, in cases where the court orders child support, it may award to the spouse who is entitled to child support such part of the other spouse's property as it may think proper. In doing so, the court may look to the property which either spouse received from the other at the time of the marriage, or afterwards, as well as to the separate property of either spouse.

TAX EXEMPTION. A trial court may order a parent to sign a release that would enable the other parent to obtain a federal tax exemption.[215]

HEALTH INSURANCE. Under T.C.A. § 36-5-101(f), the court may direct the acquisition or maintenance of health insurance covering each child of the marriage and may order either party

---

[207] *High v. High,* 2003 WL 21643353 (Tenn. App. 2003).
[208] *Mayhew v. Mayhew,* 376 S.W.2d 324 (Tenn. App. 1963).
[209] *Smith v. Haase,* 521 S.W.2d 49 (Tenn. 1975).
[210] *Darty v. Darty,* 232 S.W.2d 59 (Tenn. App. 1949).
[211] *Wade v. Wade,* 115 S.W.3d 917 (Tenn. App. 2002).
[212] *State ex rel. Wrzesniewski v. Miller,* 77 S.W.3d 195 (Tenn. App. 2001).
[213] *Harwell v. Harwell,* 612 S.W.2d 182 (Tenn. App. 1980).
[214] *Rutledge v. Barrett,* 802 S.W.2d 604 (Tenn. 1991).
[215] *Engel v. Young,* 2003 WL 1129451 (Tenn. App. 2003).

to pay all, or each party to pay a pro rata share of, the health care costs not paid by insurance proceeds. The court may also direct a party to pay the premiums for insurance insuring the health care costs of the other party.

LIFE INSURANCE. Under T.C.A. § 36-5-101(g), the court may direct either or both parties to designate the other party and the children of the marriage as beneficiaries under any existing policies insuring the life of either party. It may order maintenance of existing policies insuring the life of either party, or the purchase and maintenance of new life insurance and the designation of beneficiaries.

PARENTAGE. Under T.C.A. § 36-5-101(t), no provision in a final decree which provides that the husband is not the father of a child born to the wife during the marriage or within 300 days of the entry of the final decree, or which names another person as the father of the child, may be given preclusive effect unless (1) scientific tests to determine parentage are first performed and (2) the results of the tests are admitted into evidence.

DEATH OF PARENT. When custody of a child is awarded to a parent, his or her death does not defeat jurisdiction of the court in which the divorce proceeding was brought to make suitable provision for custody of the child.[216] By its decree rendered in a divorce, a court may bind the husband's estate after his death.[217]

RETROACTIVE MODIFICATION. A trial court's award of a retroactive increase in child support is prohibited by T.C.A. § 36-5-101(a)(5). However, when a motion for an increase in child support has not been ruled upon, a trial court is permitted to retroactively modify child support to account for annual increases in salary.[218]

Enforcement of Child Support Orders

REGISTRY OF SUPPORT CASES. Under T.C.A. § 36-5-115, all cases of support for which benefits are being provided pursuant to Title IV-D of the Social Security Act, and all support orders which are established or modified regardless of whether the orders result from cases being enforced pursuant to Title IV-D, must be contained in an automated state registry of support cases and support orders to be operated by the Department of Human Services as required by 42 U.S.C. § 654a.

COLLECTION AND DISBURSEMENT UNIT. Under T.C.A. § 36-5-116, the Department of Human Services is the central collection and disbursement unit for the State required by 42 U.S.C. § 654b. Its job is to provide a monthly notice to the custodial parent when a child support payment is received or distributed by the Department during the reporting month. All orders in Title IV-D cases, and all orders for income assignments which have directed support to be paid to the clerk of any court, are deemed to require that the support be sent to it. A trial court does not have the discretion to order otherwise.[219]

EXPEDITED HEARINGS. Under T.C.A. § 36-5-401 et seq., hearings in child support cases which are *not* being enforced pursuant to the provisions of Title IV-D of the Social Security Act must be heard within 45 days of the service of process. Hearings in Title IV-D support cases must be heard within the time frames established by federal child support regulations. The presiding judge of each judicial district must provide for expedited support hearings by the use of referees or

---

[216] *Sutton v. Sutton,* 417 S.W.2d 786 (Tenn. 1967).
[217] *Bringhurst v. Tual,* 598 S.W.2d 620 (Tenn. App. 1980).
[218] *Norman v. Norman,* 2003 WL 724677 (Tenn. App. 2003).
[219] *State ex rel. Patterson v. French,* 2002 WL 1349498 (Tenn. App. 2002).

by agreements with juvenile courts. The referee has the same authority and power as a circuit court judge to issue process and to conduct hearings and other proceedings, but final orders of a referee must be reviewed by a judge. When a hearing is held before a judge or referee, the date must be within 30 days of the date a petition is filed with the clerk.

BOND OR SURETY. Under T.C.A. § 36-5-103, the court must enforce its orders and decrees by requiring the obligated parent to post a bond or give sufficient personal surety to secure past, present, and future support, unless the court finds that the payment record of the obligor parent, the availability of other remedies, and other relevant factors make the bond or surety unnecessary.

TAKING CONTROL OF ASSETS. Under T.C.A. § 36-5-103, the court may sequester the rents and profits of the property of the obligated parent, may appoint a receiver, and may cause them to be applied to the use of the other parent and the children. It may also use any other lawful means the court deems necessary to assure compliance with its orders, including, but not limited to, the imposition of a lien against the property of the obligor. A foreign judgment for alimony can be enforced by the remedy of sequestration or attachment for contempt, providing the foreign judgment is enforceable by same equitable remedies in the state where the judgment was originally entered.[220]

THREE-YEAR REVIEW OF AWARD. Under T.C.A. § 36-5-103, in Title IV-D cases, upon request of either parent or the Department of Human Services, the Department must review child support every three years in accordance with its guidelines. If there is a "significant variance" as defined in those guidelines, the Department must seek to adjust the order, either through the courts or its own administrative process. The Department's efforts to seek adjustment, and any adjustment of the order, must be in accordance with the guidelines and must be made without proof of any other change in circumstances.

Sanctions

ATTORNEY FEES. Under T.C.A. § 36-5-103, attorney fees may be awarded to a spouse, or other person with custody of a child, if they were incurred in enforcing a decree for child support or in a suit concerning custody. Fee awards are not primarily for the benefit of the custodial parent but rather to facilitate a child's access to the courts.[221] A showing that the prevailing party is unable to pay his or her attorney fees is not a prerequisite for awarding fees.[222] A trial court does not abuse its discretion in ordering the father to pay the mother's attorney fees when the father has had ample opportunity to resolve the matter without forcing the mother to resort to the courts.[223]

CONTEMPT PROCEEDINGS. Courts have jurisdiction to enforce provisions in divorce decrees for periodic child support payments by contempt proceedings.[224]

LICENSE DENIAL AND REVOCATION. Under T.C.A. § 36-5-701 et seq., a person who fails to pay child support is subject to the loss of a license to engage in a profession, trade, occupation, business, or industry, to hunt or fish, or to operate any motor vehicle or other conveyance. There must first be an administrative hearing before the Department of Human Services. The only issues are whether the licensee is required to pay child support under an order of support; whether he or she is in compliance with the order of support; and whether good cause

---

[220] *Thones v. Thones,* 185 Tenn. 124, 203 S.W.2d 597 (1947).
[221] *Sherrod v. Wix,* 849 S.W.2d 780 (Tenn. App. 1992).
[222] *Gaddy v. Gaddy,* 861 S.W.2d 236 (Tenn. App. 1993).
[223] *Parker v. Parker,* 2003 WL 21463004 (Tenn. App. 2003).
[224] *Sowell v. Sowell,* 493 S.W.2d 86 (Tenn. 1973).

exists for imposing sanctions. After the hearing, the certification of the Department that the obligor is not in compliance is a basis for the denial, suspension or revocation of a license, or for refusal to issue or reinstate a license. A subsequent decision by the licensing authority to revoke, deny, suspend, or refuse to renew or reinstate a license may not be appealed under the Uniform Administrative Procedures Act.

CRIMINAL SANCTIONS. Under T.C.A. § 36-5-104, any person who fails to comply with an order or decree for child support may be punished by imprisonment in the county workhouse or county jail for a period not to exceed six months. A finding of willful misconduct must precede a judgment for contempt.[225] The sentence may not be served one day each month and must be completed within a six-month period.[226]

Income Withholding

CHILD SUPPORT. Under T.C.A. § 36-5-501, to provide child support, the trial court must order an immediate assignment of the obligated parent's income. The order must include an amount sufficient to satisfy any arrearage within a reasonable time. The order may also include medical expenses. Withholding may not exceed 50% of income after employment and income taxes, and a health insurance premium which covers the child, are deducted. Income assignment is not required if (1) a court finds in a reasoned order that there is good cause not to require it and the proof shows that the obligated parent has made timely payment of previously ordered support, (2) there is a written agreement by both parties that provides for alternative arrangements, or (3) the Department of Human Services agrees to permit exemption from income withholding. In all cases in which the court has ordered immediate income assignment, the clerk of the court, or the Department of Human Services in Title IV-D cases, must immediately issue an income assignment to an employer once the employer of an obligated parent has been identified. In all other cases in which the child support payments have been ordered to be paid directly to a parent, guardian or custodian, the latter may, by affidavit filed with the clerk, or the Department in Title IV-D child support cases, request that an order of income assignment be sent to the employer. No court order authorizing an income assignment is required. All payments must be made to the central collection and disbursement unit of the Department of Human Services pursuant to T.C.A. § 36-5-116. In all cases in which the obligated parent requests a hearing or administrative review, the referee, court, or Department must conduct a hearing and make a determination, and the clerk or Department must notify the parent and the employer of the decision within 45 days of the date of the order.

HEALTH INSURANCE. Under T.C.A. § 36-5-501, in any case in which a noncustodial parent is required by a court or administrative order to provide health care coverage for a child, and the employer of the noncustodial parent is known to the Department of Human Services, the Department must notify the employer of the requirement for employer-based health care coverage for the child through the parent. (Upon receipt of the notice, it is deemed a qualified medical child support order under 29 U.S.C. § 1169(a)(5)(C)(i).) The employer must withhold from the noncustodial parent's compensation any employee contributions necessary for coverage of the child and must send any amount withheld directly to the health care plan to provide coverage for the child. The Department, in consultation with the custodial parent, must promptly select from available plan options when the plan administrator reports that there is more than one option available under the employer's plan.

---

[225] *Haynes v. Haynes,* 904 S.W.2d 118 (Tenn. App. 1995).

[226] *Herrera v. Herrera,* 944 S.W.2d 379 (Tenn. App. 1996).

Enforcement by the Department of Human Services

ENFORCEMENT POWERS. Under T.C.A. § 36-5-801 et seq., the Department of Human Services has, among other things, the powers to subpoena records from employers; to obtain information maintained by any agency of the State of Tennessee relating to registration of any motor vehicles or law enforcement activities; to order the genetic testing of a child, the mother and a putative father without the necessity of filing a paternity action; to change the payee to the clerk of the court or to the Department; to enter an administrative order to add an amount to the monthly support order which will reduce the arrearage over a reasonable period of time; to order the party to file, for entry into the state registry of support cases, and to update, the party's and the child's vital information; and to enforce an administrative order, a subpoena, or a civil penalty by filing a motion in the court having jurisdiction over the support order or in the county of the residence of the person against whom the request, administrative order or administrative subpoena was issued.

SEIZURE OF PROPERTY. Under T.C.A. § 36-5-901 et seq., in any case of child or spousal support enforced by the Department of Human Services under Title IV-D of the Social Security Act in which overdue support is owed, a lien arises by operation of law against all of the real and personal property of an obligated parent for the amount of any overdue support. The Department is authorized to intercept payments and benefits, seize assets held in financial institutions, attach public and private retirement funds, and force the sale of property. When the action is taken administratively, both administrative and judicial review may be obtained, but it is limited in scope.[227]

EMPLOYMENT RECORDS. Under T.C.A. § 36-5-1101 et seq., an employer must furnish to the Department a report that contains the name, address, date of hire, and social security number of each newly hired employee, and the name, address, and identifying number of the employer. The Department may use the information received to locate individuals for purposes of establishing paternity and establishing, modifying and enforcing child support obligations.

SOCIAL SECURITY NUMBERS. Under T.C.A. § 36-5-1301 et seq., applications for professional licenses, driver licenses, occupational licenses, hunting and fishing licenses or recreational licenses, or marriage licenses must contain the social security number of each applicant. In addition, the social security number of any individual who is subject to a divorce decree, an order of support issued by any court, an order of paternity or legitimation, or a voluntary acknowledgment of paternity must be placed in the records relating to the matter.

Interstate Enforcement

Under T.C.A. § 36-5-2001 et seq., a Tennessee court may forward proceedings to another state and may receive proceedings initiated in another state. Indeed, a Tennessee court may act even when there is no initiating court in another state.

JURISDICTION OVER NONRESIDENTS. Under T.C.A. § 36-5-2201, in a proceeding to establish, enforce, or modify a support order or to determine parentage, a Tennessee court may exercise personal jurisdiction over a nonresident individual if: (1) the individual is personally served with notice in Tennessee; (2) the individual submits to the jurisdiction of Tennessee by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction; (3) the individual resided with the child in Tennessee; (4) the individual resided in Tennessee and provided prenatal expenses or support for the child; (5) the child resides in Tennessee as a result of the acts or directives of the individual; (6) the

[227] *State ex rel. Anderson v. Jarrett,* 2002 WL 1349505 (Tenn. App. 2002).

individual engaged in sexual intercourse in Tennessee and the child may have been conceived by that act of intercourse; (7) the individual asserted parentage in the putative father registry maintained in Tennessee by the Department of Children's Services; or (8) there is any other basis consistent with the constitutions of Tennessee and the United States for the exercise of personal jurisdiction.

COMPETING PROCEEDINGS IN DIFFERENT STATES. Under T.C.A. § 36-5-2204, the court in the child's home state (the state in which the child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing) has priority. If the child has no home state, the state where the first filing occurred has jurisdiction. .

CONTINUING, EXCLUSIVE JURISDICTION OVER CHILD SUPPORT ORDERS. Under T.C.A. § 36-5-2205, the issuing court retains continuing, exclusive jurisdiction over a child support order, as long as one of the individual parents or the child continues to reside in the issuing state, and as long as the parties do not agree to the contrary. On the other hand, if all the relevant persons -- parents and the child -- have permanently left the issuing state, its courts no longer have jurisdiction to modify. However, the original order of the issuing court remains valid and enforceable. That order is in effect not only in the issuing state and those states in which the order has been registered, but it also may be registered and enforced in additional states even after the issuing state has lost its power to modify its order. (Alimony is treated differently; the issuing tribunal retains continuing, exclusive jurisdiction over an order of spousal support throughout the entire existence of the support obligation.[228])

RECONCILING MULTIPLE CHILD SUPPORT ORDERS. T.C.A. §§ 36-5-2207 through 36-5-2209 contain the rules for harmonizing multiple orders from different states.

PROCEEDINGS COVERED BY THE INTERSTATE RULES. T.C.A. §§ 36-5-2301 through 36-5-2902 apply to many types of proceedings including: (1) establishment of an order for alimony or child support; (2) enforcement of a support order and income-withholding order of another state without registration; (3) registration of an order for alimony or child support of another state for enforcement; (4) modification of an order for child support or alimony issued by a Tennessee court; (5) registration of an order for child support of another state for modification; and (6) a determination of parentage. Among the judicial decisions interpreting the rules is the following: a father has no right to contest paternity in interstate child support proceedings even if he is not the biological father.[229]

Intercounty Enforcement

TRANSFER OF SUPPORT OR CUSTODY CASES. Under T.C.A. § 36-5-3003, a case may be transferred, without any additional filing by the party seeking transfer and without service of process upon the other party, to a court in another county. It must be the county where the child resides if neither the child, nor the custodial parent, nor the noncustodial parent currently resides in the first county, and if the child has resided in the county to which the case is to be transferred for at least six months. A case may also be transferred for modification of support or custody to a court in the Tennessee county in which the noncustodial parent resides with no six-month residency period if both the child and the custodial parent reside outside Tennessee and the custodial parent does not object after notice. If objection is made, or if the requesting party does not seek immediate transfer, the requesting party may obtain transfer for modification of the order by demonstrating that the custodial parent and the child have resided outside Tennessee for at least six months. To illustrate,

[228] T.C.A §§ 36-5-2205 and 36-5-2206.
[229] *State ex rel. Schleigh v. Schleigh,* 2002 WL 31421665 (Tenn. App. 2002).

where a mother filed a divorce action in the county where the parties lived at the time of separation but the mother subsequently moved to another county, the father's motion under T.C.A. § 36-5-3004 to transfer the case to the mother's new county of residence was properly denied because the divorce action was still pending and no custody or support order was the subject of a request for enforcement or modification.[230]

CONTEST OF TRANSFER. Under T.C.A. § 36-5-3007, a party may contest the transfer of the case by filing a motion in the transferor court for that purpose within 15 days of the mailing date of the notice from the requesting party. Unless it is shown by the non-requesting party that notice of the request for transfer was not received, failure to contest the transfer request within the 15-day period waives an objection to the transfer request. The contest of the transfer is limited to whether the residences of the parents and child meet the statutory requirements.

Enforcement without Transfer of Jurisdiction

REGISTRATION OF ORDER. Under T.C.A. §§ 36-5-3103 and 36-5-3104, a support order issued by a Tennessee court may be registered in the county where the child resides, but for enforcement purposes only. If the order is being enforced pursuant to Title IV-D of the Social Security Act, it may also be enforced in the county of the residence of the parent obligated to pay child support, at the option of the Department of Human Services. (An order may be modified in a court other than the issuing court only if it is transferred pursuant to T.C.A. § 36-5-3001 et seq.) A support order issued in another county is registered for enforcement when the order is properly filed in the registering court. It is enforceable in the same manner and is subject to the same procedures as an order issued the registering court. A registering court must recognize and enforce, but may not modify, a registered order.

CONTEST OF REGISTRATION. Under T.C.A. § 36-5-3106, a party may contest the validity or enforcement of a registered order by requesting a hearing within 15 days after the date of mailing of the notice of the registration to him or her. The non-registering party may seek to vacate the registration, may assert any defense to an allegation of noncompliance with the registered order, or may contest the remedies being sought or the amount of any alleged arrearages. If the non-registering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law. A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of four statutory defenses. If he or she presents evidence establishing a full or partial defense, the court where the order is registered may stay enforcement of the order until the issues have been resolved by the court that issued the order. If the contesting party does not establish a defense regarding the validity or enforcement of the order, the registering court must issue an order confirming the order. An order confirming registration of the order is not required if no contest to the registration is made.

CHILD CUSTODY AND VISITATION

Custody

AWARD OF CUSTODY. Under T.C.A. § 36-6-101, a court may award the custody of a child to either or both of the parents or to another suitable person. (A finding that child abuse or child sexual abuse has occurred within the family gives rise to a rebuttable presumption that it is detrimental to the child and not in the best interests of the child for the court to award sole custody, joint legal or joint physical custody to the perpetrator of the abuse.) If the parents agree upon joint

[230] *Buss-Flinn v. Flinn,* 2003 121 S.W.3d 383 (Tenn. App 2003).

custody, there is a presumption that joint custody is in the best interest of a minor child unless the court finds by clear and convincing evidence to the contrary. Otherwise, the court has the widest discretion to order a custody arrangement that is in the best interest of the child. If the issue is a modification of the court's prior decree pertaining to custody or a residential parenting arrangement, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. It may include failures to adhere to the parenting plan, or an order of custody and visitation, or other circumstances which make the parenting plan no longer in the best interest of the child. In each contested case, the court must make such a finding as to the reason and the facts that constitute the basis for the custody determination.

RIGHTS OF THE NON-CUSTODIAL PARENT. Under T.C.A. § 36-6-101, unless a court finds it not to be in the best interest of the child, the non-custodial parent has the rights to unimpeded telephone conversations with the child; to send uncensored mail to the child; to receive notice and relevant information about hospitalization, major illness or death of the child; to receive, directly from the child's school, records customarily made available to parents; to receive copies of the child's medical records directly from the child's doctor or other health care provider; to be free of unwarranted derogatory remarks in the presence of the child; to be given at least 48 hours' notice, whenever possible, of all extra-curricular activities; the opportunity to participate in or observe activities as to which parental participation or observation would be appropriate; to receive from the other parent, in the event the other parent leaves the state with the minor child or children for more than two days, an itinerary including telephone numbers for use in the event of an emergency; and access and participation in education on the same basis that is provided to all parents.

PARENTAL EDUCATION SEMINAR. Under T.C.A. § 36-6-101, if the court finds that it would be in the best interest of the minor children, the court may order the parents to attend an educational seminar concerning the effects of divorce on the children. The court may not deny the granting of a divorce for failure of a party or both parties to attend the educational session. Refusal to attend the educational session may be punished by contempt and may be considered by the court as evidence of the parent's lack of good faith.

JOINT CUSTODY. Although joint child custody is generally disfavored, there is no invariable rule against joint custody.[231] A court may grant joint custody when one parent's ability and willingness to provide the child with food, clothing, medical care, private education, and other necessities exceeds the other parent's.[232] However, joint legal custody is not appropriate between parents separated by 1,000 miles and a bitterly fought custody dispute.[233]

NOTICE TO THE PARENT. A parent from whom child custody may be removed, even temporarily, must be provided with notice sufficient to meet due process requirements. T.C.A. § 36-6-101(a)(2)(B) defines the proper standard for modifying custody.[234]

CUSTODY BY NONPARENTS. Until it is shown that neither parent is a suitable custodian, it is improper to consider entrusting custody to a nonparent.[235] In a choice between a mother of

[231] *Gray v. Gray,* 885 S.W.2d 353 (Tenn. App. 1994).
[232] *Swett v. Swett,* 2002 WL 1389614 (2002).
[233] *Shepherd v. Metcalf,* 794 S.W.2d 348 (Tenn. 1990).
[234] *Keisling v. Keisling,* 92 S.W.3d 374 (Tenn. 2002).
[235] *Bush v. Bush,* 684 S.W.2d 89 (Tenn. App. 1984).

young children and third parties, even grandparents, equal fitness by the parties cannot overcome the law's preference for the mother.[236]

CONTINUING JURISDICTION. Every divorce decree in which an order is made for support and maintenance of wife and children remains in the court where the divorce decree was granted, regardless of whether the decree specifically provides for retention.[237]

GROUNDS FOR MODIFICATION. The courts will change a custody or visitation arrangement if the party seeking the change proves: (1) that the child's circumstances have changed materially in a way that could not reasonably have been foreseen at the time of the original custody decision, and (2) that the child's interests will be better served by changing the existing custody or visitation arrangement.[238] Under T.C.A. § 36-106-101, a material change in circumstance does not require a showing of substantial risk of harm to the child to modify a custody order, and that same standard is applied to a petition for a modification to a visitation order.[239]

BEST INTEREST STANDARD. The best interest rule trumps all other custody principles, including the one generally disfavoring separation of siblings.[240] If there has not been a material change in circumstances, the court is not required to make a best interest determination and must deny the request for a change of custody.[241] The material change of circumstances must occur after the entry of the order sought to be modified and the change cannot be one that was known or reasonably anticipated when the order was entered. It must be a change in the child's circumstances, not the circumstances of either or both of the parents.[242]

FACTORS TO BE CONSIDERED IN DETERMINING BEST INTEREST. Under T.C.A. § 36-6-106, to determine the best interest of the child, the court must consider all relevant factors including the following: (1) the love, affection and emotional ties existing between the parents and child; (2) the disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care, and the degree to which a parent has been the primary caregiver; (3) the importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; (4) the stability of the family unit of the parents; (5) the mental and physical health of the parents; (6) the home, school and community record of the child; (7) the reasonable preference of the child if 12 years of age or older; (8) evidence of physical or emotional abuse to the child, to the other parent or to any other person; (9) the character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and (10) each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

BURDEN OF PROOF. The party seeking a change in custody has the initial burden to show a material change of circumstances which affects the welfare of the child. The burden remains on the moving party to show that he is comparatively more fit than the party with custody under the

[236] *Doles v. Doles,* 848 S.W.2d 656 (Tenn. App. 1992).
[237] *Morrissey v. Morrissey,* 377 S.W.2d 944 (Tenn. 1964).
[238] *Solima v. Solima,* 7 S.W.3d 30 (Tenn. App. 1998).
[239] *Scales v. Mackie,* 2003 WL 43355 (Tenn. App. 2003).
[240] *Rice v. Rice,* 983 S.W.2d 680 (Tenn. App. 1998).
[241] *Caudill v. Foley,* 21 S.W.3d 203 (Tenn. App. 1999).
[242] *Hoalcraft v. Smithson,* 19 S.W.3d 822 (Tenn. App. 1999).

challenged custody decree and to show that it would be in the child's best interest for the moving party to be the custodial parent.[243]

FINDINGS OF FACT. The statute does not require a trial court, when issuing a memorandum opinion or final judgment, to list every applicable factor along with its conclusion as to how that particular factor impacted the overall custody determination.[244]

CONTINUITY OF PLACEMENT. When both parents are fit to have custody of a child, custody should remain the same because of the strong presumption in favor of continuity of placement.[245]

PREFERENCE OF THE CHILD. Under T.C.A. § 36-6-106, the court must hear the preference of a child age 12 or above and may hear that of a child under age 12 upon request. The preferences of older children should normally be given greater weight than those of younger children.

RELIGIOUS BELIEFS. The religious beliefs of the parents are not controlling in custody cases.[246]

REMARRIAGE. The remarriage of either parent does not itself constitute a material change of circumstances; however, the possible change in home environment caused by remarriage is a factor to be considered in determining whether or not there has been a change in circumstances that would warrant an alteration of custody arrangements.[247]

EDUCATION OF CHILD. The decision about which school a child should attend usually rests with the custodial parent.[248] Home schooling is not inherently inimical to a child's welfare and does not necessarily impose a substantial social burden on a child.[249]

HOMOSEXUAL LIVING ARRANGEMENT. When a mother is living as a lesbian, she should not be awarded unrestricted rights to have the child with her every other weekend from Friday evening until Sunday evening. Such visitation could provide nothing but harmful effects on child's life in the future.[250]

CHILD ABUSE OR CHILD SEXUAL ABUSE. Under T.C.A. § 36-6-106, where there are allegations that a parent has committed child abuse or child sexual abuse against a family member, the court must determine, by a clear preponderance of the evidence, whether the abuse has occurred; must include in its decision written findings of facts; and, where appropriate, must refer any issues of abuse to the juvenile court for further proceedings. Under T.C.A. § 36-6-107, where the court makes findings of child abuse or child sexual abuse, the court may only award visitation under circumstances that guarantee the safety of the child. The court may order: (1) that all visits be supervised by a responsible adult or agency, the costs to be primarily borne by the perpetrating parent; (2) that the perpetrating parent attend and complete a program of counseling or other intervention as a precondition to visitation; (3) that overnight visitation be prohibited until such time that the perpetrating parent has completed court ordered counseling or intervention, or otherwise demonstrated a change in circumstances that guarantees the safety of the child; (4) that

---

[243] *Hoalcraft v. Smithson,* 19 S.W.3d 822 (Tenn. App. 1999).
[244] *Burnett v. Burnett,* 2003 WL 21782290 (Tenn. App. 2003).
[245] *Placencia v. Placencia,* 3 S.W.3d 497 (Tenn. App. 1999).
[246] *Mollish v. Mollish,* 494 S.W.2d 145 (Tenn. 1972).
[247] *Tortorich v. Erickson,* 675 S.W.2d 190 (Tenn. App. 1984).
[248] *Lewis v. Lewis,* 741 S.W.2d 900 (Tenn. App. 1987).
[249] *Rust v. Rust,* 864 S.W.2d 52 (Tenn. App. 1993).
[250] *Dailey v. Dailey,* 635 S.W.2d 391 (Tenn. App. 1981).

the address of the child and the non-perpetrating parent be kept confidential; and (5) any other conditions the court deems necessary and proper to guarantee the safety of the child.

APPLICATION OF MULTIPLE FACTORS. A father was the more comparatively fit custodian since he was a very concerned and competent parent; sought almost all the medical attention that the children required; made more responsible parenting decisions than the mother and her boyfriend; was more involved in the educational process of the children; and was the more attentive parent.[251] The mother's interference with the father's visitation with his child and the mother's neglect of the child's medical, dental, and educational needs supported a finding of a material change in circumstances.[252]

DEPRIVATION OF RELATIONSHIP WITH OTHER PARENT. A change of custody was appropriate because the mother refused to foster any relationship between the twins and their father, and she would continue to deprive them of the benefit of an open and affectionate relationship with the father if she continued to have custody.[253] Because the mother had deliberately interfered with the father's visitation rights by monitoring the children's telephone conversations with their father, by refusing to allow the children to speak with the father on the telephone, by refusing to speak with the father, by refusing to provide him with relevant information about the children, and by making derogatory remarks about him in front of the children, a material change in circumstances existed.[254]

CONDUCT BY OTHERS IN THE HOME. In transferring primary residential custody of two pre-teenagers from the mother to the father, the trial court properly considered the fact that the mother's 18-year-old daughter from an earlier marriage had a boyfriend who was allegedly dealing drugs while staying at the mother's home.[255] A trial court did not err in awarding custody to the father based on the mother's boyfriend's conduct.[256]

FRICTION BETWEEN PARENT AND CHILD. Friction between a mother and a daughter can warrant a change of custody because of its detrimental effect on both of them.[257]

TWO UNSATISFACTORY PARENTS. A trial court did not err in finding that it was in the best interests of the minor children to modify an existing parenting plan and to designate the mother the primary residential custodian with full decision making authority. Even though the trial court stated that it was terrified about the environment the children were being raised in and that it was not impressed with the abilities of either parent, the father had used the previous parenting plan as a hammer to harass his ex-wife and their children. The court felt it had no choice but to grant primary custody to the mother.[258]

RACIAL PREJUDICE. A court may not consider the alleged effects of racial prejudice.[259]

RELATIONSHIP OF DIFFERENT STATUTES. T.C.A. § 34-2-103 does not override the best-interest analysis of T.C.A. § 36-6-106.[260] A mother's argument that the trial court erred in

[251] *Wilson v. Wilson,* 58 S.W.3d 718 (Tenn. App. 2001).
[252] *Roache v. Bourisaw,* 2001 WL 1191379 (Tenn. App. 2001).
[253] *Branch v. Thompson,* 2002 WL 31662398 (Tenn. App. 2002).
[254] *Cranston v. Combs,* 106 S.W.3d 641 (Tenn. 2003).
[255] *Staggs v. Staggs,* 2002 WL 31769112 (Tenn. App. 2002).
[256] *Rice v. Rice,* 983 S.W.2d 680 (Tenn. App. 1998).
[257] *Dougherty v. Dougherty,* 2003 WL 535925 (Tenn. App. 2003).
[258] *Mayberry v. Mayberry,* 2003 WL 21392193 (Tenn. App. 2003).
[259] *Parker v. Parker,* 986 S.W.2d 557 (Tenn. 1999).
[260] *In re Horner,* 2003 WL 1452997 (Tenn. App. 2003).

applying a best-interest-of-the-child analysis under T.C.A. § 36-6-106, instead of the factors enumerated in T.C.A. § 36-6-108, was overruled.[261]

Rights of Noncustodial Parents

Under T.C.A. § 36-3-110, unless a court finds it not to be in the best interest of the child, the non-custodial parent has the rights to unimpeded telephone conversations with the child; to send uncensored mail to the child; to receive notice and relevant information about hospitalization, major illness or death of the child; to receive, directly from the child's school, records customarily made available to parents; to receive copies of the child's medical records directly from the child's doctor or other health care provider; and to be free of unwarranted derogatory remarks in the presence of the child. (See also T.C.A. § 36-3-103 and 36-3-104 regarding medical records and educational report cards.) Under T.C.A. § 36-6-105, these rights do *not* include the power to change the physical custody of a child at a school or day care center without furnishing a certified copy of a valid court order placing custody of the child in that parent and giving reasonable advance notice of intent to take custody of the child.

Parenting Plans

TEMPORARY PARENTING PLAN. Under T.C.A. § 36-6-403, a temporary parenting plan must be incorporated in any temporary order of the court in actions involving a minor child. A temporary parenting plan must comply with the provisions for a permanent parenting plan that are applicable for the time frame and must include a residential schedule. If the parties can agree to a temporary parenting plan, no written temporary parenting plan is required to be entered by the court. If the parties cannot agree, the court may immediately order the parties to participate in dispute resolution to establish a temporary parenting plan. In either mediation or in a hearing before the court, each party must submit a proposed temporary parenting plan, a verified statement of income, and a verified statement that the plan is proposed in good faith and is in the best interest of the child. If only one party files a proposed temporary parenting plan, that party may petition the court for an order adopting that party's plan by default, upon a finding by the court that the plan is in the child's best interest. In determining whether the proposed temporary parenting plan serves the best interests of the child, the court must be governed by the allocation of residential time and support obligations contained in the child support guidelines and related provisions in T.C.A. Title 36, Chapter 5.

PERMANENT PARENTING PLAN. Under T.C.A. § 36-6-404, any final decree of divorce or decree of modification involving a minor child must incorporate a permanent parenting plan. Among other things, the plan must provide a process for dispute resolution; allocate decision-making authority to one or both parties regarding the child's education, health care, extracurricular activities, and religious upbringing; require the parent paying child support to report annually to the other parent his or her income on a form provided by the court; and include a residential schedule. The court must make residential provisions for each child, consistent with the child's developmental level and the family's social and economic circumstances, which encourage each parent to maintain a loving, stable, and nurturing relationship with the child. Generally, the court must consider 15 factors specified by statute and any others it deems relevant. If the parties have not reached agreement on a permanent parenting plan 45 days before the date set for trial, each party must file and serve a proposed permanent parenting plan, even though the parties may continue to mediate or negotiate. Each parent submitting a proposed permanent parenting plan must attach a verified

[261] *Gregory v. Gregory,* 2003 WL 21729431 (Tenn. App. 2003).

statement of income pursuant to the child support guidelines and a verified statement that the plan is proposed in good faith and is in the best interest of the child.

MODIFICATION OF A PLAN. Under T.C.A. § 36-6-405, in a proceeding for modification of a permanent parenting plan, a proposed plan must be filed and served with the petition for modification and with the response to the petition for modification. (A plan is not required if the modification pertains only to child support.) The proposed parenting plan of a parent paying child support must be accompanied by a verified statement of his or her income. The process for permanent parenting plans must be used to establish an amended plan.

RESTRICTIONS AND LIMITATIONS. Under T.C.A. § 36-6-406, a parent's residential time must be limited. Its restrictions apply if a court determines that a parent has engaged in willful abandonment that continues for an extended period of time; has substantially refused to perform parenting responsibilities; has engaged in physical or sexual abuse; or has shown a pattern of emotional abuse of the parent, child or of another person living with that child. A parent's residential time with a child must also be limited if a court determines that the parent resides with a person who has engaged in physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child. If a parent has been convicted as an adult of a sexual offense, or has been found to be a sexual offender, the court must restrain the parent from contact with a child that would otherwise be allowed. If a parent resides with an adult who has been convicted, or with a juvenile who has been adjudicated guilty, of a sexual offense or who has been found to be a sexual offender, the court must restrain that parent from contact with the child unless the contact occurs outside the adult's or juvenile's presence and sufficient provisions are established to protect the child. A court may also preclude or limit any provisions of a parenting plan if it finds after a hearing that any of eight other circumstances exist.

CHILD SUPPORT. Under T.C.A. § 36-6-406, in cases in which payment of support is to be made to the Department of Human Services, the court may only approve a temporary or permanent parenting plan that complies with the requirements of T.C.A. § 36-5-116. Prior to approval of a parenting plan in which payments are to be made directly to the spouse or the court clerk or to another person or entity, there must be filed with the court a written certification, under oath if filed by a party, or signed by the party's counsel, stating whether the support is subject to collection through DHS.

FORM. Under T.C.A. § 36-6-406, parenting plans must conform to all substantive language requirements established by the Administrative Office of the Courts. A standard form is required.

ALLOCATION OF PARENTING RESPONSIBILITIES. Under T.C.A. § 36-6-407, the court must approve an agreement of the parties allocating parenting responsibilities if it finds that the agreement is knowing and voluntary, is in the best interest of the child, is agreed to by any guardian ad litem appointed by the court. and is consistent with any limitations on a parent's decision-making authority mandated by T.C.A. § 36-6-406. The court must order sole decision-making to one parent if it finds that a limitation on the other parent's decision-making authority is mandated by T.C.A. § 36-6-406, if both parents are opposed to mutual decision making, or if one parent is opposed to mutual decision making and the opposition is reasonable in light of the parties' inability to satisfy the criteria for mutual decision-making authority. In other cases, the court must consider the following criteria in allocating decision-making authority: the existence of a limitation under T.C.A. § 36-6-406; the participation of each parent in decision-making in the areas of a child’s physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities, and religion; the failure of a parent to attend a court-ordered parent

educational seminar; and the parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

PARENT EDUCATIONAL SEMINAR. Under T.C.A. § 36-6-408, each parent must attend a parent educational seminar as soon as possible after the filing of the complaint for divorce. The minor children must be excluded from attending the sessions. The requirement of attendance at a seminar may be waived by the court upon the showing of good cause. No court may deny the granting of a divorce for failure of one or both parents to attend the educational session.

PROCEDURES FOR DISPUTE RESOLUTION. Under T.C.A. § 36-6-409, each neutral party, the court, or any special master must apply or, in the case of mediation, assist the parties to uphold as a standard for making decisions in mediation, the criteria set forth in the statute. The criteria permit each parent to have an attorney present at mediation or other dispute resolution procedure. The Tennessee Rules of Evidence do not apply; instead, the neutral party may rely upon evidence submitted that reasonably prudent persons would rely upon in the conduct of their affairs. Dispute resolution must be preceded by a pretrial conference and the attendance by parents at parent education seminars. The court may not order a dispute resolution process, except court action, if the court finds that any limiting factor under § 36-6-406 applies; if it finds that either parent is unable to afford the cost of the proposed dispute resolution process; if it enters a default judgment against the defendant; or if it preempts the process upon motion of either party for just cause. If an order of protection issued in or recognized by Tennessee is in effect or if there is a court finding of domestic abuse or criminal conviction involving domestic abuse within the marriage, the court may order mediation or refer the parties to mediation only with the agreement of the victim of the alleged domestic or family violence; if mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and if the victim is permitted to have in attendance at mediation a supporting person of the victim's choice, including an attorney or advocate. The other party may also have in attendance at mediation a supporting person of his or her choice.

JUDICIAL DECISIONS. The best interests of the children were most effectively served by a custody determination that divided the parents' physical custody equally between the parents. A plan by which the parents would alternate custody on a weekly basis was the one the trial court should have adopted.[262] A husband was relieved of his obligation to pay child support where the wife's income exceeded his, and neither parent spent the greater amount of time with the children.[263]

Visitation

STANDARDS. Under T.C.A. § 36-6-301, the court must grant such rights of visitation as will enable the child and the non-custodial parent to maintain a parent-child relationship unless the court finds visitation is likely to endanger the child's physical or emotional health. The court must designate in which parent's home each minor child shall reside on given days of the year, including provisions for holidays, birthdays of family members, vacations and other special occasions. If the court finds that the non-custodial parent has physically or emotionally abused the child, the court may require that visitation be supervised or prohibited until such abuse has ceased or until there is no reasonable likelihood that such abuse will recur.

CHILD'S STATE OF MIND. The child's state of mind cannot be the only factor in deciding visitation privileges.[264]

---

[262] *Hopkins v. Hopkins,* 2003 WL 21462971 (Tenn. App. 2003).
[263] *Cox v. Cox,* 2003 WL 1797944 (Tenn. App. 2003).
[264] *Wilson v. Wilson,* 987 S.W.2d 555 (Tenn. App. 1998).

VISITATION OUTSIDE THE STATE. A child's relationship with the noncustodial parent would likely improve if that parent were allowed to have the child visit in another state.[265]

CONSTITUTIONALITY. A provision of a divorce decree that the husband was entitled to visitation only upon petition by the guardian ad litem and after an opportunity for the wife to be heard by the court violated the open courts provision of the state constitution.[266]

ANGER MANAGEMENT AND PARENTING SKILLS. A provision in a visitation decree requiring the husband to enroll in programs of anger management and parenting skills and a program with a psychiatrist, subject to the approval of a guardian ad litem, is unduly restrictive.[267]

VISITATION BY OTHER CHILDREN. A trial court erred by granting visitation of a child to the father's other children where it did not make the requisite findings, the other children were not parties to the custody action, and the order violated the mother's fundamental right to raise her children.[268]

VISITATION BY STEPPARENTS. Under T.C.A. § 36-6-303, a stepparent may be granted reasonable visitation rights to a child upon a finding that such visitation rights would be in the best interests of the child and that the stepparent is actually providing or contributing towards the support of the child.

VISITATION BY GRANDPARENTS. When married parents have maintained continuous custody of their children and have acted as fit parents, court interference in behalf of grandparents constitutes an unconstitutional invasion of privacy rights under the Tennessee Constitution.[269] However, under T.C.A. § 36-6-306, any of the following circumstances necessitates a hearing if grandparent visitation is opposed by the custodial parent or parents: (1) the father or mother is deceased; (2) the child's father or mother are divorced, legally separated, or were never married to each other; (3) the child's father or mother has been missing for not less than six months; (4) the court of another state has ordered grandparent visitation; or (5) the child resided in the home of the grandparent for a period of 12 months or more and was subsequently removed from the home by the parent or parents. (The latter relationship establishes a rebuttable presumption that denial of visitation may result in irreparable harm to the child.) At a hearing, the court must first determine the presence of a danger of substantial harm to the child if the relationship with the grandparent is terminated. Substantial harm may be found when (1) the child had such a significant existing relationship with the grandparent that loss of the relationship is likely to occasion severe emotional harm to the child; (2) the grandparent functioned as a primary caregiver so that cessation of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm; or (3) the child had a significant existing relationship with the grandparent and loss of the relationship presents the danger of other direct and substantial harm to the child. (A grandparent is deemed to have a significant existing relationship with a grandchild if the child resided with the grandparent for at least six consecutive months, the grandparent was a full-time caretaker of the child for a period of not less than six consecutive months, or the grandparent had frequent visitation with the child for a period not less than one year.) Second, the court must determine whether grandparent visitation would be in the best interests of the child based upon all pertinent matters including seven circumstances described in T.C.A. § 36-6-307.

---

[265] *Bunker v. Finks,* 2002 WL 924211 (Tenn. App. 2002).
[266] *Whitaker v. Whitaker,* 957 S.W.2d 834 (Tenn. App. 1997).
[267] *Whitaker v. Whitaker, supra.*
[268] *Engel v. Young,* 2003 WL 1129451 (Tenn. App. 2003).
[269] *Hawk v. Hawk,* 855 S.W.2d 573 (Tenn. 1993).

Jurisdiction and Enforcement

INITIAL JURISDICTION. Under T.C.A. § 36-6-216, a Tennessee court has jurisdiction to make an initial child custody determination only if: (1) Tennessee is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state; (2) a court of another state does not have jurisdiction or a court of the home state of the child has declined to exercise jurisdiction on the ground that Tennessee is the more appropriate forum; the child and at least one parent have a significant connection with Tennessee other than mere physical presence; and substantial evidence is available in Tennessee concerning the child's care, protection, training, and personal relationships; (3) all courts having jurisdiction have declined to exercise jurisdiction on the ground that a Tennessee court is the more appropriate forum to determine the custody of the child; or (4) no court of any other state would have jurisdiction under these criteria. For example, the trial court lacked jurisdiction to modify the child custody decree issued by Louisiana originally granting custody of the minor child to the mother and subsequently amending the decree granting custody of the child to the father because the father still lived in Louisiana and the Louisiana court did not relinquish jurisdiction to Tennessee courts.[270] The six-month residency requirement does not include time that a child resides in Tennessee with the child's parent while there is a custody controversy in progress.[271]

CONTINUING JURISDICTION. Under T.C.A. § 36-6-216, jurisdiction is continuing until: (1) a Tennessee court determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent, have a significant connection with Tennessee, and that substantial evidence is no longer available in Tennessee concerning the child's care, protection, training, and personal relationships; or (2) a Tennessee court or a court of another state determines that the child, the child's parents, and any person acting as a parent, do not presently reside in Tennessee.

MODIFICATION OF A DECREE FROM ANOTHER STATE. Under T.C.A. § 36-6-218, a Tennessee court may not modify a child-custody determination made by a court of another state unless a Tennessee court has jurisdiction to make an initial determination *and* (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction or that a court of this state would be a more convenient forum or (2) a Tennessee court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

TEMPORARY EMERGENCY JURISDICTION. Under T.C.A. § 36-6-218, a Tennessee court has temporary emergency jurisdiction if the child is present in Tennessee and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

HOME STATE. Under T.C.A. § 36-6-205, "home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. A period of temporary absence of any of those persons *is* part of the period. When the wife resides in Tennessee and the husband in Arizona, a Tennessee court has jurisdiction to grant the divorce and make child custody orders. However, it does not have personal jurisdiction over the husband to establish child support or to require him to

[270] *Cliburn v. Bergeron,* 2002 WL 31890868 (Tenn. App. 2002).
[271] *P.E.K. v. J.M.,* 2002 WL 1869416 (Tenn. App. 2002).

provide health insurance, pay uncovered medical bills, provide life insurance, and pay attorney fees.[272]

NOTICE. Under T.C.A. §§ 36-6-211 and 36-6-211, the notice required for the exercise of jurisdiction when a person is outside Tennessee must be given to all persons who would be entitled to notice in child-custody proceedings between residents of Tennessee. It may be given in a manner prescribed either by the law of Tennessee for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice, but it may be by publication if other means are not effective.

EXTENT OF PERSONAL JURISDICTION. Under T.C.A. § 36-6-212, a party to a child-custody proceeding is not subject to personal jurisdiction in Tennessee for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding. That is not the end of the matter. A person who is subject to personal jurisdiction in Tennessee on a basis other than physical presence is not immune from service of process in Tennessee. Additionally, a party present in Tennessee who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

COMMUNICATION BETWEN COURTS. Under T.C.A. § 36-6-213, a Tennessee court may communicate with a court in another state concerning a child-custody proceeding with or without allowing the parties to participate. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. A proper judicial record must be made of the communication.[273]

PLEADINGS. Under T.C.A. § 36-6-224, in child-custody proceedings of any type each party must state under oath the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party: (1) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child-custody determination, if any; (2) knows of any proceeding that could affect the current proceeding and, if so, identify the court, the case number, and the nature of the proceeding; and (3) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons. If a party alleges that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing.

EVIDENCE FROM ANOTHER STATE. Under T.C.A. § 36-6-214, a party may offer testimony of witnesses who are located in another state by deposition, telephone, audiovisual means, or other electronic means. Documentary evidence transmitted from another state by technological means that do not produce an original writing may not be excluded from evidence. Under T.C.A. § 36-6-215, a Tennessee court may request the appropriate court of another state to: (1) hold an evidentiary hearing; (2) order a person to produce or give evidence pursuant to procedures of that state; (3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding; (4) forward to the Tennessee court a certified copy of the

[272] *Kljajic v. Kljajic,* 2003 WL 21954189 (Tenn. App. 2003).
[273] *Bishop v. Milner,* 2003 WL 21458588 (Tenn. App. 2003).

transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and (5) order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child. Upon request of a court of another state, a court of this state may hold a hearing or enter such an order.

INCONVENIENT FORUM. Under T.C.A. § 36-6-218, a Tennessee court may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.

UNCLEAN HANDS. Under T.C.A. § 36-6-219, if a Tennessee court has jurisdiction because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless: (1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction; (2) a court of the state otherwise having jurisdiction determines that Tennessee is a more appropriate forum; or (3) no court of any other state would have jurisdiction under the criteria specified in T.C.A. §§ 36-6-216 through 36-6-218. A Tennessee court acts within its discretion when it declines jurisdiction due to a mother's violation of the visitation provisions of a North Carolina custody decree.[274]

Foreign Decrees

RECOGNITION AND ENFORCEMENT OF FOREIGN DECREES. Under T.C.A. §§ 36-6-227 to 36-6-241, a Tennessee court must enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with Tennessee law or the determination was made under factual circumstances meeting the jurisdictional standards of Tennessee law and the determination has not been modified. Decrees from another state may be registered in the manner set forth by statute. A Tennessee court may grant any relief normally available under the law of Tennessee to enforce a registered child-custody determination made by a court of another state. It must recognize and enforce, but generally may not modify, a registered child-custody determination of a court of another state.

PROCEEDINGS FOR ENFORCEMENT OF FOREIGN DECREES. A petition to enforce a decree from another state must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to it. The petition must state: (1) whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was; (2) whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under the statute and, if so, identify the court, the case number, and the nature of the proceeding; (3) whether any proceeding has been commenced that could affect the current proceeding and, if so, identify the court, the case number, and the nature of the proceeding; (4) the present physical address of the child and the respondent, if known; (5) whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law enforcement officials, and, if so, the relief sought; and (6) if the child custody determination has been registered and confirmed, the date and place of registration. Upon the filing of a petition, the court must issue an order directing the respondent to appear in person with or without the child at a hearing and stating that the court will order that the petitioner may take immediate physical custody of the child unless the respondent appears and establishes one of two things. One is that the child-custody determination has not been registered and confirmed and that the issuing court did not have jurisdiction; the child-custody determination for which enforcement is sought has been vacated,

[274] *Marcus v. Marcus,* 993 S.W.2d 596 (Tenn. 1999).

stayed, or modified by a court having jurisdiction to do so; the respondent was entitled to notice, but notice was not given in the proceedings before the court that issued the order for which enforcement is sought. The other is that the child-custody determination for which enforcement is sought was registered and confirmed, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so.

TEMPORARY IMMEDIATE CUSTODY. Upon the filing of a petition seeking enforcement of a child-custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child. If the court finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child.

Parental Relocation

PROCEDURE. Under T.C.A. § 36-6-108, if a parent desires to relocate outside the state or more than 100 miles from the other parent within the state, he or she must send 60 days' notice to the other parent by registered or certified mail. (In the event no petition in opposition to a proposed relocation is filed within 30 days of receipt of the notice, the parent proposing to relocate with the child may do so.) Unless the parents can agree on a new visitation schedule, the relocating parent must file a petition with the court seeking to alter visitation.

STANDARDS. The court must consider all relevant factors and the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent. If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, there is no presumption in favor of or against the request to relocate with the child. The court must determine whether or not to permit relocation of the child based upon the best interests of the child, considering all relevant factors including the 11 defined by the statute. If the parents are *not* actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the latter must be permitted to relocate with the child *unless* the court finds: (1) the relocation does not have a reasonable purpose; (2) the relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change of custody; or (3) the parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child. (Specific and serious harm to the child includes, but is not limited to, six factors defined by statute.) If the court finds it is not in the best interest of the child to relocate but the parent with whom the child resides the majority of the time elects to relocate, the court must make a custody determination considering all relevant factors including 11 prescribed by statute. The court must also take into account the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

MOTIVE FOR OBJECTION TO RELOCATION. Vindictiveness of the relocating parent may be a valid objection, but it cannot be based solely on the conclusion that the mother dislikes the father's new wife.[275]

JOB OPPORTUNITY. Relocation because of a better job opportunity, greater salary, and career advancement opportunities establishes a "reasonable purpose" within the meaning of T.C.A. § 36-6-108(d).[276]

[275] *Caudill v. Foley,* 21 S.W.3d 203 (Tenn. App. 1999).
[276] *Butler v. Butler,* 2003 WL 367241 (Tenn. App. 2003).

RECONCILIATION WITH PARENT. Temporary denial of relocation for a father and son is proper when it might cause the child to lose the chance to reconcile with his mother.[277]

VISITATION COSTS. When a parent has gone out of the way to obey visitation as ordered, and the parent's move to another state is reasonable even though it results in additional transportation costs for both parties, the trial court may assess the extra costs to the other parent.[278]

[277] *Nigro v. Nigro*, 2003 WL 21634320 (Tenn. App. 2003).
[278] *Ramsey v. Henson,* 2002 WL 1760421 629 (Tenn. App. 2002).