



King & Ballow

Volume 31, Number 1  
January 2017

# Family Law Comment



Elizabeth Holt, Editor  
eholt@kingballow.com



## ALIMONY

### Fault and earning capacity affects trial court's ruling

by [Brigham Dixon](#)  
bdixon@kingballow.com

In November, the Tennessee Court of Appeals reversed a trial court's decision to award a contested divorce to the wife, and to deny the wife alimony *in futuro*. Upon review, the court of appeals found the divorce should be without fault to either party and the wife was entitled to \$2,000 per month in alimony *in futuro*, in addition to the alimony *in solido* award of \$11,297.30.

#### The couple's history

The husband and wife had been married for 21

years prior to filing for divorce. The wife was 57 years old, well-educated in music, and had maintained employment for the majority of the marriage. By the time of the divorce proceedings, the wife had begun collecting disability due to fibromyalgia and chronic pain, which prevented her from working in the future. The husband was a 76 year-old retiree of the Air Force who operated a food photography business and collected disability, retirement income from the military, and social security income.

see "ruling," page 2

## CONTEMPT

### Contempt...proper remedy for breach of property settlement

by [Patricia Kryder](#)  
pkryder@kingballow.com

Three years after a couple divorced, the former wife filed a petition seeking to have the former husband held in civil contempt for willfully breaching provisions of their Marital Dissolution Agreement (MDA), which was incorporated into their divorce decree, that required him to pay certain debts and transfer certain real and personal property to her. The former husband maintained his failure to comply with the MDA was not willful. He asserted the motorcycle had been repossessed; he offered to deliver the corvette and its parts to the wife; and he was financially

unable to continue making payments on the Infiniti SUV. With regard to the real property, he indicated the property had been transferred to the mortgage holder.

The former husband did not attend the contempt hearing and the court found he willfully violated the divorce decree based upon the former wife's testimony. The former husband filed a post-judgment motion to alter or amend or for a new trial based on his assertion that compliance with the court's order was impossible. Approximately one year after the

see "contempt," page 3

### Note from the Editor

Are you familiar with the laws that may affect your family? As the Editor of the *Family Law Comment* newsletter, my goal is to provide you with updates on cases in the Family Law area such as parental rights, child custody, alimony, divorce and other Family Law issues. Stay up-to-date regarding these and other issues by [subscribing here](#) to receive our newsletters and blogs monthly. Please feel free to [let us know](#) what topics you would like to see discussed in this newsletter.

### Divorce proceedings

The husband filed for divorce and the wife filed a counter-complaint, with each alleging irreconcilable differences and inappropriate marital conduct. The husband claimed the wife was depleting the couple's bank account and withdrawing large sums of money without his permission. The wife, while conceding the husband had never engaged in an extramarital affair, claimed he had maintained inappropriate relationships with four women during their marriage. Specifically, the wife claimed the husband was giving these women money and gifts, referring to them in endearing terms, and even signing emails to one with "ILY" for "I love you." Though the husband gave various reasons for his frequent contact with the women, including coaching one's daughter on a softball team and other work-related scenarios, the wife testified the husband's contact with the women caused her to move out of the couple's shared bedroom and, eventually, the home for a period of time. After the wife moved out, the parties agreed to attend counseling, but the wife stopped attending after one session because she claimed

the husband had lied. Ultimately, the trial court granted the wife a divorce based on the husband's contact with the other women and awarded the wife alimony *in solido*, which included her attorney's fees.

### Divorce on appeal

On appeal, the husband contended the divorce should be declared without regard to fault pursuant to Tennessee Code Annotated § 36-4-129(b). The court of appeals rejected the wife's argument in response—that neither the husband nor the wife had initially sought a divorce without regard to fault, and that the husband had not shown her at fault—and found that § 36-4-129(b) did not require either party to seek a divorce without fault in order for the court to make such a finding. In addition, the court of appeals found an abuse of discretion by the trial court in not initially considering the wife's alleged financial misdeeds when considering fault for the divorce, but later considering such misdeeds in its alimony determination. Finding that each party had contributed to the divorce, and the wife had refused to engage in any meaningful reconciliation, the court

of appeals granted a divorce without fault.

The court of appeals next took up the issue of alimony *in futuro*—alimony awarded on a long-term basis based upon various factors set out in Tennessee Code Annotated § 36-5-121(i). The two most relevant factors for the court are a disadvantaged spouse's need and the obligor spouse's ability to pay. The court of appeals determined the wife was economically disadvantaged and agreed with the lower court's assessment that the factors upon which to base an alimony determination were evenly weighted except for the husband's increased earning capacity and separate assets.

When looking at the evidence, the court of appeals found the wife demonstrated a need for long-term support. In particular, the husband's earning capacity consisted of the husband's own disability and military retirement payments, totaling \$5,306.03 per month, plus an additional \$1,750 per month in social security income, compared to the wife's \$1,586 per month in disability. Because of the husband's increased earning capacity due to his disability and retirement,

the court of appeals awarded the wife \$2,000 per month in alimony *in futuro*, until she reached the age to collect her own retirement or upon a showing of a substantial and material change in circumstances.

### Take-aways

Keep in mind a court will abuse its discretion if it awards a divorce to the non-faulting party, but considers the non-faulting party's fault in making an alimony determination. This case reinforces the fact that courts in Tennessee will consider all types of income for spouses and the discrepancies in those incomes when determining alimony. While both parties collected disability, the vast discrepancy in the husband's disability and retirement payments were important considerations in the court of appeals finding the wife was entitled to a portion of those payments until such time as she was able to earn a substantially equal sum by collecting her own retirement. ♦

This *Family Law Comment* newsletter is written by the attorneys at the law firm of King & Ballow. This newsletter is emailed monthly to our subscribers free of charge. The materials contained herein have been abridged from laws, court decisions and administrative rulings and should not be construed as legal advice on specific subjects. To subscribe to receive other King & Ballow Comment newsletters and blogs monthly and/or to unsubscribe to stop receiving this newsletter, please visit our website at [www.kingballow.com/subscribe](http://www.kingballow.com/subscribe).

from "contempt," page 1

bankruptcy court petition required the trial court to withdraw its prior attachment for the former husband's arrest and hold the contempt proceedings in abeyance pending the resolution of the bankruptcy proceedings, the former wife filed a motion requesting the former husband to show cause why he should not be incarcerated pursuant to the trial court's contempt order. The former husband argued the trial court did not have authority to enforce the property settlement by contempt because those provisions of the MDA retained their contractual nature despite being incorporated into the divorce decree. Thus, arguing only a breach of contract claim was appropriate. The trial court rejected the former husband's arguments and would not grant relief from the contempt order until he appeared to testify on his own behalf. Consequently, the trial court upheld the contempt of court finding which required the former husband be incarcerated and fined \$50 per day until he became compliant with the court's order. The former husband appealed.

#### **Contempt is appropriate**

The Tennessee Court of Appeals considered the characterization of a marital dissolution agreement as both a contract between divorcing parties and as part of the court's decree. Based upon previous case law, the court reasoned trial courts retain statutory authority to modify certain provisions of a marital dissolution agreement relating to child support and alimony when justified by a change in circumstances. On the other hand, subsequent modification by a trial court to provisions of a marital dissolution agreement that retain its contractual nature will violate Tennessee Constitutional prohibition against the impairment of contractual obligations. Even though contract provisions cannot be modified, the court of appeals found contempt for non-compliance of a marital dissolution agreement was appropriate as the court retains its right to enforce an order. There-

fore, the court of appeals considered whether the contempt was willful.

#### **Willful contempt**

Once a trial court determines a person willfully violated a lawful order, it may in its discretion hold a person in contempt. If the contempt consists of an omission to perform an act that the person has the ability to perform, the court may imprison the individual to compel performance of the court order. In addition, while "coercive" fines are rare, the individual can also "be separately fined, authorized by law for each day [he or she] is in contempt." The four essential elements for contempt are that: (1) a lawful order has been violated; (2) that was clear, specific and unambiguous; (3) the order has been actually disobeyed or resisted; and (4) was violated willfully. Willful requires the individual being able to comply at the time of the hearing and failing to do so.

In looking to the evidence, the court of appeals agreed with the trial court finding the former husband was in contempt because he was aware of his obligations and failed to comply. However, the court of appeals modified the contempt order that found the former husband must comply with the divorce decree by delivering to the former wife a deed conveying title to the real property free and clear of all liens and debt. Rather the court of appeals found under the MDA the former husband was required to deed the real property to three individuals jointly.

#### **Bottom line**

Whether a provision of an MDA is modifiable, or not by the court will not affect the court's ability to enforce its orders. As a result, contempt of court is an appropriate remedy when a marital dissolution agreement is violated. ♦



#### **Tennessee Office:**

315 Union Street  
Suite 1100  
Nashville, Tennessee  
37201  
Phone: (615) 259-3456  
Fax: (888) 688-0482

#### **California Office:**

1999 Avenue of the Stars  
Suite 1100  
Century City, California  
90067  
Phone: (424) 253-1255  
Fax: (888) 688-0482

[www.kingballow.com](http://www.kingballow.com)

Twitter  
[@kingballow](https://twitter.com/kingballow)

#### **To contact the editor:**

Phone: (615) 726-5426  
Fax: (888) 688-0482  
E-mail:  
[eholt@kingballow.com](mailto:eholt@kingballow.com)



Follow King & Ballow on Twitter  
and "Like" our Page:  
[www.twitter.com/kingballow](http://www.twitter.com/kingballow)