



King & Ballow
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Family Law Comment

Stay informed on the laws that
affect your family



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RESIDENTIAL PARENT

Change in family dynamics and work schedules may warrant modification of primary residential parent

by [Patrick Ogilvy](#)
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The Tennessee Court of Appeals has determined a significant and material change in circumstances warranting a modification of a primary residential parent determination may be present where: (1) there are changes in a child's family dynamics, such as a parent getting married or having additional children, and (2) where a parent has a significant change in

work schedule creating a shift in relative stability between the two parents' homes.

Changes in lifestyle

In February 2010, following a hearing on parental custody, a trial court designated a child's father as the primary residential parent. This decision was due

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ORDER OF PROTECTION

Mutual Order of Protection contrary to governing statute

by [Sean McLean](#)
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The 27 year relationship of a couple came to an end following a heated argument which culminated in the boyfriend throwing ice water in the girlfriend's face. The boyfriend went to bed, but was awakened by the police and arrested for domestic assault. The

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COURT ORDERS

Final decree must provide permanent parenting plan

by [Andrew Coffman](#)
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In a Final Decree of Divorce, must a permanent parenting plan be incorporated or can a temporary parenting plan be entered which is subject to being renewed annually? Pursuant to Tenn. Code Ann. § 36-6-404(a), a permanent parenting plan must be en-

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Note from the Editor

Are you familiar with the laws that affect families? As editor of *Family Law Comment* newsletter, my goal is to provide you with updates on cases in areas such as parental rights, child custody, alimony, divorce and other family law issues. Stay up to date with the issues that affect you and [subscribe here](#) to receive the *Family Law Comment* newsletter on a monthly basis. Please feel free to [let us know](#) what topics you would like to see discussed.

Court rules “unidentified” alimony award is modifiable as alimony *in futuro*

by [Chris Barrett](#)

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Alimony *in futuro* is a modifiable alimony obligation that shall remain in the court’s control. What happens if a Marital Dissolution Agreement fails to address the type of alimony awarded and its ability to be modified? The trial court must look at the intent of the parties and whether the alimony award lacks sum-certainty of the amount to be paid. It will be up to the court to determine the type of alimony awarded and the statutory law will dictate the award’s ability to be modified.

Excessive child support becomes alimony

The parties were married in 1972 and divorced in 1997. At the time of their divorce four of their eight children were minors. The parties agreed on all terms of their divorce and entered into a final decree, which was drafted by the wife’s counsel and contained the terms for alimony, child support and property division. The husband signed the final decree without having an attorney review the document on his behalf.

In the final decree, the husband was required to pay \$3,114.00 per month in child support. The provision provided that “[s]aid amount shall never be decreased as any child reaches the age of majority,” and that “after the last minor child reaches the age of majority, the husband shall continue to pay the [\$3,114.00 per month] as spousal support until the wife remarries or dies.” The trial court approved the final decree and granted the divorce after the husband testified to understanding the terms.

Shortly thereafter, the husband consulted with an attorney and filed a motion to set aside the final decree. The trial court denied the husband’s motion and the appeals court affirmed the trial court’s decision. The appeals court observed: “awards of child support . . . and of alimony are never final but may be modified from time to time as warranted by changing circumstances.” As a result, the husband complied with the consent decree for 15 years. During which time the parties’ youngest child reached the age of majority. In 2012, the husband moved to terminate his alimony obligation to the wife based on a substantial and material change in his circumstances. In support for the change in circumstances, the husband asserted his health had declined, he now made less money than he previously had, and he was approaching retirement. He also contended the wife no longer needed his support.

The trial court denied the husband’s motion to terminate his alimony obligation finding the final decree “clearly” provided the award of

alimony *in futuro* would not be modified, and would continue until the wife died or remarried. Following the husband’s unsuccessful motion for reconsideration, he appealed.

Tennessee’s long term spousal support

Tennessee’s two long term alimony determinations are *in futuro* and *in solido*. Alimony *in futuro* is awarded when a spouse cannot be rehabilitated to become self-sufficient, while alimony *in solido* is usually assigned to help divide the marital assets. In determining whether a long term alimony award is modifiable, the court must determine which type of alimony award was granted. If the award is for a definite sum of money over a period of time it is classified as alimony *in solido* and is non-modifiable. If the alimony award lacks a sum-certainty due to contingencies it is generally classified as alimony *in futuro* and modifiable upon a showing of a substantial and material change of circumstances.

Appeal

On appeal, the husband argued his alimony obligation was modifiable. The court of appeals reviewed the relevant statutes and cases and concluded, that under both Tennessee statutory and case law, alimony *in futuro* is modifiable. Despite the law, the wife nonetheless asserted the parties had “contracted out” of any modification of the alimony award based on the language used in the final decree. The court of appeals was not persuaded and found that even if the parties had “contracted out” of any modification, the final decree “only provides that child support shall not decrease by virtue of a child reaching the age of majority,” and further that “[t]he language does not foreclose a modification of spousal support based on other grounds.” The court noted, in making its decision, the language requiring the spousal support obligation to continue until the wife’s death or remarriage were “common contingencies affecting the duration of an award of alimony *in futuro*” and did not necessarily render an alimony award non-modifiable.

Notable

This decision is notable because it finds that, at least in a vast majority of cases, awards of alimony *in futuro* are modifiable. The court did not rule on whether parties can ever “contract out” of such modification, but did make clear that merely including a provision stating that alimony will continue until a party’s death or remarriage standing alone will be insufficient to establish the award non-modifiable. ♦

This *Family Law Comment newsletter* is written by the attorneys of the law firm of King & Ballow in Nashville, Tennessee and San Diego, California. This newsletter is e-mailed 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.

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in part to the mother's temporary residence with one of her parents, while the father owned a home and had a stable work schedule. Over the next couple of years, the mother married and had three more children with her husband, maintained a steady job, and became a stay at home parent caring for her children full time. Meanwhile, the father married, began caring for his wife's child, and changed jobs requiring him to work 24-hour shifts every third day as opposed to a Monday through Friday schedule. As a result, the mother filed a petition for modification of the primary residential parent.

In support of her petition, the mother testified she scheduled all of the child's medical and dental appointments, kept the child up to date on her vaccinations, and enrolled the child in weekly activities, such as cheerleading, dance, and soccer. The mother also testified the father was not commit-

ted to these activities, as the child often missed them while in the father's care, and he failed to attend soccer games, even when he was available to do so. The mother further asserted the father appeared uninterested in the child's education, because he did not attend to the details of her registration for kindergarten and did not know where the child would go to school. The father testified he spent most of his time off from work socializing with friends or picking up odd jobs. At these times, he would either take the child to daycare or take the child with him while visiting friends' businesses.

The trial court found the mother established a material change in circumstances, due to both parents marrying, the birth of three new siblings, the mother's very active role as a stay-at-home parent and the father's change in work activities. Although the trial court believed the mother and father

were good parents with loving homes, it was swayed by the stability and attention offered by the mother as a stay-at-home parent compared to the father's unusual schedule. Finding the mother more in line with the tasks of a primary residential parent, the trial court concluded a significant change in circumstances occurred warranting the mother becoming the primary residential parent. The father appealed.

Trial court determination upheld

On appeal, the Tennessee Court of Appeals concluded the trial court made the correct determination. The court of appeals agreed the changes in the child's family dynamics due to the parents' respective marriages, the addition of three younger siblings and the changes to the father's work schedule were significant and material changes. In particular,

the court of appeals was swayed by the father's non-traditional and inconsistent work schedule, which caused his days off to no longer correlate with a standard parenting schedule. Furthermore, the court found the mother's marriage created a "change in home environment" that was more stable than the environment offered by the father. This stability also weighed heavily in favor of finding the mother's appointment as primary residential parent was in the best interest of the child, as other factors, such as love, affection and emotional ties, and the disposition of each parent to provide food, clothing and other necessary care, were equal between the mother and father. Accordingly, the modification of the primary residential parent was upheld.♦

PRENUPTIAL AGREEMENT

Husband loses wife, but gains half a house

by [Andrew Coffman](#)

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The husband and wife divorced after seven years of marriage. Prior to the marriage, the parties entered into a prenuptial agreement, which provided that all separate property obtained by the parties during the marriage was to remain separate. Furthermore, it established the only property to be considered marital property would be property jointly owned as tenants by the entirety.

During their marriage, the parties purchased real property and began building their marital home. Although the real property was

bought with the wife's separate property, the deed provided it was held as tenants by the entirety by the husband and wife. The construction took approximately two years. The husband acted as the construction foreman and was paid \$600 per week by the wife for his work, which went to paying his bills and contributed to expenses of the household. It was not until the parties divorced that the titling of the deed became an issue. In an attempt to maintain the residence as her sole property after the divorce, as opposed to splitting the

property with the husband, the wife sought reformation of the deed on the grounds that the husband's name was included on the deed as a mistake.

At trial, the wife asserted her intent was to be the sole owner of the property and claimed she instructed the realtor to have the deed drafted in her name as the sole owner. In support of the parties' intentions, the wife established she was also the sole applicant on the accompanying mortgage. The wife testified it was not until closing that she discovered

the husband's name was on the deed. The wife asserted she objected to the drafted deed, but claimed she was told by the closing agent the husband's name was required by state law to appear on the deed because the parties were married. Accordingly, the wife claimed she relied upon this advice to her detriment and did not learn there was no such requirement until the divorce proceedings were underway. The wife further admitted she knew upon leaving the closing that the husband's name appeared on the deed

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Staying with an abusive partner leads to termination of parental rights

by [Courtney Karnes](#)
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A three-month old infant exhibited signs of distress, including continuous vomiting. Although diagnosed with a virus, the infant did not get better and was taken two days later to a clinic, where the infant was transported to the hospital. While at the hospital, the infant was examined by a child abuse pediatrician who suspected internal brain injuries. An MRI and CT scan confirmed the infant was bleeding between his brain and the membrane closes to the skull and there was small bleeding and contusions on the front part of his brain. The doctor concluded the infant's injuries were "very serious and were inflicted on several occasions with great force." She further classified the brain bleeding and bruises as a result of "abusive non-accidental trauma."

When being questioned, neither parent could offer a plausible explanation for the injuries. As a result, the police were contacted and an investigation conducted. In the investigation, both offered up alternative theories for the infant's injuries, including that the infant's four-year old brother could have caused the injuries. Both parents also indicated the other had been violent in the past. Due to the parents' inability to provide a valid reason for the infant's injuries, the infant was taken into protective custody by the Tennessee Department of Children's Services ("DCS") and DCS filed a petition to declare the infant dependent and neglected.

Upon a hearing, the infant was declared dependant and neglected due to the court finding the injuries were not consistent with the parents' explanations. Furthermore, due to the type of injuries the court found the infant had been subject to severe child abuse. In its finding, the court concluded the infant had been

severely abused by the father, who had been alone with the infant the day he likely suffered his injuries, and the mother had failed to protect the infant from the abuse. Finding both parents were guilty of child abuse, DCS received custody of the infant and was not required to proceed with reasonable efforts to reunify the infant with the parents. The mother appealed to the Tennessee Court of Appeals.

Dependency and neglect

The mother unsuccessfully claimed on appeal clear and convincing evidence was not established to support a finding that her infant was a dependent and neglected child. Tennessee law has several statutory definitions of a dependent and neglected child, including if a child is suffering from abuse or neglect. Abuse is defined as "a person under the age of eighteen suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian or caretaker." Abuse focuses on the child's circumstances, not the caretaker's state of mind.

The court of appeals noted DCS was not required to show direct evidence of abuse; instead, in instances where the only witnesses to the abuse is the child and the abuser, DCS can establish "abuse gleaned from circumstantial evidence." The court of appeals found DCS clearly showed abuse occurred warranting the trial court's finding. The most influential evidence was the infant suffered two brain injuries during the first three months of his life, in which the doctor testified the second injury was the result of abusive trauma that could not have been caused by the infant himself. Finding the only individuals in contact with the infant during the timeframe in which the injury

occurred were his parents and younger sibling, and ruling out the possibility that the infant's sibling could have inflicted enough force to cause the severity of infant's injuries, the court of appeals concluded the combined evidence was sufficient to find the infant was dependent and neglected.

Severe child abuse

Although subdural bleeding and brain contusion are severe child abuse under Tennessee law, the mother alleged the child did not suffer severe child abuse by her specifically. Severe child abuse involves a knowing exposure of a child to abuse or neglect. The mother asserted she did not knowingly fail to protect the infant from abuse. In Tennessee, the knowing requirement does not require the parent to be present; it can also be imposed when the "parent ha[s] been presented with sufficient facts from which he or she could have and should have recognized that severe child abuse had occurred or that it was highly probable that severe child abuse would occur." The evidence clearly showed that before the infant's second injury, he suffered a brain bleeding incident. The doctors testified that it would have caused noticeable symptoms that a caregiver should have recognized and reported. However, the mother never did so, and despite knowing the father's history of violence she left the infant in his care on the day he suffered his second injury. Accordingly, the mother's failure to protect her infant constituted severe child abuse.♦

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girlfriend later filed a petition for an order of protection, which was granted on a temporary basis until a hearing could be arranged.

At the subsequent hearing, the boyfriend requested the court award him exclusive possession of the residence he owned, where the couple had cohabitated throughout their relationship. The girlfriend asked the court to grant her possession of the residence while the protection order remained in place, or alternatively order the boyfriend to provide her suitable alternative housing and pay for her moving expenses. The court ultimately entered a mutual order of protection for a one year period, awarded the girlfriend exclusive possession of the shared residence for a 14 day period, and required the boyfriend to pay the girlfriend's moving expenses and attorney's fees. The girlfriend appealed the court's order contesting the mutuality of the order of protection.

Governing statute

Under Tennessee Code Annotated § 36-3-605, a court may issue a temporary order of protection where immediate and present danger of abuse is shown by a petitioner. Within 15 days thereafter, a hearing on the order of protection shall be held. At which time, the court

shall either dissolve any temporary order that has been issued or shall, if the petitioner has proven the allegation of domestic abuse, stalking or sexual assault by a preponderance of the evidence, extend the order of protection for a definite period of time, not to exceed one year.

Appellate court's determination

In reviewing the matter on appeal, the court of appeals noted only the girlfriend asked for a protection order. The boyfriend did not present any evidence that would support an order of protection against the girlfriend. Furthermore, the governing statute provides only two options on an order of protection hearing: (i) to dissolve the temporary order of protection, or (ii) to extend the order of protection for a definite period not to exceed one year. Entering into a mutual protection order is not one of the available statutory options. Accordingly, the court of appeals ordered the mutuality of the order of protection be vacated, effectively limiting the order of protection to protect the girlfriend.♦

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and she never attempted to correct the deed prior to the divorce proceedings.

The realtor who drafted the sales contract testified the agreement listed only the wife as the buyer, per the parties' instructions, and further explained the sales contract specifically provided for the deed to be prepared in the wife's name only. Despite the wife's objections, and because the closing proceeded with the wife signing the necessary documents, the husband asserted the property was marital and subject to equal division pursuant to the prenuptial agreement.

At trial, the court found the inclusion of the husband on the deed was shown by clear and convincing evidence to be unexpected by both parties and not desired by either party. The trial court found an inequitable windfall would be received by the husband if his name was included on the deed. Accordingly, the trial court awarded the marital residence to the wife, solely, and the husband appealed.

Reformation in Tennessee

Under Tennessee law, the judicial alteration of the provisions of a written agreement is an equitable remedy known as reformation. Reformation is generally intended to make a contract conform to the actual intention of the parties. However, since the law strongly favors the validity of written contracts, a person seeking to reform a written contract must do more than prove a mistake. Instead, he or she must present evidence of mistake that is clear and convincing. In order to obtain

reformation on the basis of mistake in expression, a party must present clear and convincing evidence that: (1) a prior agreement regarding some aspect of the bargain was reached; (2) they intended the prior agreement to be included in the written contract; (3) the prior agreement and the written contract materially differs; and (4) the variation is not the result of gross negligence on the part of the party seeking reformation. If established, the court will presume the discrepancy between the parties' prior agreement and written contract are a result of a mutual mistake.

Contract language overrules alleged intent

In a split decision, the Tennessee Court of Appeals reversed the trial court. The court of appeals determined the evidence demonstrated that although the wife initially requested the deed be drafted to reflect she was the sole owner, she clearly knew the deed contained both names when she accepted it. Thus, the court determined the titling was not a mutual mistake and the property was co-owned by the parties as tenants by the entirety. Because the court found the prenuptial agreement was enforceable, the co-owned property was subject to equal division. Finding the wife must transfer one-half interest to the husband or pay the husband one-half of the fair market value, the court of appeals reversed the decision of the trial court and sent the case back to have the property divided in accordance with the prenuptial agreement.♦



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from "plan" page 1

tered with the Final Decree of Divorce. A temporary parenting plan may only be used with temporary orders of the Court, not final orders.

Final order

The couple divorced in late 2010 and the mother was named the primary residential parent of the parties' minor child. The father was granted co-parenting time and required to pay child support. While the divorce decree stated the parenting plan was permanent, it provided the court would revisit the matter of custody in one year's time to determine whether the father should be given additional co-parenting time.

Approximately a year and a half later, the parties attended a hearing in which the trial court entered a permanent parenting plan. The order sustained the mother as the primary residential parent, but adjusted the father's support payments. Again, the court's order provided the matter would be reviewed after one year. One year later, the father petitioned to modify the parenting plan in order to allow him more co-parenting time. The court recognized it had utilized a document entitled "Permanent Parenting Plan," but stated the entered parenting plan was a temporary plan because the court directed a review of the matter after a period of one year. The court cor-

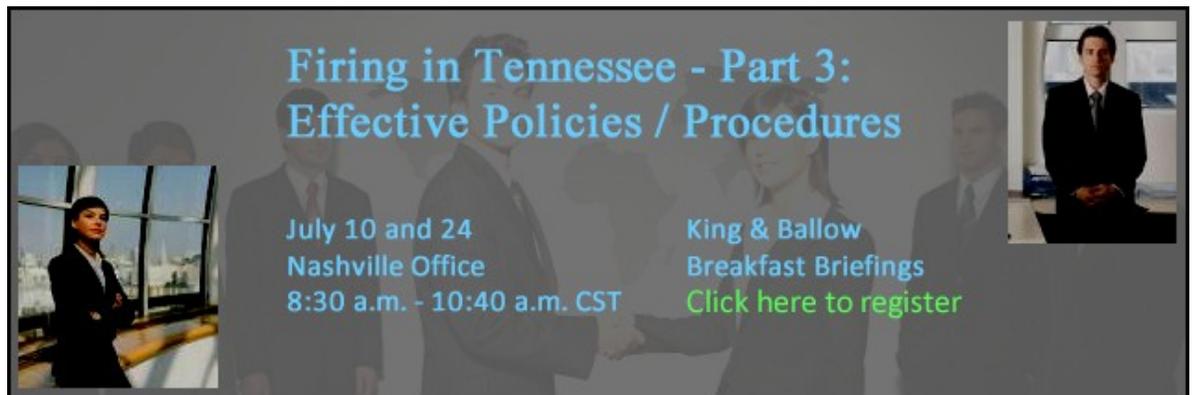
rected the terminology contained in its order and the mother appealed.

Trial court contrary to law

On appeal, the Tennessee Court of Appeals examined the law surrounding parenting plans. Tennessee law states that upon any divorce action, the court shall incorporate a permanent parenting plan into the Final Decree of Divorce. The court of appeals noted the legislature's use of the word "shall" meant all divorces involving children require a permanent parenting plan to be entered. Thus, the trial court's order eliminating the permanent parenting plan and classifying the entered parenting plan as temporary was contrary to the law. Because the court of appeals found the parenting plan was permanent, it sent the case back to the trial court to determine whether there was a material change in circumstances that required a modification of the current parenting plan.

Keep in mind

Tennessee family law requires specialized attention to statutory details. It is important to have an experienced lawyer to make sure all the "i"s are dotted and "t"s are crossed.♦



Firing in Tennessee - Part 3:
Effective Policies / Procedures

July 10 and 24
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