



Family Law Comment



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PARENTAL RIGHTS

Newsflash: crime is generally not good for your parental rights

By King & Ballow
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The Tennessee Court of Appeals affirmed the termination of a father's parental rights over his child on the grounds of willful abandonment by an incarcerated parent and conduct demonstrating a wanton disregard for the child's welfare. The court of appeals decision rested on, among other things, the father's extensive history of criminal activity and lack of contact with his child for three months while evading arrest and the child's preference to be placed in sole custody of his mother and step-father.

Background

The child's parents married in 2002 and divorced

in August, 2011. The permanent parenting plan approved by the court provided for equal co-parenting time and designated the mother as the primary residential parent. The agreement did not order child support for either parent. After the divorce, the mother married the stepfather who sought to adopt the child. The issue became the father's predilection for criminal behavior.

In the spring of 2012, the father was charged with two counts of theft, and was released from jail on bond. That same day the court granted an *ex parte* order giving the mother exclusive custody of the child. The court later enacted an order granting supervised

see "newsflash," page 2

MARITAL ASSETS

Equitable division of marital assets need not be equal

By Patricia Kryder
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A couple was married for more than 20 years when the wife filed for divorce. During their marriage, the parties had two children together and the husband adopted the wife's child from a previous marriage. The husband owned a printing business, which the wife assisted, and both were employed by a pen and pencil subsidiary of U.S. Tobacco. After a trial, the court entered a final decree classifying the couple's property as either marital or separate and dividing the

property. The court classified an investment account, which it called the regular Scottrade Account, as marital property and divided it equally between the parties. The Scottrade IRA was also classified as marital property and the court awarded 40 percent to the wife and 60 percent to the husband. In addition, the court required the husband to pay \$2,000 to the parties' son out of his share of the marital estate finding the debt was marital.

see "assets," page 6

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.

visits to the father. Within the span of nine months, the father was charged with eight different crimes and pled guilty to some of them, which led to him being incarcerated for a short period of time. After being released from prison in November 2013, the father had two supervised visits with the child, and spoke to the child on the phone numerous times in January, 2014. Unfortunately, the father violated the terms of his probation and an arrest warrant was issued. During his 90 days of evading arrest, the father made no attempt to schedule a visit with his child, but spoke to the child on the phone a few times until he was apprehended and incarcerated. Soon thereafter, the mother filed a petition to terminate the father's parental rights.

The mother's petition asserted three grounds to terminate the father's parental rights: (1) abandonment by willfully failing to visit and/or support; (2) abandonment by willfully failing to visit by an incarcerated parent; and (3) abandonment based on conduct that exhibited a wanton disregard for the child's welfare. The trial court granted the mother's petition on all three grounds finding the father willfully abandoned his child and exhibited a wanton disregard for the child's welfare with his repeated criminal conduct. The father appealed.

Abandonment and wanton conduct claims

On appeal, the court of appeals reversed the trial court's finding the father abandoned the child by willfully failing to visit and/or support. The court of appeals held this form of willful abandonment did not apply when a parent whose rights are at issue was incarcerated at any point in the four months preceding the petition for termination of rights. Finding the father had been incarcerated before the petition was filed, abandonment by willfully failing to visit and/or support did not apply.

The court of appeals, however, affirmed the trial court holding the father's actions constituted abandonment by willfully failing to visit by an incarcerated parent. Because the father was incarcerated at the time of the petition for termination of his rights, the court looked back to the four months preceding his incarceration to determine if he had indeed abandoned his child. The court of appeals held he had. During the four month period, the father only visited his child twice. Although the father argued the mother had inhibited his ability to have supervised visits with his child by making him jump through hoops, the court of appeals found this explanation unavailing. While

the mother's conduct was not blameless, the court of appeals determined she did not completely prevent the father from seeing the child and the father did not really make an effort to defeat his ex-wife's "hoops." Furthermore, the father willfully chose to evade arrest for three months and did not see his child as a result of his own illegal behavior. Accordingly, the court of appeals upheld the trial court's abandonment holding.

The court of appeals also held the father's rampant criminality in the preceding years and months constituted conduct that exhibited a wanton disregard for his child's welfare, finding the father's criminal conduct reflected a complete disregard for the consequences to the child. Troubling to the court was the child's unsolicited testimony that the father had taken him with him while committing two thefts. Although the father disputed the allegations, the court of appeals upheld the trial court's finding that his explanation was implausible. Accordingly, the trial court's ground for termination of the father's parental rights was upheld.

Best interests of the child

The court of appeals then considered whether terminating

the father's parental rights was in the child's best interest. The court of appeals concluded termination was appropriate. Of high consideration was the child's statements that while he loved his father, he did not want to see him anymore because he was a criminal. The court of appeals also took note the child had a stable family life with his mother and stepfather, was a straight-A student, participated in sports, and had a close relationship with his stepfather – whom he viewed as a role model. Thus, the court of appeals concluded it was in the best interest of the child to move on from the destabilizing influence of the father.

Takeaway

It is clear the father did indeed love his child, and was willing to fight for his right to see him. However, actions are often the most important measure of how one expresses love. In the end, the father's continued, willful criminal actions drowned out any feelings he might have toward his child. Therefore, providing actions do indeed matter, and can have extensive consequences.

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ALIMONY

Stock market decline does not alter alimony obligation

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The husband and wife divorced in 2008. Pursuant to the parties Marital Dissolution Agreement (MDA), the husband agreed to pay the wife 35 percent of his regularly distributed amounts from his investment and retirement accounts, known as the Trust, and a stock portfolio. The MDA specified the monthly total distribution to the wife as alimony could be no less than \$1,200 per month, which

was read to be a minimum floor. In September 2013, the husband filed a petition against the wife to modify his alimony obligation. He argued because his income from the trust continues to significantly decline due to the downturn of the stock market and his other means of income, such as rental income and income from his farm, were no longer an option, he was not able to meet his alimony obligation without tapping into his separate property. As a result, the husband claimed he was at risk of losing his health insurance and his ability to afford basic needs. Due to these reasons, the husband claimed a material change in circumstances had arisen and his alimony obligation to the wife should be reduced. The husband also asserted the change in circumstances were not anticipated at the time of the divorce or at the execution or subsequent amendment to the MDA.

The trial court entered a judgment denying the husband the right to modify his alimony, finding the plain language of the MDA provided the alimony award was subject to modification upon establishing of a substantial and material change of circumstances by the husband. The trial court found, however, there had not been a material and substantial change of circumstances because the fluctuation of income was anticipated in the MDA due to the baseline minimum payment. The trial court also found the husband failed to establish the rebuttable presumption, that the wife no longer required all or some of the support due to a third party, to suspend all or part of the alimony award. The husband appealed.

Modification of alimony

Alimony *in futuro* is long term alimony that is awarded when there is relative economic disadvantage by the spouse and rehabilitation is not feasible of the recipient spouse. Alimony *in futuro* remains in the court's control and may be

“increased, decreased, terminated, extended or otherwise modified” upon showing a substantial and material change in circumstances. To modify alimony, the party seeking modification must prove there was a substantial and material change in circumstances. In addition, an alimony *in futuro* award may be suspended in all or part upon a rebuttable presumption arising that either (1) a third party is contributing to the support of the recipient spouse or (2) the recipient spouse is providing support to a third party. Thus, concluding the recipient spouse does not require all or some of the previously awarded support.

On appeal

On appeal, the husband raised the question of whether the trial court abused its discretion in declining to find a substantial and material change in circumstances occurred to reduce his alimony obligation. The court of appeals recognized a trial court's “decision to modify support payments is given ‘wide latitude’ within its range of discretion . . . [and] appellate courts are generally disinclined to second-guess a . . . spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.” In looking to the MDA, the court of appeals concluded the language was clear and unequivocal and could be seen as having taken into consideration the instability of the market because of the language of a minimum floor of \$1,200 per month. The court of appeals found unavailing the husband's argument that a change in the market should allow him to lower his alimony obligation, noting a change in market is not enough of a material change in circumstances as downturns in the market are a risk of the stock market and therefore foreseeable. Therefore, the court of appeals affirmed the trial court's finding that no material change in circumstances stemming from a downturn in the husband's financial portfolio occurred.

As for the rebuttable presumption asserted by the husband, the court of appeals found the evidence was undisputed the wife's two adult children were living on her property and assisting her with her needs. While the trial court acknowledged the children did not provide monetary support to the ex-wife, it found they did provide services. However, because the trial court failed to determine whether the services provided contributed to the wife's support and whether the wife still needed alimony, the court of appeals sent the case back for a specific determination on the rebuttable presumption outcome to determine whether all or part of the husband's alimony should be suspended.



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CHANGE IN CIRCUMSTANCE

Military mother no longer primary residential parent after change in circumstance

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A mother and father, both of whom were active duty service members, parented three children in Oklahoma. Following their divorce, the mother was named the primary custodial parent. The court, anticipating the mother and father's military commitments would require frequent relocation, provided certain custody terms in the event the parents lived over 200 miles apart and addressed the children's living arrangement should the mother be deployed. The terms for such a situation would give the father, as non-custodial parent, custodial periods during Spring Break, Thanksgiving and Christmas every other year, and Summer of every year. Should the mother be deployed, the father was to have physical custody of the children until her return.

The mother and children moved to Tennessee. Following the move, the father began encountering significant difficulty in communicating with his children and arranging visits. The mother frequently questioned the father's reasons for seeking to talk to the children, and told him the children were either not available or did not want to speak with him. Approximately two years later the mother was deployed. During the deployment, the children were left with their maternal grandmother, which was directly contradictory to the joint custody plan. Be-

cause communication with the children had improved, the father did not object.

However, after other similar attempts over a two and a half-year period by the mother to prevent the father from speaking to or seeing his children, the father petitioned for a change in the joint custody plan as to two of the children, recognizing the oldest child had a strong desire to remain with the mother. Soon after, the mother learned of a reassignment to Hawaii and sought the court's permission to relocate the children with her.

After a hearing, the court granted the father's petition finding a material change in circumstances occurred "based upon both the pattern and conduct of the Mother that has impacted the Father's ability to maintain a relationship with the children and the Mother's pending move to Hawaii." Upon the ruling, the court noted this case involved "the most outrageous and egregious case of wrongful conduct of a primary residential parent in terms of deliberately alienating the alternate residential parent's ability to enjoy a parenting relationships with his children that this Court has ever seen." Accordingly, the court designated the father as the primary residential parent and granted the mother 80 days of visitation each year. The mother was also required to pay \$886 per month in child support. She appealed.

see "parent," page 5

LEGITIMIZATION

An acknowledgement of paternity does not provide custody and visitation rights

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Does signing an acknowledgement of paternity by a biological father, which declares him to be the legal father, vest him with custody and visitation rights? According to the Tennessee Court of Appeals, no because the acknowledgement of paternity provides the legal father with child support obligations and notice of litigation, termination of parental rights and adoption only. Absent an Order of Custody to the contrary, a child born out of wedlock is in the custody of the mother under Tenn. Code. Ann. § 36-2-302.

Father oversteps

An unwed mother listed the father on the child's birth certificate. The father was deployed as a Marine. When he returned, he was stationed in California and underwent DNA testing which confirmed he was the father of the child. As a result, the father signed an acknowledgment of paternity with the Arizona Department of Economic Security and a Marine's Statement affirming he was the father and directing that \$300 per month be provided to the mother as the military allotment of support for

the child. In addition, the father applied for an uniformed services identification card (DEERS) for the child, which allowed the child, as the father's dependent, to receive military benefits including health insurance. To obtain dependent benefits under federal regulations for illegitimate dependent children of a service member, the father provided he was maintaining over 50 percent support for the child.

Once discharged from the military, the father moved to Arizona, but continued his informal relationship and visitation with the child. Eventually the father moved from Arizona to Tennessee. Shortly thereafter, the mother moved to Tennessee and secured employment. Once relocated she allowed the father extensive informal visitation with the child. Approximately two years later, the mother moved back to Arizona with the child. As a result, the father filed a sworn petition in Tennessee seeking legitimacy of the child and to obtain custody. The father alleged Tennessee was the child's home state pursuant to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and therefore the Court had jurisdiction to make an initial custody determina-

see "paternity," page 5

from "parent," page 4

Court analysis

When designating a primary residential parent a two step analysis is implemented. It must be established that a material change in circumstances has occurred since the court's prior order and upon a finding of a material change whether modifications of the residential parent is in the child's best interest. In implementing this analysis, the court must determine which parent is more fit to be the custodial parent. To assist with the analysis, Tennessee statutory law provides 15 non-exclusive factors to consider including a parent's willingness to facilitate and encourage a close and continuous parent child relationship, love affection and emotional ties between each parent and continuity in the child's life, among others.

Mother appeals best interest

The court of appeals analyzed the case under the non-exclusive statutory factors in Tenn. Code Ann. § 36-6-106(a) (1)-(15). Ultimately, in affirming the trial court, the court of appeals rejected the mother's arguments on every issue, and

from "paternity," page 4

tion even though the child was now absent from Tennessee.

Based upon the father's sworn petition, the trial court issued an *ex parte* injunction for the "well-being" of the parties' minor child, requiring the mother to return the child to Tennessee. There were no findings of fact and conclusions of law. The basis upon which the father should have the child returned to him was the Acknowledgment of Paternity and Filing of the Federal Dependent Child Enrollment by the father. After the mother refused to return the child, the father received a second *ex parte* injunction and traveled to Arizona, bringing the child back to Tennessee. The mother filed an emergency motion to set aside the *ex parte* injunctions, which was denied. The mother then filed an extraordinary appeal alleging the child should never have been removed from her custody as she was the custodial parent under Tennessee law.

Temporary injunction incorrect

Temporary injunctions under the Tennessee Rules of Civil Procedure require evidence the petitioner will suffer "immediate and irreparable injury, loss or damage pending a

found strong support in the record for the trial court's findings that "Mother failed to foster a good relationship" and "appears to be incapable of fostering a good relationship between Father and the children." In addition, the court of appeals noted the mother's argument ignored her own role in hindering a close and continuing relationship between the children and the father and her alienation of the father.

Side note

This is an excellent case of what not to do when granted the privilege of being the primary residential parent following a divorce. The mother's failure to communicate and abide by the joint custody plan caused a complete reversal of custody of her children, and likely caused significantly more disruption in the children's lives than if she had complied with the joint custody plan in the first place. Divorced parents should be mindful of the continuing ability of the courts to modify custody plans based on their compliance and the best interest of the child.

final judgment in the action . . ." In ruling on a temporary injunction, the court must provide both findings of fact and conclusions of law. In looking to the evidence, the court of appeals determined the trial court in issuing its injunction so departed from the accepted and usual course of judicial proceedings that it granted immediate review. The court of appeals found there was a fundamental illegality of the trial court because the rulings were without legal authority, were not in accordance with the requirements of the law and denied the mother her day in court. Under Tennessee statutory law, custody of a child out of wedlock is with the mother unless there is a custody order to the contrary. While an acknowledgement of paternity declares a biological father the legal father, thus requiring child support and notice of litigation, termination of parental rights and adoption, it does not vest custody of visitation rights. Consequently, the *ex parte* injunctions resulted in a loss to the mother of her qualified right to the exclusive custody or the child during the pendency of the proceedings in Tennessee. Therefore, the court of appeals reversed the trial court and restored custody of the child to the mother.

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from "assets," page 1

The husband appealed the trial court's division of the Scottrade accounts and debt allocation. Meanwhile, the wife appealed the division of the Scottrade IRA and the court's failure to award her one-half of the \$62,644.50 the husband received from the marital accounts during the pendency of the divorce.

Marital verse separate

When dividing property in a divorce, the court is tasked with determining what property is separate. Separate property is not subject to division by the court, but the valuation may be required for equitable division of the marital property. Marital property is all real and personal property acquired by either or both spouses during the marriage up to the final divorce hearing. While Tennessee requires equitable division of marital property, equitable is not equal. The division of assets is a three-step process. First, the assets are to be identified and classified as either marital or separate; then the court must value the marital property; and finally, the court must divide or apportion the marital property keeping in mind equitable is not equal.

Trial court's accurate

The court of appeals was tasked with reviewing the classification of the parties' property and the division of marital assets. To make this determination, the court of appeals reviewed the source of the income during the marriage that was invested in the Scottrade accounts, as well as the money borrowed for the investments and repaid with marital income. The court of appeals determined the division was appropriate finding the evidence established there was commingling of the asset with marital property. In addition, the court of appeals found the husband's expenditures from marital property funds during the pendency of the divorce were regular, normal and appropriate, stating simple mismanagement is not dissipation. Thus, the court of appeals concluded the husband did not dissipate the marital estate. The court of appeals also agreed with the trial court's position that the \$2,000 payment to the parties' son should be paid by the husband, who received a larger share of the marital assets, because he failed to provide the checks to the son and was in the best position to repay the debt. Accordingly, the trial court's ruling was upheld on all issues.



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TRUCKING OWNERS BUSINESS ROUNDTABLE SEMINAR Nashville, Tennessee

On Thursday, June 22, 2017, from 7:30 a.m. until 11:30 a.m., King & Ballow Law Offices and Katz, Sapper & Miller's Transportation Services Group are sponsoring a Trucking Owners Business Roundtable in Nashville. This program will bring together owners of top trucking companies from inside and outside Tennessee to network and hear from top industry market leaders and nationally known industry advisors on the state of the trucking industry. This is a sponsored event and there is no fee to attend. Seating will be limited.

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