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**NOTICE**

**The opinions expressed herein, unless otherwise noted, are those of the writer and do not reflect the opinions of the Tennessee Department of Human Services or their employees, agents or contractors.**

## 2016 CHILD SUPPORT CASE LAW SUMMARIES AND LEGISLATION

### I. LEGISLATION

#### A. Public Chapter 200; Debt Compromise and Settlement

Signed into law on 04/20/2015 and effective 07/01/2015. Public chapter 200 amends T.C.A. § 36-1-101(f) and provides a mechanism for compromising and settling unpaid child support obligations, including accumulated interest, for the first time since the provisions currently found in that section was enacted in 1985.

1. To qualify, the obligor first has to make 12 consecutive months of full child support payments.
2. Any monies owed to the State of Tennessee are not subject to being settled and compromised.
3. As the name “compromise and settlement” implies such a settlement cannot be forced upon the obligee parent; this is to be accomplished by way of an agreed order. If the case is a Title IV-D case the State must be a party to the agreed order.
4. The obligee shall be given a full, written explanation of the compromise settlement and the obligee’s rights with respect to child support arrears owed to the obligee.
5. An obligor can only take advantage of this provision one time. If the child support arrearage is compromised and settled under this statute and the obligor gets behind in his/her child support again he/she cannot avail himself/herself of this option a second time.

#### B. Public Chapter 716

Signed into law on 04/06/2016 and effective 07/01/2016. Public Chapter 716 modifies T.C.A. § 36-1-102 and § 37-1-107 in regard to juvenile court magistrates.

1. No longer does a magistrate submit a “Finding and Recommendation”, he/she will now submit an “Order”.
2. A confirming order signed by the judge is no longer needed, nor allowed.
3. The period within which to request a rehearing before the judge of the court is extended from 5 to 10 days.
4. The rehearing before the judge of the court is expressly to be “de novo”.

Magistrates in Circuit and Chancery courts are under the provisions of T.C.A. §§ 36-5-403 and 36-5-405. In those courts magistrates still submit “Findings and Recommendations”, the trial judge still has to sign a confirming order, and the time for filing a Request for Rehearing is still 5 days.

Child Support Magistrates are established by T.C.A. Section 36-5-401, et seq. This statute did not change on 7/1/16. Magistrates appointed under this statute are still under the time periods of 5 days in which to request a rehearing before the Judge and still have to submit a “Finding and Recommendation.”

**C. T.C.A. § 36-5-714---Restricted License**

This was Public Chapter 852, which was introduced by Rep. William Lamberth. The Public Chapter passed and was signed by the Governor, but was not effective until 07/01/2015. This statute is specifically designed to give a person whose driver’s license has been revoked for failure to pay child support a second option for getting back his or her driving privileges.

When a driver’s license (or for that matter any license or permit issued by the State of Tennessee) is revoked for failure to pay child support, Department of Human Services policy is to try and obtain a lump sum payment equal to three (3) months of child support and enter into with the obligor parent an agreement to make payments on the remaining arrearage which will result in restoration of full driving privileges so long as the Obligor complies with the agreement.

Section 36-5-714 appears, in application, to be used either where for whatever reason the obligor parent can’t reach an agreement with the Department or he/she simply doesn’t want to go that route.

If a restricted driver’s license is obtained under this statute and one is stopped driving, if any of the provisions of the restrictions are in violation the result will be a driving on a revoked license charge.

To obtain a restricted license under this statute, the obligor will be working out an agreement directly with the Central Office for DHS. There are certain criteria outlined in the statute which must be met in order to have a restricted license such as being employed at least 30 hours per week. If this piece is met and the obligor also would like their license to go to/from school, this provision can be added. There currently is a \$30 fee to obtain a restricted license under this statute.

**II. CASE LAW**

**ISSUE: Immunity from Liability & Sovereign Immunity (and a little Due Process, too)**

**Murphy v. State of Tennessee Child Support Services, Ct. App. Docket No. M2014-02182-COA-R3-JV (Tenn. Ct. App., 12/07/2015)**

Parents divorced in 1993. Mother granted custody of the two children and father was ordered to pay \$50.00 per week in child support. In 1997 the children came into the custody of the maternal grandfather and in 2007 the IV-D office in Humphreys County filed a petition to set child support against the father on behalf of the maternal grandfather.

Mr. Murphy failed to attend a further hearing in February 2008 where his child support obligation was increased to \$333.00 per month and the Court found that he owed \$31,635.00 in child support arrearages. Mr. Murphy filed an action for relief on the basis that the action to set child support was procedurally flawed due to the existing child support obligation in the divorce. The court of appeals disagreed in the first appeal, but did find that the trial court erroneously applied the guidelines in setting child support and remanded the case for further proceedings.

On remand, Mr. Murphy filed a “Motion for Further Relief” seeking reimbursement from the State the monies he paid under the March 2008 order. The Trial Court held that pursuant to T.C.A. § 36-5-101(a)(7), the State would not be ordered to reimburse. Mr. Murphy appealed.

T.C.A. § 36-5-101(a)(7) states as follows:

The State of Tennessee, its officers, employees, agents, or contractors, any counties, county officials, the clerks of any court, or any Title IV-D child support enforcement agency shall not be liable, in any case, to compensate any person for repayment of child support paid or for any other costs, as a result of the rescission pursuant to § 24-7-113 of a voluntary acknowledgment or the rescission of any orders of legitimation, paternity or support.

The Court of Appeals ruled that the statute is dispositive and that the State has no liability to compensate Mr. Murphy.

In footnote number six, the Court discusses Sovereign Immunity, which while not necessary to decide the case, is noted as an additional ground for denying Mr. Murphy’s motion. Quoting from **White v. State, ex rel., Armstrong, 2001 WL 134601 (Tenn. Ct. App., 02/16/2001)**, the Court of Appeals stated, “The doctrine of sovereign immunity divests the courts of subject matter jurisdiction over suits against the state for money damages unless the State has consented to these suits. Not only has the State not consented, the statute affirmatively prevents such a suit.

Mr. Murphy also made a constitutional argument; that under his theory, he was denied due process because the trial court lacked jurisdiction and the State retained his property (his money paid as child support) when the trial court did not order that he be reimbursed.

The Court of Appeals ruled that under T.C.A. § 37-1-104(d)(1)(A), the Juvenile Court had jurisdiction to set child support. During the appeal, jurisdiction vested in the Court of Appeals and when the case was remanded back to the Juvenile Court of Humphreys

County, it regained subject matter jurisdiction. Nothing in the record would indicate that Mr. Murphy was denied his day in court; the opportunity to be heard in a timely and meaningful manner being a fundamental requirement of due process. The court states at page seven of the opinion:

The fact that the law does not afford him [Mr. Murphy] the relief he seeks in the circumstances presented does not equate to a denial of his rights to due process of law.

#### **ISSUE: Voluntary Under Employment**

**State, ex rel., Brown v. Brown, Ct. App. Docket No. M2014-02497-COA-R3-CV (Tenn. Ct. App., 02/08/2016).**

Divorce was granted in 2008. The Parenting Plan provided for equal parenting time between the parents and Father was ordered to pay \$29.00 per month in child support to the Mother. The Mother's gross income at the time was \$3,666.00 per month and the Father's was \$4,250.00.

The Mother obtained the services of the local IV-D office and a petition to modify child support was filed in July 2014 which was heard in November 2014. A number of the factors for calculating child support were stipulated, such as the Father's income at the time being \$4,639.81 per month and that the Mother was earning \$1,451.77. The Mother's earning history was also stipulated to which showed her highest income was the \$43,698.00 in 2008 and her lowest \$11,033.00 in 2012. The parties did not stipulate as to the Mother's earning capacity which was left to the trial court to determine.

At the time of the original Parenting Plan the Mother worked for Fifth Third Bank as a Personal Banking Representative in Nashville where her hours were from 9:00 A.M. to 5:00 P.M., Monday through Friday. Mother lived in Franklin, TN The Mother quit her job in November 2011, but shortly thereafter, learned that her position with the bank was eliminated and other employees who held the same job duties were laid off. The Mother testified that she had relocated to Spring Hill where the Father lived as he also worked in Nashville on a 24 hour on/48 hour off schedule. Mother cited the 1+ hour commute was taking too much time away from her minor child and she wanted to spend more time with the child. Further, Mother was attending school full time to obtain a degree as a Radiology Technician at Columbia State, she anticipated graduating in 2016. She was also working a part-time job in the healthcare industry making \$1,451.77 per month.

The Trial Court entered an order making a finding that the Mother was not voluntarily underemployed and that she was motivated by the best interest of her child and that her decision benefited the quality of the child's life. The Court modified the Father's child support to \$380.00 per month.

The Father appealed alleging that the trial court erred by not finding that the Mother was voluntarily underemployed.

The Court of Appeals ruled that while the Mother was motivated by a desire to be closer to her child, which in and of itself would tend toward a finding of voluntary underemployment, she also obtained a job in the health care industry at NHS Place in Franklin and was at the same time attending school as a full time student to obtain a degree in the health care field where her anticipated starting salary would be almost double that of the current income. Further, there was no evidence that she turned down any positions in the banking industry similar to the one that she had held at Fifth Third.

The Court of Appeals affirmed the Trial Court.

**Cocke v. Cocke, Ct. App. Docket No. M2015-01440-COA-R3-CV (Tenn. Ct. App., 04/19/2016)**

Parties were married on 10/16/1993 and divorced on 04/25/2012 at which time they had two children ages 17 and 15. Mother was designated the PRP, but split the number of days of parenting time evenly. The Father was ordered to pay child support of \$1,270.00 per month in addition to alimony. The mother eventually remarried which terminated the alimony obligation. The older of the two children emancipated upon his high school graduation in May 2014.

Both parties filed actions to modify child support. The Father argued that his son's emancipation entitled him to a reduction in child support. The Mother argued that the original child support order did not evenly split the child support between the children, nor did the Parenting Plan specify how much child support was allocated to each child.

Testimony at the trial court showed that the Father earned \$137,000.00 in 2014 and was on track to make \$148,992.00 in 2015. The Mother holds a degree in journalism, but was working as a private swim instructor 15 hours per week. Prior to the divorce, the Mother had taught swimming part-time at a community center at the rate of \$55.00 per hour, but she had left the community center and only had access to an outdoor pool making her work seasonal.

The Mother's testimony was that her work was exhausting and that 15 to 20 hours a week was all that she could do. The Mother testified that it was her "passion" to teach swimming. She had been teaching swimming for about 15 years and had been out of the regular job market for about 20 years (she had previously worked in real estate). The Mother was then currently charging \$80.00 per hour for private swimming lessons, but she was unable to produce financial records for the year to date at the time of the hearing. In 2012 and 2013, the Mother earned \$24,790.00 and \$26,371.00 respectively.

The Court found that at the time of the hearing, the Father was earning \$12,416.66 per month. Also, the Court found the Mother to be willfully and voluntarily underemployed,

that she had the ability to earn \$825.00 per week (15 hours per week at \$55.00 per hour) or \$3,575.00 per month, plus the Mother's current husband gave her an additional \$1,000.00 per month which the court considered to be gift income under the Child Support Guidelines. Mother's total gross monthly income was set at \$4,575.00.

As to parenting time the Court found that the Mother was spending 120 days per year with the minor daughter and the Father 245 days.

The trial court shifted the obligation to pay child support to the Mother, set the Mother's child support obligation at \$113.00 per month, and awarded the modification retroactive to 08/01/2014 a judgment to the Father in the amount of \$11,290.00.

The Court of Appeals states that in determining whether or not a parent is voluntarily underemployed the parent's past and present employment must be considered. If the reason for taking a lower paying job is reasonable and made in good faith, the court will not find the person to be willfully and voluntarily underemployed. The Mother in this case the choose to work part time when she admitted that she was able to work fulltime in another profession. The proof did not preponderate against the trial court's ruling.

**ISSUE: Is it a final order?**

**In Re., AVA B., Ct. App. Docket No. E2015-01413-COA-R3-JV (Tenn. Ct. App., 02/19/2016)**

Susan M. and Warren B. are the parents of Ava B. The trial court's 09/17/2015 order contained findings regarding the parents' co-parenting schedule, but did not address child support. The Father had requested that child support be apportioned pursuant to the Child Support Guidelines and that that issued was to be referred to the Magistrate for determination. The Magistrate's Finding and Recommendations did not address the child support issue. Both parents filed timely notices of appeal.

The Court of Appeals ruled that the Father had asked the trial court to address child support and nothing was reflected in the order regarding child support. Therefore, the order was not a final order as it did not adjudicate all of the issues before the parties and as a result, the Court of Appeals lacked subject matter jurisdiction. The appeal was dismissed and remanded back to the trial court.

**ISSUE: Social Security benefits to a minor child from the obligor parent's disability (Can you offset against an arrearage or is this considered a retroactive modification?)**

**Sewell v. Sewell, Ct. App. Docket No. E2015-00983-R3-CV, 2016 WL 3180330 (Tenn. Ct. App., 05/27/2016**

In January 2013, the Father filed an action in Hamilton County Circuit Court to register the parties' 1997 Georgia divorce decree. In the divorce decree, the Mother was designated as the PRP. The Hamilton County Court entered an order in March of 2013 modifying the parenting plan and naming the Father as the PRP.

Subsequently, the Mother filed to register two Georgia orders; one from 1998 finding the Father to be in contempt, and a 2003 order for a wage assignment. The Mother also filed an amended counter-complaint alleging several matters of contempt, including non-payment of child support and uncovered medical charges.

The Circuit Court held a 2 day bench trial and it was stipulated that the Father had received Social Security disability payments from 2004 through 2013, and that the mother had received **\$107,037.00** in disability benefits (from the Fathers' disability) on behalf of the child during the same time period.

**The trial court found that because the Father had not petitioned for a child support modification prior to filing his petition to modify custody he could not receive credit for the Social Security benefits received by the mother on behalf of the child toward his unpaid child support obligation.** The trial court did, however, use the disability funds to offset the uncovered medical expenses of the child. The court awarded the mother a judgment for unpaid child support in the amount of \$46,592.68, plus statutory interest.

The Father appealed the judgment for unpaid child support.

The Court of Appeals affirmed the trial court's finding that offsetting the child support arrearage by applying the Social Security benefits received by the Mother on behalf of the child would constitute an impermissible retroactive modification of the Father's child support obligation.

1. The child support guidelines do not permit the court to disregard a child's social security check when calculating child support if that check is derived from an obligor parent's account.
2. The Father acknowledged that T.C.A. § 36-5-101(f)(1) prohibits a retroactive child support modification, but he contended that asking for an offset or credit against his child support arrearage didn't constitute an impermissible retroactive modification.

The Court of Appeals cites **Alexander v. Alexander, 34 S.W.3d 456**, for the proposition that "A court has no power to alter a child support award as to any period of time occurring prior to the date on which an obligor spouse files his or her petition."

The Tennessee Child Support Guidelines specifically provide for factoring in the social security benefit that the child receives from an obligor parent; however, **the Court of Appeals finds no provision in the Child Support Guidelines that allows credit for Social Security disability payments retroactive to the filing of a petition for modification. The court found that to allow such a credit would be contrary to the operation of T.C.A. § 36-5-10(f)(1).**

The trial court was affirmed.

### **ISSUE: Upward Deviation**

#### **IN RE ANDREA R., Ct. App. Docket No. M2014-01895-COA-R3-JV (Tenn. Ct. App., 11/30/2015)**

This is the 2<sup>nd</sup> appeal in this case from the Mother's 2008 petition to set the Father's child support obligation for the parties' 5 year old child, to make an upward deviation for private school and to determine the amount of retroactive child support.

The trial court set child support and included the upward deviation. The Father appealed and the Court of Appeals reversed and remanded holding that the trial court had made no finding of fact that would justify the upward deviation.

On remand the Mother sought to introduce additional proof about the appropriateness of private school. The trial Court declined to accept the addition evidence and chose to rely upon the evidence from the previous hearing. The trial court ruled that the deviation was not justified. The trial court also established the Father's child support obligation for each of the (now) six years preceding the filing of the petition, computed the retroactive award, and further found that the direct payments that the Father had made to the Mother exceeded the retroactive award. The Mother had filed a new petition to modify the current child support obligation which was consolidated with the hearing on remand and the court allowed both parties to introduce evidence of their incomes. The Mother failed to introduce any proof of income and the court imputed income to her. Child support was modified without a deviation. The Mother appealed. The Court of Appeals affirmed the trial court.

1. When a court considers deviating from the guidelines for extraordinary expenses like private school tuition, it has to determine whether the private school is appropriate based upon both parents' financial abilities and the child's lifestyle.
2. There was no finding of fact in the first appeal as to the parents' financial abilities nor the child's lifestyle. On remand, the Court of Appeals instructed the trial court to make the requisite findings as to the appropriateness of private school.
3. The Court of Appeals did not indicate that the record from the trial court was insufficient to make the finding of fact, nor did it direct the trial court to reopen the proof. As such it was discretionary with the trial court whether or not to take additional

proof and therefore the decision to take no additional evidence was discretionary and not error.

4. The obligation to support a child exists from the child's birth and the Father is liable for support from that date. The trial court determined that the period for retroactive support was from May, 2003 to September, 2009. Because support had not been established for the time period and the parents' incomes varied during this period the court established a monthly child support obligation for each year. Based upon this arrangement, the total retroactive award was **\$41,700.00**.
5. The trial court determined that the Father had voluntarily paid the mother **\$84,275.00** during the retroactive period and that since the voluntary payments exceeded the amount of the retroactive child support award, he owed no retroactive child support.
6. Here the Court of Appeals found that the Father began paying support under a pendent lite order in January 2009 and the retroactive support period should have ended then. With this adjustment, the Father's retroactive obligation was \$39,700.00 and the voluntary payments made for the same period was \$78,035.00.
7. The Mother agreed that the Father should receive credit for some voluntary payments, but she disagreed with credit for rent, food, utilities, etc. The Court of Appeals looked at the rules applicable to the "Doctrine of Necessaries" as set forth in the case of **Psychek v. Rutherford, 2004 WL 1269313 (Tenn. Ct. App., 06/08/2004)**, and others. The Court felt that under the facts of the case, the payments by the Father were appropriate under the "equitable considerations rule."
8. The Court imputed income to the Mother because she had not provided reliable evidence of her income and was voluntarily underemployed. When modifying child support and a parent fails to provide reliable proof of income (e.g., tax returns, check stubs, etc.) the court can impute income to that parent of up to 10% per year for each year since child support was set or last modified. **Tenn. Comp. R. & Regs., 1240-02-04-.04(3)(a)(2)(iv)(II)**.
9. The Mother failed to provide reliable proof of income (she was paid in cash) and the court imputed an increase of 10% per year since the setting of child support.

## **ISSUES—Parenting Plan based on one parent’s schedule; voluntary underemployment**

### **Roland v. Roland, 2015 WL 5719833 (Tenn. Ct. App. Sept. 24, 2015):**

Mother and Father were married in 2005; they are the parents of two children—Charlie and Rorie. Charlie’s biological father died before he was born and Father adopted Charlie when he was three years old. Mother and Father separated in 2011 and Mother filed a complaint for divorce in March 2012. Father was employed as a firefighter working 24 hours on, 48 hours off. Mother was employed in Gallatin making \$18.40 an hour, but had to drive over an hour to her job and, at the time of trial, testified she planned to quit her current job and begin working at her father’s company making \$10.00 an hour. Mother testified that this would allow her more flexibility to take care of her children; take Charlie to necessary therapy appointments; and to allow her more time with her children. Mother also received \$840 a month in SSI for Charlie due to his biological father’s death.

Mother testified that Father would need help from his mother taking care of the children due to his 24 hour shifts and that he did not feel Charlie’s therapy appointments were important. Father admitted to having lost control of his temper in the past, and using a handmade wooden paddle to discipline his children. Father was charged with domestic assault for one such incident and had taken anger management and parenting classes as a result.

The court found that Mother had exhibited poor judgment where the children were concerned during the separation period, including staying overnight with the children at a man’s house; allowing the children’s school lunch accounts to accumulate a \$200 balance in arrears; and allowing Charlie’s homework to get behind on several occasions.

The trial court made Father primary residential parent, finding that the children will reside with him during the 48 hours he is off work and with Mother during the 24 hour shifts Father was working. The schedule was to apply to all days, but each party would be awarded one continuous week with the children in the summer. Mother appealed.

**Did the trial court err in entering a parenting plan based on Father’s work schedule?** Yes. While the Court of Appeals affirmed the trial court’s designation of Father as PRP, finding that while courts are required to consider each of the best interest factors, they are not required to list each factor and explain how it impacts the ultimate determination. The Court upheld the trial court’s determination that Father was more stable financially at the time of trial and had more stable housing. The trial court found that Father had taken steps to address his temper issues. The Court of Appeals found that the parenting schedule was unorthodox and problematic as it was based entirely on Father’s work schedule, with no regularity to it. The Court found that the schedule basically “relegates Mother to the position of babysitter for the children while Father is working and gives her very little meaningful opportunity to parent her children, even as an alternate residential parent.” The Court of Appeals remanded the issue of developing an appropriate parenting plan to the trial court, with directions to consider the time Father would

need assistance from his mother to help with the children as potentially depriving Mother of time she could have with the children.

The Court of Appeals found error in the trial court's credit to Father of \$401.58 for children's health insurance premium, as there was no evidence in the record of the cost and vacated this portion of the order.

**Voluntary Underemployment**—The Court also found that attributing Mother's income at her prior income level was erroneous, and that there was reliable evidence of what Mother's income would be after trial. The court also found that the trial court's decision to impute additional income to Mother lacked an evidentiary basis and constituted an abuse of discretion.

***Merkel v. Merkel*, 2016 WL 1276094 (March 31, 2016):** Mother and Father were married in April 1999 and had two children. They were separated in the summer of 1996 and thereafter Wife's father, McKeel, purchased a residence for Wife and the children's use for \$119,400, listing owners as McKeel and Mother. Mother and Father reconciled shortly thereafter, and the couple lived there together until the summer of 2013.

On August 1, 2013, Mother filed for divorce. Both parties allowed McKeel to join the suit as a third party. Testimony demonstrated that from tax years 2007 through 2011, Mother and Father gave income tax refunds to McKeel; Father claimed this was payment towards the residence pursuant to an oral agreement to purchase the residence. Divorce granted May 2, 2013.

Father designated as PRP, paying \$458 a month in child support. The trial court found that the tax refunds tendered to McKeel were payments towards over \$70,000 owed to McKeel for various loans and automobiles he gave to Mother and Father through the course of the marriage. The trial court entered a judgment against Father in favor of McKeel for a \$183.45 for utility bill incurred while Father was living alone at residence during the separation period and \$4,660 for an IRS bill McKeel paid for Father. Father appeals.

**1. Did the trial court err in awarding a third party a judgment against Father? No.** Intervention is permitted when a party has a legally recognizable interest in the proceeding. Further both parties agreed to allow the intervention.

**2. Did trial err in not awarding Father half of Mother's half of house? No.** Marital property includes income from and any increase in value of property determined to be separate property if each party substantially contributed to its preservation and appreciation. No evidence house value increased from purchase to trial; therefore ½ attributable to Mother was properly her separate property.

**3. Did trial court err in making child support order retroactive to date of complaint?** No, the Guidelines require a judgment to be entered which includes monthly support due up to the date that an order for current support is ordered.

**4. Did the trial court err by prohibiting Chris Allen from contact with the children?** Yes, there was no evidence that Allen should not be in presence of children, so this issue is reversed.

**ISSUE—Subject matter jurisdiction of Juvenile Court to hear a post-divorce child support matter**

**Blandford v. Blandford, 2016 WL 1166339 (Tenn. Ct. App. March 24, 2016)**

Mother and Father were divorced in in Knox County Circuit Court January 29, 2003; designated as co-parents for three children with Mother to pay child support. Mother moved to modify and an agreed order was entered July 14, 2008, terminating Mother's child support obligation. On June 7, 2010, Father filed a petition in Knox County Juvenile Court alleging the children were dependent and neglected. March 31, 2011, order was entered awarding custody to Father, and finding children to be dependent and neglected as to Mother. Father subsequently filed a petition to set child support in the juvenile court on September 20, 2011; court entered an order June 1, 2012, setting Mother's support obligation at \$725.00 per month and reserving the issue of any arrearage. In an order entered *nunc pro tunc* to September 24, 2012, order finding children were not dependent and neglected. Mother then filed a motion to set child support in juvenile court on April 1, 2013, and the court found that Mother had no current child support obligation beginning July 2012 due to change in custody but ordered Mother to pay \$200,00 per month towards an arrearage of \$13,502.00. Mother moved to set aside child support on September 22, 2014, alleging lack of subject matter jurisdiction and an appeal to the trial court judge. The trial court found that the juvenile court had properly exercised subject matter jurisdiction over support during the dependency and neglect proceedings but that after the action was dismissed September 24, 2012, jurisdiction reverted back to the Fourth Circuit Court, and that the order ending Mother's child support obligation and determining an arrearage to be set aside. The Court of Appeals found it lacked subject matter jurisdiction to hear this appeal as it stemmed from a dependency and neglect action, and should have been brought in Circuit Court; as Tenn. Code Ann. § 37-1-159(a) provides that a Juvenile Court's final judgment in a dependency and neglect action is appealable to Circuit Court. The Juvenile Court has original jurisdiction over

proceedings in which a child is alleged to be dependent and neglected until the action is dismissed. The case was transferred to the Knox County Circuit Court for determination of the appeal.

### **ISSUE-Voluntary Underemployment**

**Smith v. Smith, 2016 WL 3095067 (Tenn. Ct. App. April 4, 2016):** Mother and Father were divorced in January 2012; an order modifying support was entered on September 11, 2013, increasing Father's obligation to \$369.00 per month. In May of 2014, Mother filed a petition to modify, citing a substantial decrease in her income and an increase in Father's income. The only contested issue was Mother's income. Mother had worked at a number of jobs from 2012 through the time of trial. Prior to current job, she was working at Green Hills Healthcare, making \$19 per hour. She testified she had failed to meet her requirements and had been issued a performance action plan on or about July 30, 2014; sensing she was about to lose her job she resigned to receive her paid time off, 30 days of insurance coverage and a positive referral. She then began working at Premier Orthopedics making \$12 an hour. The trial court found she was not voluntarily underemployed, but found that her income could be \$13.30 an hour (an average of her past incomes). The Court of Appeals found that the evidence did not preponderate against the trial court's determination that Mother did not voluntarily leave her job and that her decision was reasonable, and that she was not voluntarily under-employed. Because of that determination, the trial court should have used her current pay rate to determine her income, so the Court vacated that part of the trial court's order, remanding it for the proper determination of her income.

### **ISSUE—Nonprofit corporation income as property; combining alimony with child support awards**

**Lubell v. Lubell, 2015 WL 7068559 (Tenn. Ct. App. Nov. 12, 2015)**

Mother and Father were married in July 1976, divorced in 1988, remarried in 1991, and filed for divorce in 2012. Mother and Father had two adopted children; an autistic fourteen year old son who attended a special private school; and a fourteen year old daughter. The two founded Partners for Christian Media in 1992, and since that time the nonprofit had been Father's only source of income. Mother had previously worked at the company, but her employment was terminated in December of 2012. Mother was instrumental in securing funding for the business. In 2012, company's net worth was approximately 1.2 million; with Father making \$190,000 per year. Mother had previously worked for Partners, making significantly less, as her income was based on a twenty-percent commission for her sales. She made \$60,000 per year 2002-2006; and thereafter approximately \$20,000 per year except for year 2012, when she received \$42,000

which included a trade in barter owed from residual accounts. Mother wanted the company included as a marital asset, but the trial court did not include it as such. Mother received transitional alimony combined with child support in the following amounts: \$2750.00 for three years; \$2000.00 for three years; \$1750.00 for two years; \$1000.00 for (alimony only) for two years.

The COA affirmed the trial court's determination that the nonprofit was not a marital asset and would not pierce the corporate veil. Tennessee law prevents nonprofit corporation assets from being distributed to any private individual. Further, the compensation Father received was reasonable as an employee of the company. Mother could not demonstrate the factors necessary to otherwise pierce the corporate veil.

Regarding the alimony, the trial court found that the alimony should have been awarded separately from the child support and modified the award to be alimony in futuro versus transitional alimony as transitional alimony is only appropriate to rehabilitate an economically disadvantaged spouse. Mother's long term earning potential was much less than Father's and the award was modified to alimony *in futuro*. Further, the COA found that the trial court's combination of child support and transitional alimony was improper as that impermissibly capped the child support award and child support must remain modifiable. Mother was also awarded lump sum alimony and the matter was remanded to the trial court to determine what amount was appropriate.

The COA also remanded the issue of extraordinary educational expenses as the trial court impermissibly included this amount as an adjustment to Father's gross income rather than as a deviation to be calculated separately and added to the base child support obligation.

**ISSUE: Child Support Calculation with no income shares worksheet attached**

**Yocum v. Yocum, 2015 WL 9028131 (Tenn. Ct. App. Dec. 15, 2015):**

Mother and Father were married for five years prior to separating in September of 2012. Father was employed overseas at the time of trial. The parties had three children ages 10, 6, and 3. The 6 year old had epilepsy, asthma, and developmental delays and required more care. Father made approximately \$130,000 per year and Mother approximately \$5,000, working mainly as a homemaker. Trial court awarded Mother child support, alimony in future, and alimony in soldido. Father raised several issues on appeal, including the trial court's refusal to allow him to testify by phone at the September trial. Trial court did not err in refusing such testimony as no Tennessee law or rule provides a right to testify by phone in a divorce action and Mother objected to such testimony. Father also cited trial court's failure to exclude Mother's father from the courtroom, despite the fact that he did not testify because Father said he "coached" Mother from behind the bar. Father was not prejudiced by any prompting of Mother on the "reserved"

issues, and this is not reversible error. Regarding Mother referencing a hearsay document and keeping it even after refreshing her recollection, the COA found no reversible error because Father was provided with the document and the document was later entered into evidence. The trial court's determination that Mother was not voluntarily under-employed and refusal to impute minimum wage income to her was upheld as Mother had to provide care to her three children, including one with more specialized needs. The COA reversed the child support order for a redetermination, however, because no income shares worksheets were attached to the various child support orders entered in this matter. Father also cited error in the trial court's use of his payroll checks versus the W-2 form he later proffered. The COA affirmed the trial court's determination of his income as the payroll checks contained housing allowance monies not included in the W-2 that are relevant to income determinations for child support purposes. Both alimony awards to Mother were upheld, as were attorneys' fees to her former attorney as it was shown Mother could not afford to pay them and Father could.

**ISSUES: Modification of child support; Fraudulent income; Upward deviations**

**Wilder v. Wilder, No. E2014-02227-COA-R3-CV (Tenn.Ct.App. September 4, 2015); Knox Co. Circuit Court**

This was a post-divorce action wherein Mother, who had full custody of the children, filed a petition for modification of child support. Later Mother alleged Father fraudulently misstated his true income. The trial court adopted the Magistrate's findings and recommendations and held Mother could not obtain Rule 60 relief on her fraud claim as time had expired. Mother appealed several issues, but the COA affirmed the trial court.

This is the second appeal filed by Mother (the first appeal upheld the trial court's findings too). The present appeal stems from a petition to modify child support filed by Mother in December 2010. Mother argued that a previous order of support should be modified to include an upward deviation for extraordinary expenses and reimbursement of medical expenses. A hearing occurred in April 2012 and Father's support was set at \$1,419 per month (up from \$1014 per month). The Magistrate also equally divided uncovered medical expenses for the children.

In October 2012, Mother filed her first amended petition for modification. At this stage, she first alleged fraudulent conduct and perjury by Father and his attorney as to Father's income. At a hearing in July 2014, the Magistrate set Father's support at \$1,624 per month retroactive to January 2011 and the parties were to equally divide uncovered medical expenses.

In July 2014, Mother filed her exception to the Magistrate's findings and recommendations and argued, in part, for an upward deviation in child support and a prorated obligation of uncovered medical expenses. In August 2014, the trial court entered an order adopting the Magistrate's findings and recommendations, but in this order, granted time for Mother to file a more definite statement with specificity those facts which are alleged to be fraudulent to which relief is requested.

At further hearing on September 29, 2014, the Court found the Order filed on March 17, 2011 to be the final Order as it relates to child support issues. The Court found that the First Amended Petition for Modification filed October 5, 2012, which specifically included allegations of fraudulent conduct shall not be allowed as to any Rule 60 claim insofar as such filing had not occurred within one year of the final Order which was entered March 21, 2011.

**ISSUE: Allegation of fraudulent conduct**

Under the Child Support Guidelines, the trial courts have limited discretion compared to the wide discretion they once had. Decisions regarding child support must be made within the strictures of the Guidelines. Because child support decisions retain an element of discretion, the COA reviews them using the deferential “abuse of discretion” standard.

The COA decision outlines the elements of Rule 60.02 of the Tennessee Rules of Civil Procedure motions. It also explained the difference in intrinsic fraud occurring “within the subject matter of the litigation” and extrinsic fraud, “involving deception as to matters not at issue in the case which prevented the defrauded party from receiving a fair hearing.

In this case, Mother’s fraud allegations are that Father and his attorney fraudulently misled Mother as to his actual income. This type of alleged fraud, going to the subject matter of the controversy, falls into the category of intrinsic fraud. Therefore, even if Mother had brought an independent action as allowed under the savings provision of Rule 60.02, her petition still would have been correctly denied.

**ISSUE: Allocation of uncovered medical expenses**

Mother requested the court to allocate uncovered medical expenses between the parties pro rata, rather than equally. Mother took the position that under the Guidelines, all uninsured medical expenses must be allocated between parents based upon their respective incomes and that the trial court must explain any “deviation” from the Guidelines. COA rejects this reasoning.

The precise language of the Guidelines on this subject provides that uninsured medical expenses “shall be paid by the parents as incurred according to each parent’s percentage of income *unless some other division is specifically ordered by the tribunal.*” (emphasis added) Tenn.Comp.R. & Regs. R. 1240-2-4-.04(8)(d)(3).

In this case, the court chose to allocate the expenses equally. This was not a deviation from the Guidelines, therefore, an explanation wasn’t necessary.

**ISSUE: Upward deviation for extraordinary medical and educational expenses**

Mother asserted the children have special needs which require extensive educational and medical expenses. The transcripts of the trial court reveal that they heard Mother’s arguments, considered them, but adopted a contrary ultimate decision. Mother fails to explain how the trial

court abused its discretion in doing so. A discretionary decision by its very nature is one of multiple rational options. The trial court neither contravened the law or logic in declining Mother's request of this relief.

## **CONCLUSION:**

The COA affirmed the trial court's ruling.

**ISSUE: Criminal Activity and/or incarceration shall result in a finding of voluntary underemployment or unemployment and child support shall be awarded based upon this finding.**

***Brown v. Shipe***, 2015 WL 6549770 (Tenn.Ct.App. October 29, 2015) Knox County Juvenile Court.

**Facts:** In April 2014, the State of Tennessee, on behalf of Inger Brown, the grandmother and legal custodian (Grandmother) of Larry W. Shipe Jr.,'s (Father) minor child filed a petition to set support against Father. The magistrate set Father's child support obligation at \$299 per month and awarded retroactive support from August 2007 until June 2014, but excluded from the calculation the time Father was incarcerated, i.e. January 2009 through April 2013.

Grandmother requested a rehearing before the Juvenile Court Judge, arguing the magistrate erred in excluding from the calculation of retroactive support, the time period Father was incarcerated. The trial court entered an order confirming the magistrate's findings and recommendations in all respects. Grandmother timely filed an appeal to the Knox County Court of Appeals.

**Issue:** Did the trial court err in its calculation of child support when it omitted from the calculation support due from Father during a period of time when he was incarcerated?

**Law:** Child Support Guidelines, Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(I) which provide that "incarceration shall not provide grounds for reduction of any child support obligation," mandate that incarceration does not absolve an individual from his/her obligation to pay child support.

The state agreed with Grandmother's position that the 51 months Father was incarcerated should have been included in the retroactive support obligation, asserting that "the language of Tennessee's child support guidelines, Tennessee case law, sound public policy, and persuasive authority all support a finding that a parent should not be excused from supporting his or her children during a term of incarceration."

The Child Support Guidelines state specifically *criminal activity and/or incarceration shall not provide grounds for reduction of any child support obligation*. Therefore, criminal activity and/or incarceration *shall* result in a finding of voluntary underemployment or unemployment under this section and child support shall be awarded based upon this finding of voluntary underemployment or unemployment.

The language in the Guidelines cited here does not contain permissive language as discussed in prior opinions on this subject. Rather the term “shall” is utilized. The Guidelines use of that term leaves the trial court with no discretion. The use of the term “shall” requires mandatory compliance.

**COA Ruling:** Citing the above referenced law, the COA vacated the trial court’s judgment and remanded for a recalculation of Father’s retroactive child support obligation.

**ISSUE:           Civil Contempt  
                      Imputed Income**

**Cisneros v. Cisneros, 2015 WL 7720274 (Tenn. Ct. App. November 25, 2015); Circuit Court for Lincoln County.**

This is a consolidated appeal from two separate actions arising from numerous competing petitions by the parents of two minor children. The parties were divorced in December 2012; Mother was awarded custody and Father was ordered to pay child support. Father appealed, but several additional petitions to modify custody and support were filed. Mother filed a petition for civil contempt against Father for failure to pay child support. The trial court found Father in civil contempt of court for failure to pay child support and ordered him incarcerated until he paid the arrearage.

Due to Mother’s drug problems, Father was awarded emergency custody of the children in May 2015. Father, however, pursued his issues of the initial award of child support and the finding of Father in civil contempt.

As for the **civil contempt issue**, Father testified that he was paying child support, but admitted he was \$3,000 behind. He testified that he owned several guns, which he had not attempted to sell, and that he was making payments on a truck he owned. He also testified that he owned a house with a mortgage of \$61,000. At the end of the hearing, the trial court found him guilty of civil contempt of court and ordered him imprisoned until he paid the child support arrearage. Father paid the arrearage and was released.

Father insists he was entitled to the procedural protections required for petitions for criminal contempt and that he lacked the ability to pay child support both when it was due and at the time of the contempt hearing. The trial court confirmed that it was treating the petition as one for

civil contempt. As a consequence, Father was not entitled to the safeguards afforded to one accused of criminal contempt.

Sanctions for criminal contempt are “punitive and unconditional,” and the purpose of such sanctions is to “preserve the power and vindicate the dignity and authority of the law, and the court as an organ of society.” In contrast, allegations of civil contempt are brought for the benefit of a private party rather than the public at large. Sanctions for civil contempt are “remedial and coercive in nature, designed to compel the contemnor to comply with the court’s order.” Imprisonment is a proper sanction for a finding of civil contempt.

To hold a party in contempt for failure to pay child support, the court must also determine that the obligor had the ability to pay at the time the support was due. The burden of proof is on the contemnor to show the inability to pay.

With civil contempt, the one in contempt *has the keys to the jail* and can purge the contempt by complying with the court’s order. **Thus, this remedy is only available when the defendant has the ability to comply with the order at the time of the contempt hearing.**

**In this case, Father failed to show that he was unable to pay the arrearage at the time of the contempt hearing. At the time of the hearing, he was gainfully employed, owned his own home, had a bank account, owned a truck, and was paying his other financial obligations. Additional, he testified that he owned several guns that he had not attempted to sell in order to fulfil his child support obligations.**

As for the **imputed income issue**, the court found Father to be willfully or voluntarily underemployed because he had voluntarily reduced his income producing activities in order to prepare for litigation in this case. Father testified that his involvement in this litigation had not prevented him from working. The trial court did not find this testimony credible.

Based on its finding of voluntary underemployment, the trial court imputed to Father an annual earning capacity of \$37,589. Father was a sole employee of a limited liability company that performed remodeling and repair work on houses. He made \$19,000 in 2009; \$28,000 in 2010; \$39,000 in 2011 and \$22,196 in 2012. Mother insisted he was not reporting all of his income and that he was paid often in cash. She has seen him with large amounts of cash when he operated his business.

Father contended the trial court erred because they didn’t average his income over the years. Per the Guidelines, Tenn. Comp. R & Regs 1240-2-4-.04(3)(b), income averaging is appropriate when a parent receives variable income. The variable income that the Guidelines contemplate includes “commissions, bonuses, overtime pay, and dividends...” It applies to variable components of income and can be applicable where a parent is self-employed or whole total income is variable. However, averaging is usually correct for calculating a party’s fluctuating income, but it is not appropriate when a spouse’s income is steadily declining or inclining. In such circumstances, the obligor’s income should be based on his or her current salary.

The COA found that the trial court did not abuse their discretion in finding Father to be voluntarily underemployed and finding that the income for 2011 was the most recent year for which complete information was available.

**COA affirmed the judgment of the trial court on all counts.**

**ISSUES: Retroactive Modification; Retroactive Child Support; Petition for Modification or Petition to Set Support?**

**Holt v. Holt, 2015 WL 5766673 (Tenn.Ct.App. Sept. 30, 2015)  
Chancery Court for Wayne County**

This matter pertains to a dispute regarding a retroactive child support judgment for a period of time prior to the filing of the child support petition.

Mother and Father were married in 1997 and divorced in 2005 with two minor children. The final divorce decree included parenting time equal between both parents with no child support due between them. In 2008, Father filed a petition for modification of the parenting plan because the oldest child was living primarily with him at the time and the other child continued to spend equal time with each parent. As a result, the court ordered Mother to pay child support to Father in the amount of \$328.00 per month. As time passed, the oldest child emancipated and the youngest was living primarily with Mother. In October 2013, the State of Tennessee filed a petition on behalf of Mother to set child support for the benefit of the youngest child. The trial court ordered Father to pay \$548.00 per month to Mother and granted a retroactive support award to Mother back to December 1, 2011 which was 23 months prior to the filing of this petition.

Father filed a Motion to Alter or Amend arguing that the petition should have been treated as a Petition for Modification rather than a Petition to Set Support as there already was an order of support set. He also argued that the retroactive support judgment was limited by T.C.A. Section 36-5-101(f)(1) to the date the petition to modify support was filed. The trial court denied his motion.

A parenting plan was established in 2005 when the parties divorced. An order setting child support was entered in July 2008 and that order was in effect when the state filed its petition in 2013; therefore, the petition should be treated as a modification; not a set support even though the payors would be changing.

T.C.A. Section 36-5-101(f)(1) directs that a judgment for child support shall not be subject to modification as to any time period or amounts prior to the date a petition for modification is filed and notice of the action has been mailed to the last known address of the opposing parties. Therefore, the COA vacates the retroactive child support judgment and remands it for trial court to calculate the judgment from the date the petition was filed.

## **ISSUE: Child Support Modification**

**Carter v. Carter, No. M2014-02457-COA-R3-CV, 2016 WL 697348 (Tenn. Ct. App. February 19, 2016)**

Father of the child filed a petition to reduce child support and seeking relief from a requirement to pay \$150 in “additional support” for the daughter’s “extracurricular expenses,” on April 9, 2013, alleging a decrease in his income. Mother sought to have their daughter testify that it was her preference to spend zero days per month with her Father following her 18<sup>th</sup> birthday. The issue was not raised in the pleadings, therefore, the court did not believe it to be fair to raise it at the hearing. As a result, the court denied Mother’s request for the daughter to testify as to the visitation she anticipated exercising in the future after her 18<sup>th</sup> birthday. Although the court gave Mother the opportunity to make an offer of proof, Mother did not make an offer of proof at trial.

The hearing commenced in July 2014; two weeks before the child’s eighteenth birthday. The Court determined it would calculate monthly support both retroactive and prospective based on the number of days allocated each party in the existing parenting plan. Did the court identify and apply the appropriate legal principles? The COA said yes, it did. (NOTE: in other case law, the COA has ruled that the courts are to use actual parenting time being exercised; not necessarily what is set out in a parenting plan and certainly not what is anticipated in the future.)

The courts do not address future events that may or may not occur as anticipated. Parenting time is modified when a material change of circumstances has occurred; not when it might occur. Tenn. Code Ann. § 36-6-101(a)(2)(C).

On September 5, 2014, the trial court entered an order finding a “significant variance between the amount of monthly support being paid and the amount due as set forth by the Tennessee Child Support Guidelines and modified Father’s support obligation to \$1,044 per month retroactive to the date Father filed the petition. The retroactive modification resulted in a judgment against the Mother for \$8,336. The court declined to eliminate Father’s \$150 monthly payment of “additional support.”

The Mother filed a motion to alter or amend, arguing that Father’s child support obligation should be recalculated using zero days of parenting time with Father based on the visitation the child would have once she turned eighteen years old in August, 2014. The trial court denied her motion and Mother appealed.

COA ruling:

The trial court’s decision was affirmed.

## **ISSUE: Child Support Termination; Disabled Child**

**Gregory v. Gregory, No. M2015-01781-COA-R3-CV, (Tenn. Ct. App. June 2016)  
Chancery Court for Rutherford County**

The parties were divorced in 2009 after a marriage of 23 years and had one child born of the marriage. At the time of the divorce, the child had epilepsy. After divorce in 2009, Father of child filed a petition to terminate child support on July 3, 2013, alleging that there had been a substantial and material change of circumstances in that the child (twenty-one years old) no longer lived with Mother, but in a group home and received Social Security benefits, relieving Mother's need for child support. The original divorce agreement stipulated Father pay \$865 per month in child support for an "indefinite period" due to the court's finding that the child was "severely handicapped." The December 2010 order stated that the parties agreed that Father's child support obligation would continue until child turned twenty-two years of age due to her being "disabled" and would be reviewed to determine whether it should continue at that time.

On August 10, 2013 Mother of child filed an answer and counter-petition denying that there had been a material change of circumstances or that child did not live with her. The Chancery Court entered an order on January 24, 2014 clarifying that the burden was on Mother to show severe disability and that the child remained under her care and supervision. The order referenced the December 2010 order setting child support, but misstated that order in noting that "child support would continue after eighteen years of age," rather than until the age of twenty-two. As a result of the parties filing numerous motions the matter was continued until January 2015.

A hearing commenced in January 2015 wherein the court ruled accepted evidence from a doctor that the child was "severely disabled pursuant to T.C.A. § 36-5-101(k)(2) and that the child is living under the care and supervision of Mother. The court concluded the fact that child stays in a group home several days per week "does not constitute a problem." Finally, the court found that Father is financially able to continue to pay his child support obligation and ordered that support to continue until "such a time as Stephanie is able to live independently...." Father appealed.

Father asserts that the trial court erred in finding the child severely disabled and continuing Father's child support obligation.

The court quoted Tenn. Code Ann. §36-5-101(k)(1) which states that except as provided in subdivision (k)(2), the court may continue child support beyond a child's minority for the benefit of a child who is handicapped or disabled, as defined by the Americans with Disabilities Act, until such child reaches twenty-one years of age. Subdivision (k)(2) further provides that such age limitation shall not apply if such child is severely disabled and living under the care and supervision of a parent and the court determines that it is in the child's best interest to remain under such care and supervision and that the obligor is financially able to continue to pay child support. While there is no statutory definition of "severely disabled,." The courts have addressed this in case law and have found that the determination of whether a particular person is "severely disabled" requires an individualized assessment of how that person's physical and mental impairments affect his or her ability to live independently. However, the court found that the

child is severely disabled based on a review of the record. With respect to Father's child support obligation the court ruled that the child is living "under the care and supervision" of her mother as required by the statute and affirmed the trial court's order continuing Father's child support obligation and she is not capable of living independently.

COA ruling: Trial court's ruling affirmed.

### **ISSUE: Disabled Adult Child Void Order for Child Support**

#### **Catalano v. Woodcock, No. E2015-01877-COA-R9-CV, (Tenn. Ct. App. July 5, 2016) Knox County Circuit Court**

Parties were divorced in 2001 by Mother obtaining divorce via default judgment against Father. Parties had one 17 year old son at the time of the divorce who was legally blind and had been born with Down Syndrome. Mother stated in her divorce complaint that the Child was disabled and in need of permanent child support. The divorce decree "reserved" the issue of child support pending personal service of process of Father.

Father was never properly served. No motion for publication or affidavit regarding the reasons for publication appears in the record on appeal. Mother served Father by constructive notice by publication to the Father.

In 2013, Child Support Services filed a petition to set child support. Father filed a response arguing that pursuant to Tennessee Code Annotated § 36-5-101(k), the trial court could exercise subject matter jurisdiction to "continue" child support for an adult disabled child only if support had been set by order prior to the Child's reaching the age of majority.

Following a hearing, the child support magistrate recommended that the trial court consider the reservation of child support to be a prior child support order and find that it could exercise jurisdiction to set child support. The magistrate declined to set the amount of Father's child support obligation. On appeal, the trial court judge affirmed the magistrate's recommendation. Upon the father's application, the trial court and appellate court, respectively, granted permission for interlocutory appeal pursuant to Tennessee Rule of Appellate Procedure 9.

The magistrate also found that in reserving the child support obligation pending personal service of process upon Father, the divorce court had entered an order regarding child support and thereby preserved Mother's right to pursue child support. In findings and recommendations entered on January 23, 2015, the magistrate declined to set the amount of Father's child support obligation, noting that Father's appeal to the trial court judge was anticipated. Father appealed.

Father contends that the trial court erred by finding that the 2001 divorce judgment reserving child support was a valid child support order. Father argues that because no valid child support order was in place prior to the Child reaching majority, the trial court does not now have subject matter jurisdiction to set ongoing child support or award support retroactively.

**COA concluded that the divorce court lacked personal jurisdiction over Father to enter a child support order with the divorce judgment; therefore no prior child support exists in this case.** The Supreme Court has explained that in order to adjudicate a claim, a court must possess both subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction relates to the nature of the cause of action and the relief sought and is conferred by the sovereign authority which organized the court. Personal jurisdiction, by contrast, refers to the court's authority to adjudicate the claims as to the person.

**A judgment rendered by a court lacking either personal or subject matter jurisdiction is void.**

Regarding the process by which a court obtains personal jurisdiction over a defendant, the Supreme Court has explained that a court obtains personal jurisdiction over a party defendant by service of process. A judgment rendered against a defendant in any kind of a case, when process has never been served on him...*in the way provided by law*...is clearly void.

Tennessee Rule of Civil Procedure 4.08 provides: "In cases where constructive service of process is permissible under the statutes of this state, such service shall be made in the manner prescribed by those states, unless otherwise expressly provided in these rules." There are exceptions to personal service, but the **procedures have to be followed meticulously.**

The record before the COA contains no statement made under oath or by affidavit that service of process had been attempted on Father at his usual place of abode or last known residence and the record contains no statement made under oath or affidavit delineating facts supporting the allegation that Father was no longer in the state. Therefore, any portion of the divorce court's judgment related to the child support was void because the divorce court lacked personal jurisdiction over Father.

Subject Matter Jurisdiction: The State did not dispute Father's argument that because the applicable statute provides for child support to "continue" beyond the age of majority for a severely disabled adult child, the trial court can only exercise subject matter jurisdiction to enter a child support order in this case **if a prior child support order exists.** In applying T.C.A. Section 36-5-101(p)(2), a trial court has the authority to "continue child support" for a severely disabled child only where an order awarding support was entered when the child was a minor, or as a modification of any other valid child support order.

#### **COA Ruling:**

**The COA concluded that any portion of the divorce court's judgment related to child support was void *ab initio* because the divorce court lacked personal jurisdiction over Father. The trial court lacked subject matter jurisdiction to set Father's child support obligation because no prior child support existed. Therefore, COA vacated the trial court's findings and dismissed the State's petition to set support.**

### III. MISCELANEOUS ISSUES

#### A. Debit Cards / Child Support Payments.

In 2011, the Tennessee Department of Human Services contracted with J. P. Morgan / Chase Bank to issue debit cards to child support recipients as the sole method for receiving child support payments. That contract has ended as of July 2016 and not renewed as J. P. Morgan / Chase is leaving the pre-paid debit card business.

The new contractor with DHS is **Xerox State and Local Solutions**, which is issuing MasterCard debit cards through **Comercia Bank**. Xerox is not new to the pre-paid debit card business as it has 29 contracts to provide this service in 22 states and it also provides debit cards to the United States Treasury Department.

Xerox began issuing the **Tennessee “Way2Go”** debit cards on June 23, 2016, and no more funds have been deposited into the existing J. P. Morgan accounts after July 19, 2016. The new cards will have to be activated before use and anyone who has not received the new card, or has not activated the WaY2Go card, will receive paper checks during the conversion period.

Funds deposited into the J. P. Morgan / Chase account **WILL NOT TRANSFER** to the Xerox “Way2Go” card. So it is in the best interest of the child support recipient to retain the J. P. Morgan card until all funds have been withdrawn.

To protect personal privacy the State of Tennessee will not have access to card numbers or transaction information.

Only the State of Tennessee can make deposits to the debit card accounts.

The custodial parent will not receive monthly transactions statements in the mail; however, statements will be mailed out upon request. Balances can be obtained by using the **Way2Go Card** app for smartphones, or on line at [www.GoProgram.com](http://www.GoProgram.com) .

Card holders will be able to access funds free of charge at any of 132,292 Pint of Services (POS) locations, or at any of the 2,048 MasterCard member banks.

**B. Converting Non-Monthly Child Support Amounts to Monthly.**

This is something that would appear to be simple, but many times existing orders come into the child support office where one has to ask the question; how did they compute this?

The Income Shares worksheet is programed to compute a **monthly** child support obligation and the DHS accounting system is structured around the basic monthly obligation. No doubt in an effort to accommodate differing payroll structures, courts will often set payments on a weekly, bi-weekly (every two weeks), or semi-monthly basis. Since this causes some difficulty for the Tennessee Child Support Enforcement System (TCSES) computer to follow, DHS has directed the Local IV-D offices to convert all child support obligations to a monthly basis. This should not cause any difficulty to employers complying with wage assignment orders in as much as the administrative wage assignments issued by DHS break down the monthly obligation into versions that fit a variety of payroll schedules.

Issues arise when, for instance, a weekly obligation is converted to monthly. Often people will just multiply the obligation amount by four and assume that is the monthly obligation. This doesn't work, as there are not an even four weeks in each month, there are 4.33 weeks per month. This is the method that DHS requires us to use:

Weekly obligation of \$500.00  
\$500.00/wk x 52 wks/yr = \$26,000.00 yr  
\$26,000.00/yr ÷ 12 mos/yr = \$2,166.66/mo (round up to the nearest 1¢, or \$2,167/mo)

This formula works for any payroll schedule as you start by multiplying the obligation by the number of pay periods per year:

Weekly.....	52
payments per year	
Bi-Weekly (every two weeks).....	26 payments
per year	
Semi-Monthly .....	24
payments per year	
Quarterly .....	4
payments per year	

### **C. TERMINATION OF MARRIAGE & NON-PARENTAGE**

A recurring issue is that of the divorce decree that says that the husband is not the father of a child born during the term of the marriage, that says that no children were born of the marriage when a child or children were born during the term of the marriage, or is simply silent on the issue.

T.C.A. § 36-2-304(a)(1) creates a presumption that if a child is born during the marriage or within 300 days of the termination of the marriage, the husband is presumed to be the father.

T.C.A. § 36-5-101(m) provides in pertinent part that any:

“ ... finding of fact or conclusion of law in a final decree of divorce or annulment or other declaration of invalidity of a marriage that provides that the husband is not the father of a child born to the wife or within three hundred (300) days of the entry of the final decree ... **shall have no preclusive effect, unless scientific tests to determine parentage** are first performed and the results of the test that **exclude the husband from parentage of the child or children, or that establish paternity in another** are admitted into evidence.”

(Emphasis added.)

Please note that substantially similar language is found in the aforementioned section 36-2-304 as codified at T.C.A. § 36-2-304(b)(4).

Essentially this means that if the husband is truly not the father of a child born during the term of a marriage in order for the divorce or annulment to hold up you need to:

1. Acknowledge the child's existence in the order.
2. Have DNA parentage testing performed either on the husband or the biological father (if that is another individual), reflect the results in the order, and attach a copy of the lab results to the order as an exhibit.

**Note: Do not use results from a DNA test kit that can be purchased at the pharmacy and then is mailed in to a laboratory for the tests to be conducted.** These kits' results will not be admissible under the Rules of Evidence in as much as there will not be a chain of custody from the point of taking of the samples to the biologist who performs the tests. Also, there will be questions of whether or not proper protocols are observed in the taking of the samples and the identities of the persons from whom the samples were obtained.