IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 2, 2008[1] Session

# KENNETH MELVIN HOMMERDING v. JULIE ANN HOMMERDING

**Direct Appeal from the Chancery Court for Coffee County**
**No. 04-119 L. Craig Johnson, Chancellor**

---

**No. M2008-00672-COA-R3-CV - Filed June 15, 2009**

---

This dispute arises from the parties' post-divorce contempt petitions. Julie Ann Hommerding ("Wife") argues that her ex-husband, Kenneth Melvin Hommerding ("Husband") should be held in contempt for violating their divorce decree. She claims that Husband failed to give her property awarded to her in the divorce and that Husband violated the trial court's order not to have overnight visitors of the opposite sex when the children were present. Both parties argue that the trial court erred in calculating Wife's income and setting her child support obligation. In addition, Wife claims that the trial court erred by denying her post-judgment interest on the money awarded to her in the divorce. We reverse in part, affirm in part, and remand to the trial court for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in part; Reversed in part; and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Robert L. Huskey, Manchester, Tennessee, for the Appellant, Julie Ann Hommerding.

Eric J. Burch, Manchester, Tennessee, for the Appellee, Kenneth Melvin Hommerding.

---

[1]Oral argument was heard in this case on December 2, 2008. By order of April 8, 2009, this Court noted that both parties had asked the court below to award them their reasonable attorney's fees and it appeared that the trial court did not address attorney's fees. Therefore, the Appellant was given ten (10) days to show cause why this appeal should not be dismissed for failure to appeal a final order. The response was a stipulation of counsel wherein counsel for the respective parties stated that they interpreted the trial court's failure to rule upon the request for attorney's fees as a denial. By order of April 17, 2009, this Court stated that it had again reviewed the record and it was clear that the trial court did not address the issue of attorney's fees. However, the Court stated that, since this matter had been briefed and argued, the Court would entertain a motion to remand this matter to the trial court for entry of a final order. Should that not be done, the appeal would be dismissed. Such motion was made and granted. An order was entered in the trial court on May 7, 2009, denying both parties request for attorney's fees and a certified copy of that order was made a part of the record in this Court.

## OPINION

### Procedural History

On August 22, 2007, the trial court entered the Final Decree of Divorce. Among other things, the trial court allocated the following property to each respective party:

> 2. The [Husband] is awarded the marital residence. The [Husband] shall pay the [Wife] the sum of $33,979.90 for her equity in the marital home. The [Wife] shall sign a quitclaim deed conveying the marital home to the [Husband].
>
> . . . .
>
> 9. All items on Exhibit 8 are awarded to [Wife]. In addition, the [Wife] is awarded the riding lawn mower at her mother's residence, water bed canopy, rakes and shovel, Bose stereo turn-on thing, living room mirror, hallway mirror, free weights bar and bench, table saw, washer, dryer, good hammer, tape measure, nail gun, compressor, Bowflex bar, antique cabinet in the dining room, water bed, half the silverware, half the dishes, half the pots and pans, microwave, patio furniture (table and chairs and umbrella), and the barbeque grill.
>
> . . . .
>
> 12. [Husband] is awarded a judgment in the amount of $1,869.25 for child support arrears.
>
> 13. [Wife] will pay child support in the amount of $595 per month. This amount is calculated on the attached Tennessee Child Support Work Sheet, based on the [Husband's] income being $50,200.56 per year, or $4,183 per month; with the [Wife's] income being $49,920 per year, or $4,160 per month.
>
> 14. Given the amounts [Husband] owes to [Wife] and that [Wife] owes to [Husband], [Husband] owes [Wife] a total of $31,706.67.
>
> 15. Each party shall pay his or her respective attorney fees.

At the end of trial, the Court explained that neither party was to have overnight guests of the opposite sex when the children were present unless those persons were relatives or friends of the children; the court also stated "[a]nd by 'relatives,' I mean, obviously if you get remarried, then obviously your spouse can spend the night, but - - and no vacations or trips with the paramours and their children, whatever." The parties' two minor children were born January 12, 1997 and November 1, 1999.

In September 2005, each party filed a Motion to Amend the Final Decree of Divorce. Husband sought a change in child support obligations, additional back child support, and a water canopy bed that he claimed had sentimental value. The trial court modified the back child support Wife owed, but refused to otherwise modify the divorce decree.

On July 10, 2006, Husband filed a petition for civil contempt alleging Wife's failure to pay child support. Wife filed a counter-petition alleging that Husband should be held in contempt for the following reasons: (1) Husband still owed her $33,979.90 that the court ordered him to pay for her equity in the marital home; (2) Husband permitted his girlfriend to stay overnight while the children were in the home; (3) Husband had failed to refund her portion of the parties' joint tax refund; and (4) Husband failed to return various personalty the court awarded her in the divorce. Husband subsequently dismissed his contempt petition and filed a motion to increase child support. The trial court heard all of these matters together on November 2, 2007. The trial court denied Wife's claim for post-judgment interest, held that neither party was in contempt, and modified Wife's child support obligation to $352.00 a month.[2] Wife filed a timely notice of appeal on April 2, 2008.

## Issues

As set forth in her brief, Wife raises the following issues on appeal:

(1) Did the Honorable Trial Judge wrongfully increase child support based upon an approximate or supposed income on funds from an inheritance?

(2) Did the Honorable Trial Judge wrongfully fail to find the original Plaintiff Kenneth M. Hommerding in contempt of Court for blatantly violating the Court's Order and directive about not exposing the children to overnight guests of the opposite sex?

(3) Did the Honorable Trial Judge wrongfully fail to hold Kenneth Hommerding in contempt of Court for refusing to return the Original Defendant her personal property awarded in the Divorce for its deteriorated condition?

(4) Did the Honorable Trial Judge wrongfully deny interest to Counter-Plaintiff Julie Hommerding on a judgment awarded to her by the Divorce Court against Kenneth Hommerding on July 7, 2005 which judgment was not paid until after the contempt action was filed against him and then was ultimately paid on April of 2007, a year and nine (9) months after the judgment?

[2] Father alleges in his Motion to Increase Child Support that on or about June 20, 2007, the State of Tennessee Child Support Receiving Unit unilaterally reduced Mother's child support obligation to $149.00 per month.

In his brief, Husband rephrases Wife's first issue as "whether the trial court erred by not including all the appellant's investment income as shown at trial, by not decreasing the number of days credited to her in setting the appellee's child support obligation, and not finding the appellant voluntarily underemployed?" We will consider Husband's issues concurrently with Wife's assertion that the trial court erred in increasing her child support. Husband also raises the issue whether he should be granted reasonable attorney fees at trial and on this appeal.

**Standard of Review**

Because the trial court adjudicated this case without a jury, we review the decision *de novo* upon the record and presume the correctness of the trial court's factual findings. Tenn. R. App. P. 13(d); *Fowler v. Wilbanks*, 48 S.W.3d 738, 740 (Tenn. Ct. App. 2000). We will not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence. *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000). For it to preponderate against a trial court's finding of fact, the evidence must support another finding of fact with greater convincing evidence. *Mosley v. McCanless*, 207 S.W.3d 247, 251 (Tenn. Ct. App. 2006). If the trial court's factual determinations are based on its assessment of witness credibility, this Court will not reevaluate that assessment absent clear and convincing evidence to the contrary. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). If the trial court fails to make findings of fact, however, our review is *de novo* with no presumption of correctness. *Archer v. Archer*, 907 S.W.2d 412, 416 (Tenn. Ct. App.1995). On the other hand, we review the trial court's application of law *de novo* with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). Similarly, we review mixed questions of law and fact *de novo*, with no presumption of correctness. *State v. Thacker*, 164 S.W.3d 208, 248 (Tenn. 2005).

**Child Support**

Trial courts have discretion to set the amount of child support within the strictures of the child support guidelines promulgated by the Tennessee Department of Human Services. *Hanselman v. Hanselman*, No. M1998-00919-COA-R3-CV, 2001 WL 252792, at *2 (Tenn. Ct. App. Mar. 15, 2001); *State ex. rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Accordingly, we review a trial court's decision involving child support for an abuse of discretion. *Kaatrude*, 21 S.W.3d at 248. In reviewing the trial court's decision we consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the trial court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. *Id.* We will not substitute our decision for that of the trial court simply because we would have chosen a different alternative. *Tait v. Tait*, 207 S.W.3d 270, 275 (Tenn. Ct. App. 2006).

A child support order may be modified if there is a significant variance between the amount of support currently ordered and that warranted by the child support guidelines. Tenn. Code Ann. § 36-5-101(g)(1). The child support guidelines define a significant variance[3] as

[3] This definition applies to orders that were established or modified January 18, 2005 or after.

> at least a fifteen percent (15%) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order or, if the tribunal determines that the Adjusted Gross Income of the parent seeking modification qualifies that parent as a low-income provider, at least a seven and one-half percent (7.5% or 0.075) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order.

Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(c).

### A. Calculating Wife's Income

#### i. Whether inherited account was held in trust

We first address Wife's argument that the trial court erred in calculating her income for child support purposes. In December 2005, Wife received over $200,000.00 upon the death of her mother ("Mother"). The money had been held in an investment account bearing both Wife and Mother's names. Wife contends that the money should not be included in calculating child support because she holds the money in trust for all of her Mother's grandchildren. Although Mother failed to execute any formal instrument establishing a trust, Wife testified that she had discussed the money with Mother, and based on Mother's request, Wife intended to grow the account for future generations. The trial court determined that the money belonged to Wife, imputed the accruing interest into Wife's gross income, and found that Wife's income had increased by $15,000.00 per year. On this basis, the court increased Wife's child support to $352.00 per month.

Pursuant to Tennessee Code Annotated §§ 36-5-101(e), 71-1-105, and 71-1-132, the Tennessee Department of Human Services promulgates rules and regulations regarding child support (hereinafter "the Guidelines"). *See Gallaher v. Elam*, 104 S.W.3d 455, 463–65 (Tenn. 2003). These regulations provide that the "[g]ross income of each parent shall be determined in the process of setting the presumptive child support order and shall include all income from any source (before deductions for taxes and other deductions such as credits for other qualified children), whether earned or unearned." Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(a). Interest income, dividend income and trust income are several of the various forms of income that should be included in child support calculations. Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(a)(ix)-(xi).

Wife claims that by virtue of her conversations with her mother, a resulting trust arose and the she only held the money as trustee with no personal interest in the account. A resulting trust arises

> from the nature of circumstances of consideration involved in a transaction whereby one person thereby becomes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law,

> although no intention to create or hold in trust has been manifested, expressly or be inference, and although there is an absence of fraud or constructive fraud.

*Estate of J.C. Queener v. Helton*, 119 S.W.3d 682, 687 (Tenn. Ct. App. 2003) (quoting *Rowlett v. Guthrie*, 867 S.W.2d 732, 735 (Tenn. Ct. App. 1993)). Thus, a resulting trust stems out of payment of the consideration by the trust beneficiary and not from the parties' agreement. *Smalling v. Terrell*, 943 S.W.2d 397, 400–01 (Tenn. Ct. App. 1996). The party seeking to establish the existence of a resulting trust can use parole evidence but must prove a resulting trust by clear, convincing, and irrefragable evidence. *Saddler v. Saddler*, 59 S.W.3d 96, 99 (Tenn. Ct. App. 2000). The general principle underlying a resulting trust is that a trust arises and attaches at the time a party purchases property in the title of another and does not arise out of any subsequent contract or transaction. *Smalling*, 943 S.W.2d at 400.

We find Wife's argument that she held the money in trust to be without merit. First, Wife's testimony implies that Mother expressly intended to create a trust. Second, there is no evidence that either Wife or Mother's grandchildren paid consideration for the account titled in Mother's name. Third, Wife already had an interest in the investment account when she discussed plans for the account with Mother. Finally, the evidence is insufficient to establish that the conveyance of the investment account to Mother was a trust.

**ii. Whether trial court erred in calculating Wife's income**

Husband also contends that the trial court erred in calculating Wife's income because it failed to include all of the interest earned on Wife's investment account. The trial court increased Wife's yearly income by $15,000.00, which reflected a five percent return on the investment account. The trial court applied this amount to Wife's income retroactively as of July 20, 2007. Husband claims on appeal that the trial court should have increased Wife's monthly income by $3,715.93 because that was the average monthly increase in the value of Wife's investment account over a 21 month period.[4]

The amount of the non-custodial parent's income is the most important element of proof in a proceeding to set child support and when considering modification of an existing support obligation. *Turner v. Turner*, 919 S.W.2d 340, 344 (Tenn. Ct. App. 1995). The Guidelines provide that "[g]ross income of each parent shall be determined in the process of setting the presumptive child support order and shall include *all income* from any source." Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(a). Although the Guidelines do not specifically list inheritance as a form of income, this Court has held that it is within the court's discretion whether to include the cash assets from an inheritance as part of the non-custodial parent's income. *Smith v. Smith*, No. M2003-02033-COA-R3-CV, 2005 WL 1384896 (Tenn. Ct. App. Dec. 19, 2005); *see Ford v. Ford*, No. 01A01-9611-CV-00536, 1998 WL 730201, at *3–4 (Tenn. Ct. App.Oct. 21, 1998) . In this case, however, we find that the trial court erred by increasing Wife's income by $15,000.00,

[4] Husband offered proof at trial that in the 21 months prior to trial Wife had earned $78,034.59 on the account. This is approximately a 36.2% return on her investment.

which the court anticipated Wife would receive in interest from the investment account. Although we find that the trial court erred in calculating Wife's income, we also disagree with Husband's assertion that the investment account increased Wife's income by $3,715.93 per month.

Wife testified at trial that she was unsure what type of investment account she owned; all she could say was that it was composed of stocks and bonds, and there was some confusion as to whether income tax was to be paid on the gains. Wife testified that after her mother's death, she gained control of two of her mother's accounts. It is unclear from the proof whether the accounts were payable to Wife upon her mother's death or whether Wife jointly owned the accounts with her mother.[5] Although Wife seemed uncertain about the characterization of the

---

[5] Wife testified in pertinent part as follows:

Q. Okay. Since your mother passed away, have you taken – well, first of all, in regard to that account, the one that Mr. Burch mentioned being $215,000, at the time of your mother's death, was some money added to that amount after, that your mother had otherwise?
A. Yes.
Q. Where did she have some other money?
A. At the same place.
Q. But in a different account?
A. Correct. It was like a – how she explained it to me, it was like a savings account. Like if she needed money for the doctor, if the car broke down, she needed to buy a car, this was money that she did not have to pay a stock person, because when you trade stocks you have to pay the person that does it. And this was money like in a money market that got very low interest, wouldn't go away.
Q. Okay. But it was accessible to her?
A. To my mother. Yes.
Q. Okay. And after she died, did you roll that over into the account that was long-term and the stock investments?
A. By my mother's wishes what to do. Yes.
Q. Okay. And so how much was that, that rolled in and was added to that?
A. I really couldn't tell you an exact amount. My guess is about 30,000.
Q. Okay. Now, have you, yourself added some money to that account?
A. Yes, I did.
Q. How much did you add to it?
A. Probably about 20,000.
Q. And where did you get the $20,000 you put in the account?
A. From Mr. Hommerding's money that he owed me.
Q. So you paid off the rest of the child support owed and then put the rest in that account to care for the kids?
A. Yes.
Q. Okay. Have you taken one penny out of that account since your mother died nearly two years ago?
A. Not one penny
Q. Have you been sent any interest statements or anything where you would have to pay tax on any of it?
A. No, sir. And I talked to Mr. Charlie this week, and he said the reason why I don't have them – because you asked me that – is because once the stock is sold, it's directly turned right back

(continued...)

two accounts she explained that when she inherited the largest account, it contained approximately $215,000.00 in stocks and bonds.[6]

---

[5](...continued)

into another stock.

Q. And so you are not having to pay any income tax on any of that?

A. I don't see any of it.

[6] Wife also testified as follows:

Q. Now, Ms. Hommerding, your mother passed away at the end of 2005, right?

A. Yes.

Q. And that account was in your name and her name at the time she passed away?

A. In case of death.

Q. And it went to you directly in December of 2005, right?

A. Right now it's in mine and my daughter's name in case of death.

Q. Ms. Hommerding, the account went directly to you, did it not? It's a yes or no answer.

A. Okay. If I was the only sole, living, normal child.

Q. It didn't have to go through probate, did it?

A. No. Because I was the only sole, living, normal child.

Q. Okay. So you had almost a quarter of a million dollars in December of 2005, right?

A. Not available, no.

Q. It went to your name only, right?

A. It's not available if you have to turn it in and pay money to get it through.

THE COURT: Okay. Ma'am, you will need to answer his question. Is it in your name only? I mean, he is not asking you about whether you report it for income tax purposes.

THE WITNESS: Okay.

THE COURT: He is asking you if the account is in your name only.

THE WITNESS: No. It's in my daughter's name, also.

THE COURT: Okay.

Q. (By Mr. Burch) In December of 2005 –

A. When my mother died, yes, it was in mine and her name.

Q. And I assume that you are testifying that you put it in your name and your daughter's name.

A. Correct.

Q. But you have got access to all of that money right now, don't you?

A. Not without my daughter's permission, also. We both have to sign.

Q. In 2005, you had access to all of that money, right?

A. I would say no. It's like a retirement fund. Do I have access to that?

Q. It's not a 401(k), is it?

A. I don't – it's stocks and bonds. I'm not very good with stocks and bonds.

Q. I understand you would have to pay income tax on the gain.

A. No. I don't have to pay income tax on it at all because I don't get any of the money. I guess I'm very confused.

Q. Okay. And can you tell us what that document reflects? [looking at Exhibit 3]

A. It's my mom's portfolio.

Q. Okay. And you have testified that you think there is more money than that, that she left you?

A. There was money that doesn't show in this portfolio. It was a money market or something as I understand it, like a savings account because she did not have medical – she did not have prescription drugs to be paid, and her prescriptions were expensive.

Q. Now you understood that I had subpoenaed you to bring all of the records related to her accounts, don't you?

(continued...)

Wife testified that she never withdrew money from the investment account, and from the account summaries, it is evident that Wife's investment account purports to be a brokerage account and that the investment account is not a saving or checking account.

Wife explained that her mother's second account was like a savings account or a money market account where her mother kept the money she did not invest. Wife guessed that there was approximately $30,000.00 in the money market account at the time of her mother's death. After her mother died, Wife deposited those funds into the investment account. In addition, she deposited approximately $20,000.00 that she received from Husband as part of the divorce into the investment account. Contrary to both parties' assertions, we are not certain that the increased valuation of Wife's investment account can be considered income at this time. An increase in the value of stock is properly identified as a capital gain. *See Alexander v. Alexander*, 34 S.W.3d 456, 463 (Tenn. Ct. App. 2000), *Smith v. Smith*, No. 01A01-9705-CH-00216, 1997 WL 672646, at *3 (Tenn. Ct. App. Oct. 29, 1997). The legislature included capital gains in the Guideline's non-exclusive list of earnings to be included in income for purposes of determining child support. Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(a)(1)(xiii). A capital gain, however, is only recognized upon the disposition of property; which in this case would likely be the sale of the

---

[6](...continued)

A. I did. That's what they sent me. It's at the same place.
Q. You couldn't get the money market statement?
A. This is all they sent me. I asked them for what happened when my mother died, and this was still, as you see, in her name, also.
Q. Yes.
A. In my mother's name. And then I showed you what they sent me as year-to-date.
Q. Okay. But you didn't send anything regarding the money market did you?
A. I asked them for what they had as her money and this is what they sent me. I answered that question.
Q. So how would we find out what was in the money market account if they don't have that?
A. I don't know. I guess I would have to call Mr. Charlie and ask him. I don't understand what this – yes. It's increased. I've added money to it and she had money in her – in a money market thing for her money. It all went into it.
Q. What do you do with the other statements between December, '05, and September, '07? Do you not keep those to show what was added to this account?
A. No.
Q. You just throw them away?
A. Pretty much, yes, because it's like something I don't have. I don't even consider having this. Just like I have a retirement fund, I don't consider having this.

stocks.[7] *See id.* A capital gain, therefore, is not generally income until it is sold or exchanged.[8] *See id.* This Court has explained that for purposes of calculating the non-custodial parent's income from the sale of stocks it is appropriate to prorate a capital gain over the entire period of time that a stock is held. *Id.*; *Smith*, 1997 WL 672646, at *3. In this case, however, Wife has not yet sold or disposed of any stocks. The account statements that reflect an increase in value of the stocks and bonds are speculative until Wife disposes of the stocks and bonds in the account and realizes the actual gain. Only then should the trial court consider the profit that Wife makes as part of her gross income for purposes of determining her child support obligation. *See Moore v. Moore*, 254 S.W.3d 357, 359–60 (Tenn. 2007). We find, therefore, that the trial court erred by including $15,000.00 in Wife's yearly income for what it incidentally anticipated to be Wife's yearly return on her stocks and bonds. Rather, we find that we cannot tell from the proof whether the investment account generates interest which is reinvested and which we deem would be income to Wife. Therefore, we deem it necessary to remand this matter to the trial court for the purpose of hearing additional evidence pursuant to Tennessee Code Annotated § 27-3-128 to determine the nature of the account.[9]

### B. Upward Deviation in Wife's Child Support Obligation

We next address Husband's assertion that the trial court erred because it did not increase Wife's child support obligation although Wife failed to exercise visitation. The Guidelines

---

[7] In *Alexander*, we acknowledged that it is logical to equate the term "capital gain," as it is in the guidelines with the definition adopted by the Internal Revenue Service. *Alexander v. Alexander*, 34 S.W.3d 456, 463 (Tenn Ct. App. 2000); *see also Eldridge v. Eldridge*, 137 S.W.3d 1, 22 (Tenn. Ct. App. 2002) (considering inclusion of a capital gain as it was reported on the husband's tax return). The Federal Tax Regulations explain that "[e]xcept as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized." 26 U.S.C. § 1001(c); *see also* 26 U.S.C. §1001(a)-(b).

[8] We have previously held that it is immaterial whether the non-custodial parent can withdraw such funds without penalty. *Narus v. Narus*, No. 03A01-9804-CV, 00126, 1998 WL 959839, at *3 (Tenn. Ct. App. Dec. 31, 1998). We stated

> it is immaterial that Father was age-eligible to make such withdrawals without penalty; the fact is that he was not making such withdrawals, and, hence, this IRA income was not part of his spendable income. In our judgment, the definition of income -and specifically the references to "dividends" and "interest" in that definition-is not intended to include income on an IRA that has not been taxed because it has not yet been withdrawn.

*Id.*

[9] Tennessee Code Annotated § 27-3-128 provides that

> The court shall also, in all cases, where, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight without culpable negligence, remand the cause to the court below for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right.

Tenn. Code Ann. § 27-3-128 (2000).

provide for an adjustment in child support based upon an alternate residential parent's parenting time with the children. Tenn. Comp. R. & Reg. 1240-2-4-.04(7)(b). Husband argues that the undisputed proof offered at trial was that Wife failed to exercise more than ten days of parenting time with the children. The trial court, however, held that it would not consider Wife's prior lack of visitation in regard to the calculation of child support.[10] Husband claims that the trial court should have increased Wife's Child Support obligations pursuant to the Department of Human Services Rules and Regulations 1240-2-4.04(I) because Wife spent less than sixty-eight days with the children.

The amount of support derived from a proper application of the formula in the child support guidelines becomes the presumptive amount of child support. Tenn. Code Ann. § 36-5-101(e)(1)(A)(2005); *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 1005). The presumptive amount of child support can be rebutted. Tenn. Code Ann. § 36-5-101(e)(1)(A) (2005); *Richardson*, 189 S.W.3d at 725. The trial court has the discretion to deviate from the amount calculated according to the child support guidelines. *Richardson*, 189 S.W.3d at 725. When it does depart from the Guidelines, however, it must make written findings regarding how the application of the Child Support Guidelines would be unjust or inappropriate. *Id.*; Tenn. Code Ann. § 36-5-101(e)(1)(A)(2005); Tenn. Comp. R & Regs. 1240-2-4-.07(1)(b).[11]

---

[10] The trial court warned:

> I will remind the parties that there is a visitation schedule in place and that if you continue not to abide by it, whoever's fault it has been, it will only be to your detriment and the children's detriment. However, up to this point I'm not going to hold that against you for child support purposes.
>
> From this point on, if there is not a good visitation relationship established with these children, in the future if you come back for child support, that will be held against you. You will lose those days in your child support worksheet. Your attorney can explain what I mean by that.

[11] The child support guidelines provide that:

> (b) The tribunal may order as a deviation an amount of support different from the amount of the presumptive child support order if the deviation complies with the requirements of this paragraph (1) and with this chapter. The amount or method of such deviation is within the discretion of the tribunal provided, however, the tribunal must state in its order the basis for the deviation and the amount the child support order would have been without the deviation. In deviating from the Guidelines, primary consideration must be given to the best interest of the child for whom support under these Guidelines is being determined.
>
> (c) When ordering a deviation from the presumptive amount of child support established by the Guidelines, the tribunal's order shall contain written findings of fact stating:
>
> 1. The reasons for the change or deviation from the presumptive amount of child support that would have been paid pursuant to the Guidelines; and
> 2. The amount of child support that would have been required under the Guidelines if the presumptive amount had not been rebutted; and
> 3. How, in its determination,
>
> (i) Application of the Guidelines would be unjust or inappropriate in the particular case before the tribunal; and
>
> (ii) The best interests of the child for whom support is being determined will

(continued...)

The Guidelines provide for an adjustment in child support based upon the amount of time each parent spends with the children. Tenn. Comp. R & Regs. 1240-2-4-.04(7)(h) & (i). The Guidelines presume that a child lives primarily with the primary residential parent and that the Alternate Residential Parent ("ARP") spends approximately eighty days per year with the child. Tenn. Comp. R & Regs. 1240-2-4-.04(7)(a). If the ARP spends less than sixty-eight days per year with the children, the "ARP's child support obligation may be increased for the lack of parenting time." Tenn. Comp. R & Regs. 1240-2-4-.04(7)(i)(1). This Court has previously explained that

> [t]he purpose behind increasing child support obligations based on lack of visitation is "not [based on] the reasonableness of the lack of visitation, but instead aimed at the protection of the best interest of the child . . . . [a]n increase in child support obligations based on a lack of visitation "reflects the economic realities faced by the obligee/custodial parent who, in addition to having a larger share of custody than contemplated. . . , also assumes a larger share of the financial burden in caring for the children."

*Mitchell v. Green*, No. W2005-01057-COA-R3-JV, 2006 WL 1472364, at *4 (Tenn. Ct. App. May 30, 2006) (internal citations omitted).

The evidence in this case was that Wife spent minimal time with the children in the year before the trial. Jan Hommerding, Husband's current wife, testified that the children have seen Wife less than ten times in the last fourteen months. Wife testified that she has only seen her children three times in the last fourteen months. Wife explained that Husband has made it difficult for her to schedule visitation with the children. She testified that she did not know where Husband lives and that Husband does not return her phone calls. Wife also testified that she cannot drive well at night.

The trial court failed, however, to make any findings, written or otherwise, why it failed to increase Wife's child support obligations according to the formula provided in Tenn. Comp. R. & Regs. 1240-2-4-.04(7)(i). The child support guidelines provide that "[t]he presumption that less parenting time by the ARP should result in an increase to the ARP's support obligation may be rebutted by evidence." Tenn. Comp. R. & Regs. 1240-2-4-.04(7)(i)(4). The trial court's only written finding, however, is that "[p]rior lack of visitation by [Wife] will not be considered in regard to the calculation of child support." Without making specific written findings, it was error for the trial court to deviate from the child support guidelines, and we reverse the trial court's decision. We remand this issue to the trial court to consider Wife's lack of visitation in calculating Wife's child support obligation. If the trial court deviates from increasing Wife's

---

[11](...continued)

be served by deviation from the presumptive guidelines amount.

Tenn. Comp. R. & Regs. 1240-2-4-.07(1).

obligation in accordance with Tenn. Comp. R. & Regs. 1240-2-4.04(7)(i) it must make written findings as required by Tenn. Comp. R. & Regs. 1240-2-4.07.

### C. Wife's Employment

Husband's final issue regarding Wife's child support obligation is that the trial court erred by failing to find that Wife was voluntarily underemployed. Husband argues that prior to the divorce, Wife had the ability to earn $75,000.00 per year. Wife is currently in school pursuing a certification as an MRI technican. Husband submits that while Wife is pursuing her MRI technician's certification, the trial court should impute income at the presumptive level of $29,300.00 per year, not including any income from Wife's investment account.

The trial court may impute additional gross income upon a parent where it has determined that parent to be willfully or voluntarily underemployed or unemployed. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2). Whether a parent is willfully or voluntarily underemployed is a question of fact and the trial court has considerable discretion in its determination. *Eldridge v. Eldridge*, 137 S.W.3d 1, 21 (Tenn. Ct. App. 2002). The Child Support Guidelines do not presume that any parent is willfully or voluntary underemployed. Tenn. Comp. R & Regs. 1240-2-4-.04(3)(2)(ii). Rather, the trial court should "ascertain the reasons for the parent's occupational choices . . . [and] assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children." Tenn. Comp. R & Regs. 1240-2-4-.04(3)(2)(ii). The Guidelines provide that a trial court may consider the following factors when determining whether a parent is voluntarily underemployed:

(I) The parents' past and present employment;

(II) The parent's education, training, and ability to work;

(III) The State of Tennessee recognizes the role of a stay-at-home parent as an important and valuable factor in a child's life. In considering whether there should be any imputation of income to a stay-at-home parent, the tribunal shall consider:

I. Whether the parent acted in the role of full-time caretaker while the parents were living in the same household;

II. The length of time the parent staying at home has remained out of the workforce for this purpose; and

III. The age of the minor children

(IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile) that appears inappropriate or unreasonable for the income claimed by the parent;

(V) The parent's role as caretaker of a handicapped or seriously ill child of that parent, or any other handicapped or seriously ill relative for whom that parent has assumed the role of caretaker which eliminates or substantially reduces the parent's ability to work outside the home, and the need of that parent to continue in that role in the future;

(VI) Whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the parent's obligation to support his/her children and, to this end, whether the training or education will ultimately benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future;

(VII) Any additional factors deemed relevant to the particular circumstances of the case.

Tenn. Comp. R & Regs. 1240-2-4-.04(3)(2)(iii).

In this case, Wife does not contest that she previously made $75,000.00 working as an MRI technician. She testified, however, that she has never been licensed as an MRI technician. She was previously permitted to work without a license, but once the law required her to become licensed, she lost her job. Wife testified that she is currently in school to obtain her X-ray technician/MRI technician license. At the time of trial Wife had nearly completed her X-ray certification and, thereafter, she could begin classes to obtain a MRI technician license. Wife testified that with only an X-ray technician license she could make $25,000.00 to $30,000.00 per year. In light of the trial court's discretion in this question of fact, we cannot say that the trial court erred by failing to find Wife voluntarily underemployed.

**Contempt**

Contempt proceedings lie within the sound discretion of the trial court. *Outdoor Mgmt., LLC v. Thomas*, 249 S.W.3d 368, 377 (Tenn. Ct. App. 2007). Thus, we will set aside a court's finding of contempt only if the court abused its discretion.[12] *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 610 (Tenn. Ct. App. 2006). Like the trial

[12] A party may appeal an acquittal in a civil contempt proceeding. *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 510–11 (Tenn. 2005).

court, we find that Wife's petition was to hold Husband in civil contempt.[13] Civil contempt is imposed for the benefit of a private party who has suffered a violation of his rights and is designed to coerce compliance with a court order. *Reed v. Hamilton*, 39 S.W.3d 115, 118 (Tenn. Ct. App. 2000).

A court's contempt power is statutory. *See* Tenn. Code Ann. §§ 29-1-101 to 108. There are four essential elements for civil contempt claims that are based upon an alleged disobedience of a court order: 1) the order alleged to have been violated must be "lawful" 2) the order alleged to have been violated must be clear, specific, and unambiguous, 3) the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order, and 4) the person's violation of the order must be willful. *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 354–55 (Tenn. 2008). Once it determines that these four criteria have been met, a court may fine or imprison the contemnor until the act is performed, but it remains within the court's discretion whether to hold a person in civil contempt. *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 511 (Tenn. 2005); *Konvalinka*, 249 S.W.3d. at 358. A court may only hold an individual in civil contempt where the individual has the ability to comply with the order at the time of the contempt hearing. *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000). In essence, a party in civil contempt holds the "keys to the jail" because he can purge the contempt by complying with the court order. *Overnite Transp.*, 172 S.W.3d at 511; *Ahern*, 15 S.W.3d at 79.

The trial court held that both parties had been in willful contempt because Wife had been in arrears on child support, Husband and children were living with Husband's girlfriend, and Husband had not provided Wife with all of her personal property. Nevertheless, the trial court determined that the parties had purged themselves of that contempt prior to the contempt hearing. The court found that Wife had brought her child support obligations up to date, that Husband had married his girlfriend three weeks before the hearing, that Husband had now provided Wife with the various personal property awarded to her, and that Wife had contributed to the decay of her personal property by not attempting to retrieve the items for several years.

On appeal, Wife asserts that the trial court erred by violating the trial court's directive not to expose the children to overnight guests and by violating the court's order to return Wife's personal property. Wife's argument on appeal focuses on Husband's blatant defiance of the trial court's orders, and both parties admit engaging in their contemptuous conduct. Husband admitted that he moved to Elora, Tennessee in August of 2006 and was residing there with his girlfriend at the time the contempt petition was filed. Husband also acknowledged that he took

---

[13] "[W]hether a contempt sanction is civil or criminal in nature 'turns on the character and purpose' of the sanction involved.'" *Robinson v. Fulliton*, 140 S.W.3d 304, 309 (Tenn. Ct. App. 2003). Wife filed her petition for contempt as a "counter petition" to Husband's civil contempt petition. Wife failed to characterize the petition as one for criminal contempt. She only sought the money Husband owed her and termination of Husband's living arrangements with his paramour or, alternatively, change in custody. Although Wife has continued to insist that Husband should be held in contempt even after he purged the contempt by marrying the live-in girlfriend, this fact alone is insufficient for us to conclude that Wife sought for Husband to be held in criminal contempt. *Cf. Robinson*, 140 S.W.3d at 309–11.

the liberty of giving Wife replacement items for some of the property awarded to Wife,[14] and that he delayed giving some property to Wife because he was still using it. Nevertheless, Wife does not dispute that Husband was in compliance with the court's order by the time of the contempt hearing; Husband had delivered Wife's personal property to her and married his girlfriend two weeks before the hearing. As we have already discussed, civil contempt is traditionally remedial and coercive in character. *State ex rel Anderson v. Daugherty*, 191 S.W. 974, 974 (Tenn. 1917). We find no merit to Wife's argument that Husband should be held in civil contempt where he was in compliance with the court's order at the time of the contempt hearing. We do not condone either party's behavior or their outright disregard for the divorce decree, but we cannot say that the trial court abused its discretion when it declined to hold Husband in contempt.

**Post-judgment Interest**

It is a question of law whether a trial court properly awarded or denied post-judgment interest; thus, our review of this issue is *de novo* with no presumption of correctness. *Vooys v. Turner*, 49 S.w.3d 318, 321 (Tenn. Ct. App. 2001). When it entered the Final Decree of Divorce on August 22, 2005, the trial court determined that Husband owed Wife a total of $31,706.67, the majority of which came from Wife's equity in the marital home. Although the trial court did not indicate when Husband was to make the payment, the August 22, 2005[15] Divorce Decree clearly stated that Husband owed Wife the thirty-one thousand as a cash award, not as an interest in equity. Husband did not pay this money to Wife until April 2007 when he sold the marital home. Nevertheless, the trial court denied Wife's request for post-judgment interest on the $31,706.67 because it found

> that the facts and equities in this case [did] not substantiate [Wife's claim] . . . [because she] was at least partially the cause for the Thirty-One Thousand Dollars ($31,000.00) not being paid timely . . . [and Wife] has also cost [Husband] some additional money due to her failure to follow through with the closing and

---

[14] For example, Husband testified that rather than giving Wife the waterbed that they had used during the marriage, he bought a water bed that he thought was of equal value and gave the new bed to Wife.

[15] In her brief, Wife asserts that she is entitled to interest from July 7, 2005, the day that the trial court orally announced its ruling. The court's written order on the Final Decree of Divorce was not entered until August 22, 2005. The court speaks, however, through its written orders and not through the transcript. *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001).

> A judgment must be reduced to writing in order to be valid. It is inchoate, and has no force whatever, until it has been reduced to writing and entered on the minutes of the court, and is completely within the power of the judge or Chancellor. A judge may modify, reverse, or make any other change in his judgment that he may deem proper, until it is entered on the minutes . . . .

*Broadway Motor Co., Inc. v. Public Fire Ins. Co.*, 12 Tenn. App. 278 (1930). *See also Blackburn v. Blackburn*, 270 S.W.3d 42, 49 (Tenn. 2008); *State v. Thompson*, 197 S.W.3d 685, 693 (Tenn. 2006) (post-judgment interest is calculated from the date that the judgment was entered, not the date of trial); *In re Estate of Ladd*, 247 S.W.3d 628, 647 (Tenn. Ct. App. 2007).

refinancing the property in question, and the fact she owed him a substantial amount of back child support.

The evidence at trial does not preponderate against the trial court's factual findings that Wife hindered Husband's attempt to refinance the house by refusing to sign a quitclaim deed on the property. Nor does the evidence preponderate against the trial court's finding that Wife owed Husband at least approximately $13,599.95 in back child support.

On appeal, however, Wife argues that the trial court erred by applying principals in equity and denying Wife post- judgment interest. Husband argues that Wife is not entitled to post-judgment interest because the trial court failed to award Husband post-judgment interest on Wife's child support arrears[16] and because Wife could have received the money sooner if she had cooperated when Husband attempted to refinance the marital home.[17]

Tennessee law generally requires the payment of post-judgment interest. *Vooys v. Turner*, 49 S.W.3d 318, 321 (Tenn. Ct. App. 2001). This includes interest on cash awarded in divorce proceedings. *Inman v. Inman*, 840 S.W.2d, 931 (Tenn. Ct. App. 1992). The applicable statute provides that "[i]nterest **shall** be computed on **every** judgment from the day on which the jury or the court, sitting without a jury, returned the verdict without regard to a motion for a new trial." Tenn. Code Ann. § 47-14-122 (2001)(emphasis added). Although we have articulated that the "purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant," this does not impose any equitable questions into post-judgment interest awards. *Bedwell v. Bedwell*, 774 S.W.2d 953, 956 (Tenn. Ct. App. 1989) (trial court erred by considering equitable issues when determining the rate of post-judgment interest)*; see Vooys*, 49 S.W.3d at 322. To the contrary, we have concluded on many occasions that post-judgment interest is mandatory. *State v. Thompson*, 197 S.W.3d 685,693 (Tenn. 2006); *Vooys*, 49 S.W.3d at 322. Unlike pre-judgment interest, the trial court does not have the discretion to consider matters of equity when awarding post-judgment interest. C*ompare Martin v. Martin*, No. W2008-00015-COA-R3-CV, 2009 WL 454009, at *11 (Tenn. Ct. App. Feb. 24, 2008)(*no perm. app. filed*), *and Vooys*, 49 S.W.3d at 321–22, *with Estate of Fetterman v. King*, 206 S.W.3d 436, 446–47 (Tenn. Ct. App. 2006).

Finding that the trial court erred in denying post-judgment interest on the $31,706.67, we reverse, and we remand this issue to the trial court for a determination of the amount of interest due to Wife.

---

[16] Husband does not raise this as an issue on appeal.

[17] The parties dispute whether Wife was told that she had to sign the deed for Husband to refinance before he could pay her.

## Attorney Fees

Finally, Husband argues that he should be awarded attorney fees on appeal. It is within this Court's sound discretion to award attorney fees on appeal. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). When considering a request for attorney fees on appeal, we consider the following various factors: 1) the requesting party's ability to pay such fees, 2) the requesting party's success on appeal, 3) whether the appeal was taken in good faith, and 4) any other equitable factors relevant in a given case. *Carpenter v. Carpenter*, No. W2007-00992-COA-R3-CV, 2008 WL 5424082, at * 16 (Tenn. Ct. App. Dec. 31, 2008)(*no perm. app. filed*) (citing *Davarmanesh v. Gharacholou*, No. 2004-00262-COA-R3-CV, 2005 WL 1684050, at *16 (Tenn. Ct. App. July 19, 2005)). Exercising our discretion, we decline Husband's request for attorney fees.

## Conclusion

For the foregoing reasons, we affirm in part and reverse in part. We affirm the trial court's judgment with respect to its determination that Wife did not hold the investment account in trust, that Wife was not voluntarily underemployed, and that Husband was not in contempt. We hold that the trial court erred by increasing Wife's annual income $15,000.00 based on estimated income from her investment account, and we remand this issue for further proceedings as may be necessary. We also find that the trial court erred by failing to consider Wife's lack of visitation in her child support obligation without making specific written finds regarding its deviation. In addition, we find that the trial court erred by failing to award Wife post-judgment interest on the money awarded to her pursuant to the divorce. We remand these issues for further proceedings consistent with this opinion. Costs of this appeal are taxed one-half to the Appellee, Kenneth Melvin Hommerding, and one-half to the Appellant, Julie Ann Hommerding and her surety, for which execution may issue if necessary.

_____

DAVID R. FARMER, JUDGE