

INTRODUCTION

When I attended the Judicial Academy in 1994, one of the most useful documents I received was a memorandum prepared by Judge Bill Swann that helped me make findings of facts and conclusions of law in regard to divorce cases. Over the years I have modified it somewhat, specifically in regard to alimony. With the help of Professor Janet Richards and Attorney Amy Amundsen, I have made some other additions.

Judge Don R. Ash

VI. CHECKLIST FOR FINDINGS OF FACTS AND CONCLUSION OF LAW IN REGARDS TO ALIMONY

On January 8, 2009, the Supreme Court of Tennessee submitted the following proposed amendment and advisory commission comment which will take effect July 1, 2009. The proposed amendment, as promulgated by the supreme court in its order dated January 8, 2009, will change the heading and the first sentence of Rule 52.01 to read:

“Findings Required. -- In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.”

The proposed 2009 Advisory Commission Comments will read:

“The heading and first sentence of Rule 52.01 are amended. No longer must counsel request the judge to make findings of fact and conclusions of law in nonjury trials.”

A. FINDINGS OF FACT (FINAL DIVORCE DECREE)

If counsel or a Court is drawing the Final Divorce Decree, it is essential to include findings of fact similar to the form set out below. Such a rendition will show the appellate court the trial judge considered all the relevant factors in making his or her ruling. It also provides a good checklist to follow during the trial.

(1) The husband earns \$ _____ monthly. He is employed by _____ and has been there _____ years. He expects to receive \$ _____ from his profit share, retirement plan, and/or social security at age _____.

The wife earns \$ _____ monthly. She is employed by _____ and has been there _____ years. She expects to receive \$ _____ from here retirement, profit sharing, social security at age _____.

(2) The husband has (H.S., college, M.D., etc.) He (does/does not) need additional education and training to improve his earning capacity. The wife has (H.S., college, M.D., etc.) She (does/does not) need additional education and training to improve her earning capacity. She plans to do this by (college, other.) This (will/or will not) rehabilitate the wife.

(3) The parties were married on the _____ day of _____, _____. At time of trial the parties had been married _____ years.

(4) Mr. _____ is _____ years of age. Mrs. _____ is _____ years of age.

(5) Mr. _____ is in (good/bad) health. He suffers from _____, that (does/or does not) affect his earning ability. Mrs. _____ is in (good/bad) health. She suffers from _____, that (does/or does not) affect her earning ability.

(6) It (is/is not) appropriate for (husband/wife) to work outside of the home because the parties have children, ages _____ and _____. The child support is set at \$ _____ monthly.

(7) The husband is awarded separate assets that totaled \$ _____. The wife was awarded separate property that totaled \$ _____.

(8) The husband is awarded marital property totaling \$ _____ or _____% of the marital estate. The wife is awarded marital property totaling \$ _____ or _____% of the marital estate. The total marital estate totals \$ _____.

(9) The standard of living for the parties shows they spent \$ _____ annually on themselves and their children. They accumulated total marital assets of \$ _____ over _____ years of marriage. The parties owned a home worth \$ _____. They owned automobiles worth \$ _____. They did/did not travel extensively.

They paid tuition for _____ children to attend college at _____ and _____. The parties were members of _____, _____, _____ and _____. They had an (active/inactive) social life. Their income and expense statements indicate the husband has obligations of \$ _____ a month. The wife has obligations of \$ _____ a month. These expenses are (reasonable/unreasonable.)

(10) The husband has contributed to the marriage his earnings for the duration of the marriage. The wife has contributed her earnings to the marriage and as a homemaker, she (has/has not) contributed to Husband's education, training and/or increased earning power by:

EXAMPLE 1: Working at Wal-Mart for 5 years while Mr. _____ obtained his college degree, thereby increasing his earning power, while sacrificing her own opportunity for advanced education. At age _____ it is not feasible or practical

that she can be further rehabilitated by education and/or training. She has encouraged, supported and given to the husband an opportunity that she will not have. Her prospects for earning are minuscule compared to his future earnings.

EXAMPLE 2: The parties have similar income producing opportunities, however, with 4 years college; the (husband/wife) could increase (his/her) opportunities for increased income. This would enable (him/her) to be self sufficient when child support ends in 6 years or even earlier.

(11) The relative fault of the parties (should/should not) be considered. The (husband/wife) committed adultery (or other fault ground) that led to, or significantly contributed to this divorce. The evidence supports this finding because _____.

EXAMPLE 1: (He/She) started dating Missy Wrong 1 year before the divorce. He flaunted this relationship by buying her a car, rings and taking her on overnight trips with him. To add insult to injury, he introduced her to his children as the next Mrs. Wright.

EXAMPLE 2: (He/She) abused (him/her) daily by insults and taunts of “stupid,” “whore,” “money grubber,” “shrew” and “wretch.”

(12) Other factors that the Court considers are as follows:

- (a) Tax consequences (elaborate)
- (b) Retirement accounts available (elaborate)
- (c) Retirement age (elaborate)
- (d) Age of children in the home (elaborate)
- (e) Child support amount (elaborate)
- (f) Allocation of debts (elaborate)
- (g) Attorney fees (elaborate)
- (h) Discretionary costs
- (i) Other discretionary matters, i.e. temporary debt, transitional moving expenses, travel expenses, private school expenses.

Upon consideration of all these factors, the Court awards:

- (a) Alimony *In Solido* \$ _____
- (b) Alimony *In Futuro* \$ _____ mo.
- (c) Rehabilitative \$ _____ mo. X _____ mos.

- (d) Transitional \$ _____ mo. X _____ mos.
- (e) Both A and B \$ _____
- (f) Both A and C \$ _____
- (g) Both A and D \$ _____
- (h) Attorney fees \$ _____
- (i) Discretionary costs \$ _____
- (j) No alimony

B. FACTORS FOR CONSIDERATION REGARDING SPOUSAL SUPPORT

The legislature has directed Tennessee courts to consider twelve factors in awarding spousal support [§ 36-5-121(i)].

YES/ NO

- ___ ___ (1) The relative earning capacity, obligations, needs, and financial resources of;
- ___ ___ (2) The relative education and training of each party, the ability and opportunity;
- ___ ___ (3) The duration of the marriage;
- ___ ___ (4) the age and mental condition of each party;
- ___ ___ (5) the physical condition of each party, including, but not limited to, physical;
- ___ ___ (6) the extent to which it would be undesirable for a party to seek employment;
- ___ ___ (7) the separate assets of each party, real and personal, tangible and intangible;
- ___ ___ (8) the provisions made with regard to the marital property as defined in § 36-4-121;
- ___ ___ (9) the standard of living of the parties established during the marriage;
- ___ ___ (10) the extent to which each party has made tangible and intangible contributions;
- ___ ___ (11) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and,
- ___ ___ (12) such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Alimony is appropriate when one spouse is economically disadvantaged relative to the other spouse. Audiffred v. Wertz, 2007 Tenn. App. LEXIS 453.

The court may consider four types of alimony scenarios when awarding spousal support: transitional alimony, rehabilitative alimony, alimony *in solido* and alimony *in futuro*. Transitional alimony is intended to be used to “close in the gap” or “adjust to the realities of the divorce,” but where rehabilitative alimony would not be appropriate. The concept of rehabilitation is intended to allow a spouse to achieve, with reasonable effort, an earning capacity to have a standard of living comparable to that of the marriage or that of the other spouse after the divorce. Alimony *in futuro* and alimony *in solido* are two forms of a long-term or more open-ended support. Broadbent v. Broadbent, 211 S.W. 3d 216 (2006). Whether the spousal support is to be alimony *in futuro* or alimony *in solido* is determined by either the definiteness (*in solido*) or indefiniteness (*in futuro*) of the sum of alimony ordered to be paid at the time of the award. Gillespie v. Gillespie, 2006 Tenn. App. LEXIS 801.

The Tennessee legislature has demonstrated a preference for an award of rehabilitative alimony to rehabilitate an economically disadvantaged spouse. The legislative purpose behind the preference for rehabilitative alimony is to rehabilitate a spouse to achieve, with reasonable effort, an earning capacity that achieves a standard of living comparable to that during the marriage or the standard of living expected of the other spouse after the divorce.

There is no absolute formula that must be followed, however, the Supreme Court in Aaron v. Aaron, 909 S.W. 2d 408 (Tenn. 1995), set out several guiding principles:

- (1) The real need of the spouse seeking the support is the single most important factor;
- (2) In addition to the need of the disadvantaged spouse, the courts most often consider the ability of the obligor spouse to provide support;
- (3) Further, the amount of alimony should be determined so that the party obtaining the divorce is not left in a worse financial situation than he or she had before the opposite party's misconduct brought about the divorce (Burlew v. Burlew, 40 S.W. 3d 465, 469 (Tenn. 2000) citing Aaron v. Aaron, supra); and,
- (4) While alimony is not intended to provide a former spouse with relative financial ease, we stress that alimony should be awarded in such a way that the spouses approach equity.

Thus, need, ability to pay, status, and fault are the primary considerations. Aaron v. Aaron, supra.

The cost of health care is a proper expense item to consider when awarding alimony. The court may order one party to obtain or maintain health insurance on the other spouse and may order payment of the premiums and health costs not covered. T.C.A. § 36-5-121(j). Jarvis v. Jarvis, 2000 Tenn. App. LEXIS 743.

One way to guarantee alimony payments is with life insurance on the life of the obligor. The court may order one party to designate the other party as beneficiary under existing policies. T.C.A. § 36-5-121 (k). The Court can also order the acquisition and maintenance of such policies.

C. TYPES OF ALIMONY

1. TRANSITIONAL ALIMONY

This type of alimony was created by T.C.A. § 36-5-121(g). It is to be used when rehabilitation is not necessary but one party needs assistance to adjust the economic consequence of a divorce.

- (1) Payable for a determinate period of time.
- (2) Terminates upon the death of the recipient.
- (3) Terminates on the death of payor (unless specifically stated) or upon some occurrence of other specifically stated conditions such as but not limited to remarriage of the party.
- (4) Unmodifiable except by agreement of the parties in an initial order; or by the court in an initial order; or if recipient lives with third person, then there is a rebuttable presumption that the third person is contributing or receiving support from the alimony.
- (5) Can be awarded with other types of alimony, except rehabilitative alimony.

ELEMENTS

- (a) One spouse is temporarily economically disadvantaged relative to the other spouse (T.C.A. § 36-5-121(g)).
- (b) One spouse needs funds to help “bridge the gap” from the time of the divorce to a certain time in the future.
- (c) Used to soften the “economic blow” of divorce.

CHECKLIST FOR TRANSITIONAL ALIMONY

YES/NO

___ ___ (1) The amount per month \$ _____

___ ___ (2) The rationale for the amount (must be read into the record)

___ ___ (3) The duration of the amount and rationale for duration

___ ___ (4) This transitional alimony shall terminate upon the death of the payor or remarriage of payee

___ ___ (5) This transitional alimony shall or shall not be modifiable.

Yes No

___ ___

2. REHABILITATIVE ALIMONY

The question is whether, in light of all the circumstances, can the spouse rehabilitate themselves to achieve, with a reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living during the marriage or to the post divorce standard of living expected to be available to the other spouse. T.C.A. § 36-5-121(e). If the answer to the foregoing question is negative, the court should award alimony *in futuro* unless the dependent spouse already has job security, in which case an award of alimony *in solido* or transitional alimony may be more appropriate.

(1) Rehabilitative alimony is designed to temporarily support the disadvantaged spouse for the amount of time it will take to rehabilitate the recipient to such an extent that he or she can achieve, with a reasonable effort, an earning capacity that will permit that spouses standard of living after the divorce to be reasonably comparable to the

standard of living or to the post divorce standard of living expected to be available to the other spouse.

(2) Rehabilitative alimony terminates upon the death of the recipient.

Rehabilitative alimony shall also terminate upon the death of the payor unless otherwise specifically stated. T.C.A. § 36-5-121(e).

(3) Rehabilitative alimony is subject to modification for the duration of the award upon a showing of substantial and material change in circumstances. T.C.A. § 36-5-121(e)(2).

(4) Rehabilitative alimony can be awarded with other types of alimony with the exception of Transitional alimony.

ELEMENTS

(a) One spouse is economically disadvantaged relative to the other spouse.

T.C.A. § 36-5-121(d)(2) and T.C.A. § 36-5-121(e)(1).

(b) After a limited amount of time through additional training or education, the disadvantaged spouse is likely to increase appreciably his or her earning power or ability to accumulate capital assets so as to remedy the existing economic disadvantage, relative to the other spouse. Smith v. Smith, 912 S.W. 2d 155 (Tenn. App. 1995), appeal denied.

(c) If rehabilitation of the disadvantaged spouse is feasible, then temporary, rehabilitative alimony should be awarded. T.C.A. § 36-5-121(d)(2).

(d) The factors used to determine if rehabilitation is feasible are among those set out in T.C.A. § 36-5-121(i).

(1) Education

(2) Employment history, and

(3) Standard of living during the marriage. Aaron v. Aaron, 909 S.W. 2d 408 (Tenn. 1995).

CHECKLIST FOR REHABILITATIVE ALIMONY

(1) The amount per month \$ _____

(2) The rationale for amount (*read into the record*) (Describe the standard of living the parties enjoyed during the marriage or the post divorce standard of living expected to be available to the spouse).

(3) The duration.

(4) The rationale for duration (*read into the record*)

(5) The rehabilitative alimony shall _____ or shall not _____ terminate upon the death of the obligor. (*check one*)

YES/NO

3. ALIMONY IN SOLIDO (LUMP-SUM ALIMONY) – T.C.A. § 36-5-121(H)

(1) Alimony *in solido* is designed to accomplish a stated result within a limited time and not be modifiable.

(2) It is a definite, fixed amount, payable in either lump sum or periodic payments.

(3) Can be awarded with other types of alimony, when there is property of which to award this alimony. T.C.A. § 36-5-121(d)(5).

ELEMENTS

(a) One spouse is economically disadvantaged relative to the other spouse. T.C.A. § 36-5-121(d)(2).

(1) After a limited amount of time the disadvantaged spouse will no longer be in need of support from the former spouse.

(2) The disadvantaged spouse has already attained job security and only needs support temporarily. Williams v. Williams, 2005 Tenn. App. LEXIS 567.

CHECKLIST

(1) The amount awarded \$ _____

(2) The payment schedule _____

(3) The property awarded

(4) The rationale for the award

YES/NO

4. IN FUTURO OR PERIODIC ALIMONY

The purpose of alimony *in futuro* is to provide financial support to a spouse who cannot be rehabilitated. Burlew v. Burlew, 40 S.W. 3d 465, 468 (Tenn. 2000).

(1) Alimony *in futuro* is designed to continue the support that was incident to the marriage relationship, and is appropriate when the spouse cannot be rehabilitated. Rehabilitated means to achieve, with a reasonable effort a comparable standard of living to that during the marriage or which the other spouse will enjoy after the divorce.

(2) It is for an indefinite amount, payable in future periodic installments, and contingent upon the death or remarriage of the recipient and possibly on the death of the obligor or other contingencies as imposed by the court or statute.

(3) The recipient shall notify the obligor of the remarriage timely upon the remarriage. Failure to give notice will allow the obligor to recover all payments made after the date of the remarriage.

(4) Although the total amount is indefinite, the periodic payments should be of a definite amount and are subject to modification (both as to arrearages and future payments), based on a showing of a substantial and material change of circumstances arising after the divorce and not foreseen at the time of the divorce. T.C.A. § 36-5-121(f)(2); Reagan v. Reagan, 1996 Tenn. App. LEXIS 779.

(5) If the recipient lives with a third person, a rebuttable presumption arises that the third

person is contributing to the support of, or receiving support from, the recipient and, therefore, the court should suspend all alimony obligations.

(6) Alimony *in futuro* can be awarded with other types of alimony, even Rehabilitative or Transitional. T.C.A. § 36-5-121(d)(4).

ELEMENTS

(a) One spouse is economically disadvantaged relative to the other spouse. T.C.A. § 36-5-121(f).

(b) Rehabilitation of the disadvantaged spouse is not feasible. T.C.A. § 36-5-121(f).

CHECKLIST FOR ALIMONY IN FUTURO

(1) The amount of the award \$ _____ per month;

(2) This award does ____ or does not ____ terminate upon the death of the obligor; (*check one*)

(3) Alimony shall terminate upon death or remarriage of the recipient [additional contingencies] (or _____, whichever occurs first);

(4) The court foresees the following at the time of this award, which facts will not justify a sufficient change of circumstances to support a petition to modify the current alimony award (i.e., retirement of obligor, earnings or increased earnings of recipient, adult child living in recipient's home, etc.)

YES/NO

ISSUES OF TAX DEDUCTION AND BANKRUPTCY

The court should make specific findings of fact indicating:

(1) whether the alimony payments will be includible as income to the recipient and deductible as alimony to the payor pursuant to IRS § 71(b);

(2) that the alimony is necessary for the support and maintenance of the spouse, and thus, not dischargeable in bankruptcy court; and.

(3) whether the award of attorney fees as alimony *in solido* is includible as income to the recipient and deductible as alimony to the payor pursuant to IRS § 71(b). Alimony is considered taxable income to the recipient under the provisions of the Internal Revenue Code. Conversely, the payor of alimony is permitted to claim a tax deduction under I.R.C. § 215 in an amount equal to the alimony or separate maintenance payments paid during the taxable year. However, in order for alimony payments to be deductible, the eight requirements of I.R.C. § 71 must be satisfied:

YES/NO

- ___ ___ (1) Payments must be made in cash;
- ___ ___ (2) Payments must be to a spouse or on behalf of a spouse;
- ___ ___ (3) Payments must be made pursuant to a divorce or separation instrument;
- ___ ___ (4) Payments may not be designated as non-qualifying alimony;
- ___ ___ (5) Spouses may not be members of the same household;
- ___ ___ (6) The payments must terminate upon the recipient's death; (typically alimony *in solido* does not terminate on death and is not subject to be includible as income to the recipient and deductible by the payor);
- ___ ___ (7) Spouses may not file a joint return; and,
- ___ ___ (8) Payments must not constitute child support.

YES/NO

___ ___

ADDITIONAL ORDERS TO BE CONSIDERED

(1) A lien is imposed upon the following items of marital real property of the _____ as security for the payment of the spousal support

_____.

(2) As additional alimony necessary for the support and maintenance of spouse, they shall pay the health insurance premiums for the for a period of months.

(3) As additional alimony necessary for the support and maintenance of spouse, they shall pay the attorney fees of \$ _____ in the amount of \$ _____ as the court finds

that the amount of attorneys fees are both reasonable and necessary. The amount of alimony is not dischargeable in bankruptcy.

(4) The obligor shall obtain and maintenance life insurance in the amount of \$ _____, naming the other spouse as beneficiary until the alimony is paid in full.

(5) The life insurance policy insuring the obligor's life shall be owned by the payee so that the premiums paid by the obligor is deductible as income for the payor.

(6) The alimony payment shall be made by wage assignment. T.C.A. § 36-5-501.