

**IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE  
AT NASHVILLE**

ROBERT HENRY Smith	)	
	)	
Defendant/Appellant,	)	
vs.	)	No.
	)	
MARY Johnson (Smith)	)	
	)	
Plaintiff/Appellee.	)	

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**BRIEF AND ARGUMENT OF THE APPELLEE  
MARY Johnson**

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**ORAL ARGUMENT REQUESTED**

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## **TABLE OF AUTHORITIES**

## INTRODUCTION

### MAY IT PLEASE THE COURT:

This is an appeal by Robert Smith from an Order of the Eighth Circuit Court for Davidson County, Tennessee, the Hon. Carol Soloman, presiding, terminating the Appellee, Mary Johnson's, alimony obligation to Robert Smith. The Appellee, Mary Johnson, submits that the Trial Court ruled correctly and that its Order should be affirmed by this Court upon review.

The parties will be referred to as Robert Smith or the Appellant and Mary Johnson or the Appellee. References to the technical record will be denoted by (T.R. Vol. \_\_\_ pg. \_\_\_). References to the transcript of evidence will be denoted (T.E. Vol. \_\_\_pg\_\_\_).

## **STATEMENT OF THE CASE**

The parties to this action were divorced in 1994. (T.R. Vol. 1 pg. 1) The Final Decree of Divorce incorporated the Marital Dissolution Agreement and was placed under seal. (T.R. Vol. 1 pg. 2)

On July 8, 2003, Mary Johnson filed a Petition to Suspend Alimony Obligation alleging in said Petition that since the entry of the Final Decree of Divorce, a material change in circumstances had occurred in that Robert Smith was living with another person and therefore was no longer in need of \$4,000 per month alimony being paid to him pursuant to the Final Decree of Divorce. (T.R. Vol. 1 pg. 4) Robert Smith filed an Answer denying the allegations of the Petition and maintained that he was neither living with another person, receiving support from another person, nor supporting another person. He further maintained that he continued to need the \$4,000 per month from Mary Johnson. (T.R. Vol. 1 ppg. 8-9)

On April 19, 2004, subsequent to hearing, the Trial Court suspended the alimony obligation of Mary Johnson pending final hearing. The Trial Court found that Robert Smith's termination of his counsel necessitated a delay in the final hearing and that suspension of the alimony obligation pending the final hearing was an appropriate remedy. (T.R. Vol. 1 pg. 28)

On July 6, 2004, the Trial Court heard the evidence presented in the matter and found that the alimony obligation should be terminated. The Court granted relief to Mary Johnson from the date of the filing of the Petition through the date of hearing and granted Mary Johnson a judgment against Robert Smith for \$36,000. (T.R. Vol. 1 ppg. 44-47)

Robert Smith filed a Motion to Amend Findings and Judgment pursuant to Rule 52 T.R.Civ.P on August 13, 2004 with ninety (90) pages of exhibits attached. (T.R. Vol. 1 ppg. 49-141) The Motion was denied by the Trial Court by Order entered September 17, 2004. (T.R. Vol. 1 pg. 144) Robert Smith filed his Notice of Appeal with the Circuit Court Clerk on October 18, 2004. (T.R. Vol. 1 pg 146).

### **APPELLANT'S ISSUES PRESENTED FOR REVIEW**

1. Can the Court enforce and/or modify the Marital Dissolution Agreement of the parties if the agreement is not incorporated and merged in the Divorce Decree?
2. Were the \$4,000 monthly payments a division of property or alimony?
3. Does the application of the statute T.C.A. §36-5-101(a)(3) require the suspension of the \$4,000 monthly payments to Husband?
4. Can the Court deny Defendant the right to make an offer of proof?
5. Did the Court improperly exclude Defendant's testimony about a directive or order given to Defendant by his attorney?

## STATEMENT OF THE FACTS

The Final Decree of Divorce was marked as Exhibit 1 to the proceedings. (T.E. Vol. 1 pg. 15).

Ms. Mary Johnson testified that the Final Decree of Divorce had been placed under seal after Robert Smith had bragged at the Belle Meade Club that he was receiving \$2 million dollars from Mary Johnson in the Divorce. (T.E. Vol. 1 pg. 21). The payments to Robert Smith were always understood to be alimony, taxable to Robert Smith and deductible by Mary Johnson. (T.E. Vol. 1 pg. 22).

Robert Smith and Mary Johnson were married in June of 1975 and divorced in August, 1994. Mary Johnson understood that the alimony obligation would terminate upon Robert Smith's remarriage or his living with another woman. (T.E. Vol. 1 pg. 22-23).

During the marriage, Robert Smith was a member of the Belle Meade Country Club but played very little golf. Robert Smith told Mary Johnson that he had trouble playing golf due to the shaking of his hands which resulted from his alcoholism. (T.E. Vol. 1 pg. 23).

On Friday, March 23<sup>rd</sup>, an advertisement appeared in *The Tennessean* advertising Robert Smith's condominium for sale. The advertisement listed a contact telephone number of Sally Jones. The advertisement was marked as Exhibit 2. (T.E. Vol. 1 pg 24-25). After seeing the advertisement in *The Tennessean*, Mary Johnson would from time to time call Robert Smith's telephone number at the condominium and would get only

his recorder. On one occasion she did speak with a person other than Robert Smith who advised that Robert Smith was not at home and would not return until Monday. This conversation occurred on a Friday. When asked how she could get in touch with Robert Smith, she was advised to call a number identified as Sally Jones's telephone number. (T.E. Vol. 1 pg. 28-29).

Mary Johnson next hired a private investigator, Ms. Janice Holt, to find out who was living at Robert Smith's condominium and to learn whether Robert Smith was residing with Ms. Jones in Bellevue. (T.E. Vol. 1 pg. 29).

When asked by Robert Smith's counsel whether she had any information to show that Ms. Sally Jones was supporting Robert Smith, Mary Johnson referred to the deposition testimony by Sally Jones in which she stated that she paid for everything at her house including groceries, the water bill, and any of the monthly bills. (T.E. Vol. 1 pg. 44).

Ms. Janice Holt testified that she is a private investigator operating a business known as Legal Legs. She is licensed in the State of Tennessee and has been a private investigator for ten years. (T.E. Vol. 1 pg. 46). In 2003, Ms. Holt was contacted by Mary Johnson and requested to see if she could determine where Robert Smith was living. Mary Johnson gave her various information about Robert Smith including the type of car he drove and where Mary Johnson suspected he was living, 937 General George Patton with Sally Jones. (T.E. Vol. 1 pg. 47-48).

Ms. Holt planned drive-by's of Ms. Jones's residence and Robert Smith's condominium at various times to determine where Robert Smith's car could be found. A list of the dates upon which surveillance was conducted and the results of the surveillance

were introduced as Exhibit 5. (T.E. Vol. 1 pg. 48-49). The summary offered into evidence by Ms. Holt listed dates and times when drive-by's were conducted of Ms. Jones's home, and Robert Smith's condominium. For eight consecutive days in April, 2003, Robert Smith's vehicle was observed at 937 General George Patton, in the late evening hours. On no occasion was his vehicle observed at his condominium during April, 2003. In May, 2003, Robert Smith's vehicle was observed on four occasions at Ms. Jones's home and on one occasion at Robert Smith's condominium. In all, the surveillance conducted from March 31, 2003 through June 30, 2004, Robert Smith's vehicle was observed on thirty occasions at the home of Sally Jones and seven occasions at Robert Smith's condominium. Of the seven occasions when Robert Smith's vehicle was observed at his condominium, six of the occasions were on Mondays.

One of the dates on which surveillance was conducted by Ms. Holt, October 8, 2003, Robert Smith's vehicle was observed at Ms. Jones's home at 6:46 a.m. This was also the date that Robert Smith's deposition was taken in this matter. (T.E. Vol. 1 pg. 53).

The NES records for Robert Smith's condominium were received into evidence and marked as Exhibit 7. (T.E. Vol. 1 pg. 67).

Excerpts from Robert Smith's deposition were then read into the record. At his deposition, Robert Smith acknowledged that he has not been employed since his Divorce from Mary Johnson in 1994 and that he plays golf three to five times per week. (T.E. Vol. 1 pg. 69-70). Robert Smith travels extensively, both in the Southeast and overseas, to the British Open. (T.E. Vol. 1 pg. 73-74). Robert Smith acknowledged that in April, 2003, Peter Ball moved into his condominium. (T.E. Vol. 1 pg. 75).

Robert Smith acknowledged that he became romantically involved with Sally Jones in 1995 following his Divorce from Mary Johnson. In 2000, he started staying in Sally Jones's home. He admitted that he spends all but one or two nights per week at Sally Jones's home. Additionally, he acknowledged that he does not provide money to Sally Jones nor does he purchase groceries. (T.E. Vol. 1 pg. 75-76).

In 2001, Robert Smith advertised his condominium for sale. He testified that he planned to move in with Sally Jones. He further testified that he took the condominium off the market on the advice of counsel. (T.E. Vol. 1 pg. 80).

Robert Smith acknowledged that two girls from Florida live in the condominium which adjoins his but that he has only met one of them during the six months they have lived there. Mr. Smith was unable to identify any of the other persons living in the condominium complex other than two individuals by their first names. (T.E. Vol. 1 pg. 81-82).

Robert Smith acknowledged that he had given various presents to Sally Jones including an \$800 bracelet and a trip to Florida. (T.E. Vol. 1 pg. 83). Robert Smith's day trading, taken up since his Divorce from Mary Johnson, has generated significant revenues as reflected in his investment accounts. (T.E. Vol. 1 pg. 84-89).

Robert Smith purchased a computer for \$1,259.78 for his personal use which he keeps at Sally Jones's home. (T.E. Vol 1 pg. 91-92).

Mr. Robert Smith testified that he is a life long resident of Davidson County and a member of the Belle Meade Country Club for 46 years. (T.E. Vol. 1 pg. 95). Robert Smith testified that he moved into Sally Jones's home in 2000 after having knee surgery. He

later moved various clothing and belongings into Sally Jones's home. (T.E. Vol. 1 pg. 99).

Robert Smith claimed to spend two to three nights per week at his condominium until 2003 when Peter Ball, a friend of his, rented half of the unit from him. Mr. Ball paid \$400 per month to Mr. Smith. (T.E. Vol. 1 pg. 100). Robert Smith claimed to continue to spend two to three nights per week at his condominium even after renting a portion of it to Peter Ball. (T.E. Vol. 1 pg. 102).

Robert Smith admitted that he gave no money to Sally Jones for rent, food, or for any other purpose except a loan given to her in late 2003 to allow her to buy a new home. The loan was in the amount of \$92,000 and was for a period of nine days. (T.E. Vol. 1 pg. 103-105).

Robert Smith admitted that in his deposition testimony he had testified that in March through August of 2003, he stayed at the home of Sally Jones every night of the week except Mondays. (T.E. Vol. 1 pg. 127-128).

Robert Smith placed his condominium on the market for sale so that he could move in with Sally Jones. He admitted that the condominium was taken off of the market for fear that he would lose his alimony. (T.E. Vol. 1 pg. 131-132).

Robert Smith admitted that while he and Ms. Jones did not divide the expense incurred for living at her home, Sally Jones purchased all of the food that the two of them consumed since he had been living there. (T.E. Vol. 1 pg. 133).

While denying that Sally Jones supports him, Robert Smith acknowledged that half of the expenses he claims to incur would be eliminated by the sale of the condominium,

and that the reason he has not sold the condominium is to preserve his alimony. (T.E. Vol. 1 pg. 134).

Despite the foregoing, Robert Smith continued to deny that he lived with Sally Jones (T.E. Vol. 1 pg. 137).

Robert Smith admitted that he plays more golf now than he did while married to Mary Johnson. (T.E. Vol. 1 pg. 140).

## **BRIEF AND ARGUMENT**

**I. Can the Court enforce and/or modify the Marital Dissolution Agreement if the agreement is not incorporated and merged in the Divorce Decree?**

### **STANDARD OF REVIEW**

Pursuant to Tenn.R.App.P. 13(d), review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise. Issues of law, however, are reviewed *de novo* without a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997); *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Mary Johnson submits that the Trial Court correctly determined that the Marital Dissolution Agreement in this case was merged into the Final Decree of Divorce and therefore enforceable and modifiable by the Court.

Robert Smith's argument in this issue is premised on his assertion that the Marital Dissolution Agreement was not merged into the Final Decree of Divorce. This is contrary to the evidence presented at the trial of this matter, including the express provision of the Final Decree of Divorce.

The Final Decree of Divorce marked as Exhibit One to the trial has the following provision in typed form: ". . . and the Court approves the Agreement and incorporates the same herein verbatim as follows:" The provision "and incorporates the same herein verbatim as follows:" is stricken and handwritten in its place is: "which is filed herewith and placed under seal by agreement of the parties." Mary Johnson has explained the purpose of this change to the typed Final Decree in her testimony to the Court. She requested that the terms of the Marital Dissolution Agreement be placed under seal because Robert Smith had bragged to his friends at the Belle Meade Club after reaching an agreement regarding the terms of the MDA but prior to the divorce being granted that Mary Johnson was paying him \$2 Million Dollars in the divorce. (T.E. Vol. 1 pg. 21)

The undisputed purpose of the striking of the language at page one of the Final Decree was to provide that the Marital Dissolution Agreement would be placed under seal, not to prevent it from being incorporated in the Final Decree. Page 2 of the Final Decree also refers to the incorporation of the Marital Dissolution Agreement in the Final Decree and there was no attempt to modify or delete that provision which states: "With permission of the Court, the Final Decree of Divorce incorporating this Agreement shall be placed under seal."

While Robert Smith's argument is a clever attempt to derail the Trial Court's authority to modify the alimony provision of the Final Decree, it is an argument that is simply not supported

by the evidence. Because Robert Smith's argument on this issue is premised on the alleged failure of the Final Decree of Divorce to incorporate the Marital Dissolution Agreement, his argument is without merit. The Trial Court acted correctly in finding that it had the authority to modify the alimony provision of the Marital Dissolution Agreement under T.C.A. §36-5-101 (a)(3).

## **II. Were the \$4,000 monthly payments a division of property or alimony?**

Mary Johnson submits that the Trial Court ruled correctly in finding that the provision of the Marital Dissolution Agreement imposing an obligation on Mary Johnson to pay Robert Smith \$4,000 per month for twenty years or until his death or remarriage was an alimony obligation subject to modification by the Court under the provisions of T.C.A. §36-5-101(a)(3) and not a division of marital property as urged by Robert Smith.

Robert Smith asserts in this issue that paragraph eight of the Marital Dissolution Agreement is a contractual provision requiring the payment of certain amounts to him but is not an alimony or support obligation.

Robert Smith bases his argument on the provision of paragraph eight of the Marital Dissolution Agreement which states: “For the support and maintenance of the Husband, and as a further division of the marital estate. . .” Because of this clause “and as a further division of the marital estate,” Robert Smith argues that the other provisions of the paragraph obviously making the payment of alimony should be ignored. Mr. Smith relies on the unreported case of **Hussey v. Hussey**, Court of Appeals, No. 01-A-01-9504-PB-00181( Tenn.App. 1996) for his position.

The facts in **Hussey** are distinguishable from the instant case. In **Hussey**, the Court found that although the awards in question to Wife were labeled alimony, it was clear that they were part of the division of marital property. Mr. Hussey agreed to a number of payment obligations to his Wife over the future years. While some of the payment obligations were terminable upon death or remarriage the portions that

Husband attempted to terminate in this proceeding was not stated in the PSA as being terminable upon remarriage. Additionally, the Court of Appeals identified express language in the PSA suggesting that Mrs. Hussey had given up her claim to vast amounts of marital property in return for Mr. Hussey's promise to make the future payments. These critical factors simply do not exist in this case. Here the provision at issue states as follows:

(8). PERIODIC ALIMONY: For the support and maintenance of Husband, and as a further division of the marital estate, Wife agrees to pay Husband the sum of FOUR THOUSAND DOLLARS (\$4,000.00) per month (\$48,000.00 PER YEAR) for a period of twenty (20) years or until Husband's death or remarriage, whichever is the first event to occur. The first payment shall be due on August 1, 1994, and a like sum on the first day of each month thereafter until this obligation is satisfied in full. ***This sum shall be tax deductible to Wife and taxable to Husband for purposes of filing their respective Form 1040 Federal Income Tax returns.*** (emphasis added)

Not only does the title to the paragraph clearly state that the payments listed thereunder are periodic alimony, the provisions for the tax reporting of the payments also clearly suggest that the payments are periodic alimony. It is noteworthy that payments that represent a division of marital property would not qualify for special tax treatment such as is called for in this provision.

Ironically, paragraph seven of the Marital Dissolution Agreement specifically dealt with the division of the marital estate (non alimony):

(7) DIVISION OF MARITAL ESTATE: As a further division of the marital estate, ***and in lieu of any claims which Husband has against Wife's property or estate***, Wife shall pay Husband the sum of ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000.00) cash, lump sum, due and payable within seven (7) days from date of entry of Decree. ***This sum shall not be taxable to Husband, nor deductible by Wife, for***

***purpose of filing their Form 1040 Federal Income Tax returns.***  
(emphasis added)

It was in paragraph seven of the Marital Dissolution Agreement that Husband accepted \$150,000 within seven (7) days to waive any claim to Wife's property, not paragraph eight (8). Additionally, the remaining terms of paragraph eight regarding being terminable upon death or remarriage and taxable to Husband while deductible by Wife cause this provision to meet all the definitional requirements of alimony *in futuro*.

The issue advanced by Mr. Smith has been previously addressed contrary to his position in the Supreme Court case of ***Waddey v. Waddey***, 6 S.W.3d 230 (Tenn. 1999).

***Waddey*** analyzed a claim by the former Wife that periodic alimony *in futuro* was modifiable after a contingency bringing about its termination had occurred. In discussing the forms of alimony under Tennessee law, the Court stated:

Whether alimony is *in futuro* or *in solido* is determined by either the definiteness or indefiniteness of the sum of alimony ordered to be paid at the time of the award. ***McKee v. McKee***, 655 S.W.2d 164, 165 (Tenn.App. 1983). Alimony *in solido* is an award of a definite sum of alimony. ***Spalding v. Spalding***, 597 S.W.2d 739, 741 (Tenn.App. 1980). Alimony *in solido* may be paid in installments provided the payments are ordered over a definite period of time and the sum of the alimony to be paid is ascertainable when awarded, *Id.* Alimony *in futuro*, however lacks sum-certainty due to contingencies affecting the total amount of alimony to be paid. ***McKee***, 655 S.W.2d at 165-166 (holding alimony was *in futuro* where husband was ordered to pay the mortgage note until either the son turned twenty-two or the house was sold). It is therefore clear that the duration of an award of alimony *in futuro* may be affected by contingencies agreed upon by the parties or imposed by courts.

***Waddey***, 6 S.W.3d at pg. 232.

In the present case, the amount to be paid by Mary Johnson to Robert Smith was not a sum certain. There were three contingencies that would dictate the ultimate amount

paid: death or remarriage of Robert Smith, or the passage of twenty years from the date of divorce.

The Supreme Court in **Waddey** dealt with exactly the same contingencies in the alimony obligation in that case. Mr. Waddey's duty to pay was limited by death or remarriage of Mrs. Waddey or it would otherwise terminate on March, 1, 1996, thirteen and one-half years following the divorce. The Court found that the uncertainty of the amount ultimately to be paid due to these contingencies left the obligation as one of alimony *in futuro* and subject to modification by the Court. *Id.*, at pg. 232-233.

Robert Smith cites various cases for the proposition that the Court should look to his claimed disparity in the division of the marital estate to determine his intent that paragraph eight be a division of marital property. While it is true that the Court should interpret the provisions of a Marital Dissolution Agreement as a contract, the mere fact that two parties disagree about the interpretation of a specific provision of a contract, does not create an ambiguity requiring intervention by the Court. *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data System, Inc.*, 884 S.W.2d 458 (Tenn.Ct.App. 1994). A contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one. A strained construction may not be placed on language used to find ambiguity where none exists. *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975) The Court in arriving at the intention of parties to a contract does not attempt to ascertain the parties' state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written. *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526, 530 (Tenn.Ct.App. 1981)

Despite Robert Smith's arguments to the contrary, the intent of the parties that the payments to Respondent be alimony *in futuro* is evidenced by the contract as written setting forth, Mary Johnson's obligation to pay "periodic alimony" in paragraph eight of the Marital Dissolution Agreement and the language describing the conditions attached to the obligation. The obligation assumed by Mary Johnson by agreement of the parties was to pay a specific amount each month with the ultimate amount to be paid subject to certain contingencies. These contingencies rendered the payments alimony *in futuro*.

It is noteworthy that while Robert Smith claims the provisions of paragraph eight of the Marital Dissolution Agreement to be a division of marital property and not alimony, his conduct during the period of living with Sally Jones stands in strong contrast to his position. He maintained his condominium as a sham residence out of fear that his alimony would be terminated if it was known he was living with Sally Jones. When he placed his condominium on the market for sale he quickly took it off the market after being advised by counsel that such a move could terminate his alimony. Such conduct is not consistent with a person who claims that it was the intent of the parties that the \$4,000 per month be a payment of his interest in the marital property as opposed to alimony.

The Trial Court correctly determined paragraph eight of the Marital Dissolution Agreement as an alimony in futuro provision over which the Court continued to have jurisdiction including the power to modify the alimony.

**III. Does the application of the statute T.C.A. §36-5-101 (a)(3) require the suspension of the \$4,000 monthly payments to Husband?**

Robert Smith's argument on this issue is premised on his continuing position that he did not "live" with Sally Jones and therefore T.C.A. §36-5-101 (a)(3) should have not been applied to the alimony obligation. This position is contrary to the finding of the Trial Court and the overwhelming weight of the evidence.

It is the position of Mary Johnson that after becoming romantically involved with Sally Jones, Robert Smith began living with her at her home. The evidence considered by the Court and supporting the Court's conclusion included:

1. Robert Smith testified in his deposition and read into the record that since 2000, he spends all but one or two nights per week at Sally Jones's home. (T.E. Vol. 1 pg. 76, 127, 132-133)

2. Janice Holt, private investigator, testified that of the thirty-seven occasions when surveillance was conducted on Robert Smith, his vehicle was found at the home of Sally Jones on thirty of those occasions. On six occasions, Robert Smith's vehicle was observed at Robert Smith's condominium and each of these occasions was a Monday. (Exhibit 5 and T.E. Vol. 1 pg. 49, 52-53, 56-57)

3. Robert Smith admitted that despite staying at Sally Jones's six to seven nights per week, he pays none of the expenses associated with the maintenance of Sally Jones's home. (T.E. Vol. 1 pg. 77, 133-134)

4. Robert Smith testified that despite “living” in his condominium for twelve years, he knows only one or two of his neighbors. (T.E. Vol. 1 ppg. 81-82)

5. Robert Smith purchased a computer for himself which he keeps at Sally Jones’s home. (T.E. Vol. 1 ppg. 91-92)

6. Robert Smith moved some of his personal belongings to Sally Jones’s home. (T.E. Vol. 1 pg. 99)

7. Robert Smith testified that he averages having approximately ten meals per week at Sally Jones’s home. His other meals are eaten at the Belle Meade Club or Wendell’s on Charlotte Ave. (T.E. Vol. 1 ppg. 105-106) (He testified of no meals which he consumes at his condominium).

8. Robert Smith placed his condominium on the market for sale, but on the advice of counsel, withdrew it from the market out of concern he might lose his alimony. (T.E. Vol. 1 ppg 131-132)

The leading case on this issue appears to be *Azbill v. Azbill*, 661 S.W.2d 682 (Tenn.App. 1983)(perm. app. denied).

At the time the *Azbill* case was decided, Tenn. Code Ann. §36-820(a)(3) was the statutory citation for the current statute. The statute is now codified as Tenn. Code Ann. §36-5-101(a)(3).

In *Azbill*, the Court of Appeals stated:

In the case before us, while the wife and Mr. Bell denied that Mr. Bell resided in the home of wife, the record indicates that he was there daily, had a key, came in and out as he pleased, had clothes and toilet articles in the house, and at least on four different occasions spent the entire night in the home. All of this evidence was in the face of the unequivocal testimony of the wife and of Mr. Bell that he did not and had not spent the night at the home and did not have any clothing or toilet articles there...

. . . Under the record before us we cannot say that the evidence preponderates against the finding of the trial court that the wife and Mr. Bell were living together within the meaning of Tenn. Code Ann. §36-820(a)(3). Once this finding is made, it is incumbent upon the alimony recipient to then show by the greater weight or preponderance of the evidence that he or she needs the amount of support previously awarded. The record does not indicate that the wife in this instance carried this burden. . .

. . . On the contrary, the record merely reveals that the wife and Mr. Bell are living together, thus creating the rebuttable presumption that the alimony recipient does not need the amount of support previously awarded. The record does not contain evidence rebutting this presumption and accordingly the entire amount of alimony should be suspended as of the date of the filing of the petition. . .

*Azbill* at pg. 686-687

In *Whiteside vs. Whiteside*, No. 03A01-9707-CV-00272, unreported, 1998 WL 237715 (Tenn.App.1998), a copy of which is attached, the trial court found that the wife was living with a third person pursuant to Tenn. Code Ann. §36-5-101(a)(3) on evidence similar to that found in this record and accepted by the Trial Court.

When asked why he stopped the alimony payments after the November 15, 1996 payment, the Husband replied, "I just felt that it was not fair for me to pay money to her when someone else was living in the house." He testified that he had called Wife's house on several occasions and a man answered each time, that he had driven by Wife's house on Hamilton Mill Drive at various times in the mornings and afternoons on 15 or 20 occasions and he had seen Norwood's car parked there. Norwood drove a red or burgundy Lincoln Continental. He had seen Norwood leave her house three or four times at around mid-morning.

*Whiteside* at pg. 2.

After a thorough and careful review of the record, we cannot say that the trial court abused its discretion in finding that the Wife, Jacqueline Whiteside, was living with a third person, Thomas Norwood, within the intendment of T.C.A. §36-5-101(a)(3). We agree that the evidence preponderates overwhelmingly in favor of the Court's factual finding in this regard. . . . There is no evidence in the record that compels a contrary conclusion. We affirm the trial court. This finding raises the rebuttable presumption that Norwood is contributing to the support of Ms. Whiteside and she therefore does not need the amount of support previously awarded in the final judgement of divorce.

*Whiteside* at ppg. 5-6.

The evidence is much stronger in this case that Robert Smith was living with Sally Jones and therefore subject to the provisions of T.C.A. §36-5-101(a)(3) than the evidence presented in either the *Azbill* case or the *Whiteside* case. In each of those cases the evidence was found to be sufficient to sustain the Trial Court's finding that the alimony recipient was living with another person.

Mr. Smith has been living with Ms. Jones as if he were married to her since 2000, but has never married her because marriage would automatically terminate his alimony payments. Mr. Smith's veiled attempts to maintain the appearance that he was not living with Sally Jones are illustrated by his steadfast insistence that because he returns to his condominium one or two nights per week, he is not "living" with Sally Jones. Having no need for his condominium because he was living with Sally Jones, Robert Smith placed his condominium on the market for sale. On the advice of counsel and for the purpose of maintaining his alimony, Robert Smith took the condominium off the market, therefore, retaining in his mind plausible deniability regarding whether he lived with Sally Jones.

Mary Johnson submits that Robert Smith has not been credible in his claims that he does not live with Sally Jones. Additionally, Robert Smith has attempted to perpetuate

this sham of living at his condominium for the sole purpose of avoiding the effect of T.C.A. §36-5-101(a)(3). The Trial Court did not err in concluding that T.C.A. §36-5-101(a)(3) is applicable to this case and that a rebuttable presumption is created that Robert Smith no longer is in need of support from Mary Johnson.

Upon a finding that the alimony recipient is living with a third person, a rebuttable presumption arises that all or part of the alimony should be suspended. T.C.A. §36-5-101(a)(3). The burden of proof then shifts to the recipient to prove a continuing need for alimony.

The ruling by the trial court established two substantive facts material to the Court's decision to reduce the alimony *in futuro* from \$1,000.00 to \$250.00 per month under T.C.A. § 36-5-101(a)(3). First, a third person (Norwood) was living with the alimony recipient (Wife). Second, the third person is contributing to the support of the alimony recipient. The latter finding resolved the issue of "need" by the Wife who, in response to the presumption raised by the Court's finding that Norwood was living with her, presented evidence denying that he contributed to her support and that her living expenses far exceeded her financial ability to pay. The trial court stated unequivocally that it did not believe Norwood was not contributing to the Wife's support and, as such, suspended the alimony payment from \$1,000.00 to \$250.00. The statute vests the trial court with the authority to take such action and it did so in its discretion. If the alimony recipient fails to overcome the presumption, as here, T.C.A. § 36-5-101(a)(3)(A) states: "...and the court therefore *should suspend all or part of the alimony obligation of the former spouse.*" (emphasis added). The word "should" is the past tense of "shall." *Webster's New Universal Unabridged Dictionary*, 2<sup>nd</sup> ed. We find that the evidence does not preponderate against the Court's findings. There was no abuse of discretion by the Court, and the Court correctly followed the law. We affirm.

*Whiteside*, at pg. 6.

In this case, Robert Smith offered no evidence that he continued to need support. First, Robert Smith denied living with Sally Jones and denied receiving any support from her. (T.E. Vol. 1. ppg. 133-134) The evidence was overwhelmingly contrary to Robert Smith's position. Mr. Smith apparently believes that receiving support from Sally Jones

would require her to pay him money. He refuses to recognize that providing him a place to sleep, rest, work on his computer, eat his meals, have his clothes washed, including the cost of household utilities is support. He does, however, admit that in living with Sally Jones he would have no need for any of his claimed expenses associated with owning his condominium including the mortgage note, taxes, insurance, utilities, cable TV, etc. (T.E. Vol. 1 142-143) Obviously, whether he chooses to admit it or not, Sally Jones is making a significant contribution to the support of Robert Smith.

The Trial Court in its conclusions stated following the trial of this matter observed: “Because he is living there, the condo that he keeps—that he wasn’t going to keep until, as he said counsel told me, advice of counsel told him not to sell it, is a luxury. He doesn’t need it. He does not need the alimony that being provided to him. He has somebody else that is providing for him and he has no need for Ms. Johnson and I’ve not heard anything else to that effect. I mean, this other woman shelters him, pays for his utilities while he’s there, which is most of the time and buys him his food.” (T.E. Vol. 1 pg. 152) Mr. Smith offers no authority that the Trial Court abused its discretion in its findings.

Mary Johnson submits that the Trial Court correctly found that Robert Smith had failed to rebut the presumption that he was no longer in need of support from Mary Johnson and therefore acted correctly in ordering its termination.

#### **IV. Can the Court deny Defendant the right to make an offer of proof?**

In his next assignment of error, Robert Smith claims the Trial Court erred in its refusal to allow him to make an offer of proof regarding testimony and exhibits claimed to support his position that the payments in question were a division of marital property and not alimony.

At the outset, Mary Johnson asserts again that Robert Smith's position on whether the provisions of paragraph eight of the Marital Dissolution Agreement was a division of marital property as opposed to alimony is answered contrary to his position by the language within the four corners of paragraph eight when read in light of **Waddey v. Waddey**, supra, all as discussed in section II of this Brief .

In his one-half page Brief and Argument on this issue, Robert Smith claims prejudice, but makes no argument nor cites any authority that any mistake made by the Trial Court should result in reversal of the Order.

Robert Smith appears to attempt to link a ruling by the Trial Court during the hearing on his Motion to Dismiss with a subsequent ruling by the Trial Court at page 123 of the transcript wherein the Trial Judge denied Robert Smith's request to make the above stated offer of proof. No record of the proceedings from the hearing on Robert Smith's Motion to Dismiss is before the Court. Mary Johnson submits that the failure to properly

preserve that issue for the Court's review by having a transcript of the proceedings prepared and presented to the Court precludes Robert Smith from claiming error from that proceeding.

As a general rule, Robert Smith is correct that Tenn. R. Evid 103(a)(2) provides that a party should make an offer of proof to preserve review of the issue where the ruling of the Trial Court has been to exclude certain evidence. It, therefore, follows that the Trial Court should allow an offer of proof to be made. However, for the denial of an offer of proof to constitute reversible error, the Court must find that evidence excluded affected a party's substantial rights. Tenn. R. Evid. 103(a)

***Alley v. State***, 882 S.W.2d 810 (Tenn.Crim.App. 1994).

The issue Robert Smith claims to have sought to present to the Court through his documents was that the size of the marital estate was such that paragraph eight of the Marital Dissolution Agreement was a division of property rather than alimony. Apparently, the documents would evidence a marital estate of such enormity that when compared to the distribution of assets to Robert Smith, the division of marital property would be inequitable unless paragraph eight was viewed as a "further division of the marital estate."

The documents, while excluded from the Trial record, have apparently been included in the Technical Record and available for this Court's review as attachments to Robert Smith's Motion to Amend Findings and Judgment (T.R. Vol 1 pg. 49) and his affidavit (T.R. Vol 1 pg. 51-54). Any error by the Trial Court in failing to allow the offer of proof has been cured by virtue of the documents being available for this Court's review in the Technical Record.

The remaining issue for this Court would be whether the documents were properly held to be irrelevant by the Trial Court or was the ruling by the Trial Court error involving a substantial right which more probably than not affected the judgment. Rule 36 (b) TRAP.

Robert Smith fails to address in his Brief how he was prejudiced in the Court's ruling that the documents were not relevant other than to argue the Court should have considered them. The documents attached to Robert Smith's affidavit consist of an insurance policy and two tax returns. Apparently, Robert Smith's position is that these documents make it more likely than not that paragraph eight of the Marital Dissolution Agreement was a division of marital property rather than alimony.

Tenn. R. Evid. 402 provides that all relevant evidence is admissible and evidence that is not relevant is not admissible. Tenn. R. Evid. 401 defines relevant evidence as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The admission of these documents would not have made it more probable that paragraph eight of the Marital Dissolution Agreement was a division of marital property. The documents do not indicate the value of the marital estate. The insurance policy merely names both parties as insureds on a policy of casualty insurance covering the marital residence, furnishings, and jewelry. The policy fails to indicate what of the property was the separate property of either party. The policy of insurance is of no assistance in defining the "marital estate."

The two federal income tax returns attached to Robert Smith's affidavit also fail to assist in determining the "marital estate." The joint returns show no income from employment by either party. The income is listed as being predominantly from interest on investments and capital gains. The tax returns fail to identify who owned the investments on which interest was reported or the assets upon which capital gains were realized by sale. These returns do not make it more likely that paragraph eight was a division of marital property.

The Marital Dissolution Agreement itself suggests that Mary Johnson owned a significant amount of property as her separate property. At paragraph six, the \$3.3 million marital residence was stated to be in Mary Johnson's name as were other lots in Northumberland and were awarded to her without suggestion that the assets were marital property or that other consideration was being given to Robert Smith. In paragraph fifteen, the household furniture and furnishings which Robert Smith submits in his affidavit were valued at \$1,658,500, were all awarded to Mary Johnson and she agreed to pay him a lump sum payment of \$10,000 in lieu of any claims he had against the marital furniture. There is no reference in either of these provisions that paragraph eight of the Marital Dissolution Agreement was intended to serve as "a further division of the marital estate" or given to Robert Smith in lieu of him releasing claims against marital property awarded to Mary Johnson as he would now have the Court believe. Paragraph sixteen of the Marital Dissolution Agreement acknowledges that Mary Johnson owned separate property acquired prior to the marriage as well as property acquired by gift or inheritance which would remain her separate property post divorce.

Assuming for the sake of argument that Robert Smith's position that the inequity in the division of the marital property makes it more likely that paragraph eight of the Marital Dissolution Agreement was a division of marital property rather than alimony, and that such an issue is one of consequence in this litigation, these rejected documents simply fail to make that fact more likely. See generally, **State v. James**, 81 S.W.2d 751(Tenn. 2002) **State v. Dubose**, 953 S.W.2d 649 (Tenn. 1997).

For these reasons, Mary Johnson submits that the Trial Court did not commit error in excluding from consideration the documents sought to be entered into evidence by Robert Smith; that the issue claimed by Robert Smith to serve as the basis for the admission of the documents was not an issue of consequence in these proceedings; and that any error by the Trial Court in not allowing an offer of proof was cured by the filing of the documents as exhibits to the post-trial pleading and said documents being thereby preserved for this Court's consideration.

**V. Did the Court improperly exclude Defendant's testimony about a directive or order given to Defendant by his attorney?**

Robert Smith's last complaint is that the Trial Court erred in not allowing him to testify what his attorney at the time of the divorce had told him. He claims in this issue that the statement by his attorney was an order or directive and therefore was not hearsay. He further claims that the statement was offered to prove the mental state of Robert Smith. The Brief and Argument section is devoid of any further clue as to what the proposed statement was by his attorney or why Robert Smith's mental state was material or a matter of consequence for the Trial Court. Mary Johnson

submits that the paucity of facts, authority, and argument on this issue in Robert Smith's Brief should result in the Court refusing to consider the issue and concluding that the issue is waived. Tenn. R.App.P 10(b), *Nuclear Fuel Services, Inc. v. Local No. 3-677*, 719 S.W. 2d 550,552, *State v. Wallace*, 664 S.W. 2d 301,302(Tenn. Crim. App. 1983).

Should the Court choose to consider this issue, Mary Johnson's best guess of what the issue is that Robert Smith attempts to present bootstraps back to paragraph five of Robert Smith's affidavit which is attached to his Motion to Amend Findings and Judgment found at pg. 53 of the Technical Record. There he states that his attorney, Bobby Jackson, and his consulting attorney, Maclin Davis, met with him prior to the divorce to discuss the alimony payment contained in paragraph eight of the Marital Dissolution Agreement. Robert Smith asserts that during that conversation when he raised a question to his attorneys of whether he could change the \$4,000 per month payment to account for inflation over the twenty year period of the payments, "Bobby Jackson directed me not to count on ever being able to change or increase the \$4,000 per month if I accepted this offer." He goes on to say in the affidavit that he, Bobby Jackson, and Maclin Davis had a discussion with the understanding that the \$4,000 per month was definite and unchangeable.

In his Brief and Argument, Robert Smith refers the Court to Tenn.R.Evid. 801(a) and claims that the statement of Mr. Jackson was not hearsay. He then argues alternatively that if the statement was hearsay, it should have been admitted to prove Robert Smith's mental state.

First, whether the "directive" was hearsay or not is not material for this Court to address if the purpose of the statement being offered is to show Robert Smith's mental state at the time the Marital Dissolution Agreement was accepted by him. As previously argued in issue II, supra, the state of mind of a party when entering into a contract is not at issue when determining the meaning

of a contract provision. *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526, 530 (Tenn.Ct.App. 1981)

If Robert Smith's state of mind is an issue of consequence in this case, the Trial Court did not err in rejecting the evidence Robert Smith sought to admit. Robert Smith claims that Robert Jackson's "directive" to him is relevant to show Robert Smith's state of mind when the Marital Dissolution Agreement was approved by him. Robert Smith cites Tenn.R.Evid. 801 and claims the statement by Robert Jackson admissible going to Robert Smith's state of mind. Mary Johnson would refer the Court to Tenn.R.Evid. 803(3). Under this hearsay exception, the person whose state of mind is at issue *must* be the *declarant*. Here Robert Smith asserts that Mr. Jackson is the declarant, but his, Robert Smith's, state of mind is the issue of consequence. Mr. Smith is incorrect in his view that his assertion of his attorney's statement to him is admissible as evidence of Robert Smith's mental state.

Robert Smith next relies on Tennessee Law of Evidence, 4<sup>th</sup> Edition, Cohen, Sheppard & Paine, Section 8.01[10], pg. 8-22 as his authority that an order or direction is admissible and is not considered hearsay. While there is some merit to Robert Smith's argument, the facts of this case cannot be molded into non hearsay.

Generally, as discussed in the cited authority, orders or directions may be viewed as non hearsay because the statements are not usually offered for the truth of the matter asserted. A parent ordering a child to go to bed, or a policeman directing drivers to proceed through a traffic control signal even though it may be red, are classic examples of non hearsay. The statements are not offered to prove the truth of the matter asserted.

In the instant case, Robert Smith asserts in his affidavit that Mr. Jackson “directed” him not to count on ever being able to change or increase the \$4,000 per month if he accepted Mary Johnson’s settlement offer. There are ample grounds such evidence would not be admissible. First, the ultimate issue which Robert Smith intends to prove must be material or an issue of consequence. What this evidence would be offered to prove according to Robert Smith is that he did not believe paragraph eight was an alimony provision. This issue is not material unless Robert Smith was alleging mutual mistake or unless it is concluded that paragraph eight is ambiguous. There has been no evidence presented that Mary Johnson ever viewed paragraph eight of the Marital Dissolution Agreement as anything other than alimony. Mutual mistake does not exist in this case. The issue of ambiguity has been settled by the Supreme Court’s analysis in *Waddey v. Waddey*, supra, holding on almost identical language that such a provision constitutes alimony *in futuro*.

Second, the “directive” from Mr. Jackson does not necessarily suggest that the provision is not alimony. Mr. Jackson’s statement was merely to the effect that Robert Smith should not count on being able to change the amount of payments. Mr. Jackson’s statement could well have been an observation and opinion regarding the burden of proof required to change an alimony award.

Third, this is not an order or directive in the classical sense but is much more akin to Mr. Jackson’s opinion and therefore is clearly hearsay. Tenn.R.Evid 801 defines hearsay as “a statement offered to prove the truth of the matter asserted.” The ultimate issue which Robert Smith presents to the Court is whether paragraph eight of the Marital Dissolution Agreement is alimony.

Clearly, what Robert Smith hopes to prove is the truth of the matter asserted by Mr. Jackson which is that the provision cannot be changed (and is therefore a division of marital property). Mr.

Jackson's directive or order was offered for that purpose to prove, in a rather back door manner, Mr. Jackson's opinion regarding the nature of the obligation at issue. If Mr. Jackson's opinion was relevant, Robert Smith has offered no explanation as to why he was not subpoenaed to testify as a witness at the trial of this matter.

For these reasons Mary Johnson submits that the Trial Court did not err in excluding from consideration in this case any "order" or "directive" given to Robert Smith by his attorney.

### CONCLUSION

Robert Smith received an alimony *in futuro* award at the time of the divorce in 1994 that provided him with \$4,000 per month for his support and maintenance until death, remarriage or the expiration of twenty years. In 2000, Robert Smith began living with Sally Jones enjoying her support through bed, board, and companionship. They lived together. They traveled together. Robert Smith prided himself on enjoying all the benefits of Sally Jones's support and claiming to pay nothing in return. In order to hide his relationship from Mary Johnson and protect his alimony award from the application of T.C.A. §36-5-101(a)(3), Robert Smith slept at his condominium one or two nights per week at most and claimed this sham proved he was not living with Sally Jones.

The Trial Court correctly found that Robert Smith was living with Sally Jones and that a rebuttable presumption was created under T.C.A. §36-5-101 (a)(3) that he was no longer in need of the alimony. The Trial Court also correctly found that Robert Smith had failed to carry his burden that he continued to be in need of the alimony in light of the support being received from Sally Jones and the other circumstances of the case.

Mary Johnson submits that the evidence supports the findings by the Trial Court and that the Order entered by the Trial Court should be affirmed by this Court in all respects.

Respectfully Submitted,

**HOLLINS, WAGSTER, YARBROUGH,  
WEATHERLY & RAYBIN, PC**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Brief and Argument has been served on Mr. William B. Bradley, P.O. Box 1223, Brentwood, Tennessee 37024-1223, by placing a copy of the same in the United States Mail, postage prepaid, this the 7<sup>th</sup> day of March, 2005.

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JAMES L. WEATHERLY, JR.









