

INSTAGUIDE TO DIVORCE:

**One of a Series of Memoranda for Pro Bono Lawyers
about Family Law in Tennessee**

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DIVORCE

Grounds and the Defenses to Them

GROUNDS FOR DIVORCE. Under § T.C.A. 36-2-304, the chief grounds for divorce are: . . . (3) *adultery*; (4) willful or malicious *desertion or absence* of either party, without a reasonable cause, for one year; (8) *refusal to move with a spouse to Tennessee*, without a reasonable cause, and being willfully absent from the spouse residing in Tennessee for two years; (11) *cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper*, which may also be referred to in pleadings as *inappropriate marital conduct*; . . . (13) *abandoning* the other spouse or turning the spouse out of doors for no just cause, and refusing or neglecting to provide for the spouse while having the ability to do so; (14) *irreconcilable differences* between the parties; and (15) for a continuous period of two or more years, *living in separate residences and not cohabiting* as man and wife, when there are no minor children of the parties. (emphasis added)

GROUNDS FOR LEGAL SEPARATION. Under T.C.A. § 36-4-102, a person who alleges grounds for divorce may, as an alternative, file a complaint for legal separation. It must forth the grounds for legal separation in substantially the language of T.C.A. § 36-4-101 but pray only for legal separation and not divorce. The other party may deny the existence of grounds for divorce but, unless he or she specifically objects to the granting of an order of legal separation, the court must declare the parties to be legally separated. The court may provide for matters such as child custody, visitation, support and property issues during legal separation. Despite this statute, a party who can establish grounds for divorce pursuant to T.C.A. § 36-4-101 is entitled to a divorce. Where a reconciliation is not possible, the trial court is not restricted by the spouse's request for a legal separation pursuant to T.C.A. § 36-4-129 and may properly grant a divorce pursuant to T.C.A. § 36-4-102. *Haas v. Haas*, 2002 *Tenn. App. LEXIS 510* (*Tenn. Ct. App.* 2002).

ADULTERY. Adultery may be proved by circumstantial evidence. *Canning v. Canning*, 59 *Tenn. App.* 678, 443 *S.W.2d* 502 (1968), overruled on other grounds in *Fox v. Fox*, 676 *S.W.2d* 956 (*Tenn.* 1984). Adultery and bigamy are no longer complete bars to a spouse's right to seek a divorce on one of the grounds in this section. *Thompson v. Thompson*, 797 *S.W.2d* 599 (*Tenn. Ct. App.* 1990). It may also be the basis for a divorce on the ground of cruel and inhuman treatment. *Farrar v. Farrar*, 553 *S.W.2d* 741 (*Tenn.* 1977); *Stanfill v. Stanfill*, 742 *S.W.2d* 267 (*Tenn. Ct. App.* 1987). (Even false charges of adultery constitute cruel and inhuman treatment as a ground for divorce. *Reitano v. Reitano*, 52 *Tenn. App.* 289, 373 *S.W.2d* 213 (1963).) A court can grant a divorce on the ground of cruel and inhuman treatment notwithstanding the fact that both parties committed adultery. *Stanfill v. Stanfill*, 742 *S.W.2d* 267 (*Tenn. Ct. App.* 1987).

DESERTION. Where wife's testimony did not show such misconduct on the part of her husband as would render it impossible to continue the matrimonial cohabitation with safety, health and self-respect, her leaving him was not justified and after two years (now one year) would constitute grounds for his suit for divorce. *Bailey v. Bailey*, 6 *Tenn. App.* 272 (1927). Where a petition for divorce is based on desertion, it must be charged and proved that such desertion was intended and willful. *Page v. Turcott*, 179 *Tenn.* 491, 167 *S.W.2d* 350 (1943). Where the wife is living separate and apart from her husband under a decree of separate maintenance, she commits no

wrong against the marital relation by refusing a reconciliation. *Perrin v. Perrin*, 201 Tenn. 354, 299 S.W.2d 19 (1957).

CONVICTION OF A FELONY. A sentence to serve time in the penitentiary imposed for a felony conviction constituted grounds for divorce. *Pendergrass v. Neil*, 338 F. Supp. 1198 (M.D. Tenn. 1971), modified on other grounds, 456 F.2d 469 (6th Cir. 1972), vacated on other grounds, 412 U.S. 935, 93 S. Ct. 2768, 37 L. Ed. 2d 394 (1973).

REFUSAL OF SPOUSE TO MOVE TO STATE. Testimony that husband had made one isolated telephone call several years prior to time of trial and asked his wife to come to Memphis was not sufficient to establish a refusal to remove to this state without reasonable cause, especially where there was evidence of failure of husband to support his wife and child and of failure to visit them under circumstances where it would have been possible to have done so. *Greene v. Greene*, 48 Tenn. App. 636, 349 S.W.2d 186 (1960).

CRUEL AND INHUMAN TREATMENT. Cruel and inhuman treatment may be shown by an actual physical lack of safety, danger, and indignity to the wife or husband and it may be accomplished in subtle and insidious ways through continuous mistreatment and indignity of a much more refined character. *Harwell v. Harwell*, 612 S.W.2d 182 (Tenn. Ct. App. 1980). Cruelty as a cause for divorce is the willful, persistent causing of unnecessary suffering, whether in realization or apprehension, whether of body or mind, in such a way as to render cohabitation dangerous and unendurable. *Schwalb v. Schwalb*, 39 Tenn. App. 306, 282 S.W.2d 661 (1955); *Stone v. Stone*, 56 Tenn. App. 607, 409 S.W.2d 388 (1966). Cruelties warranting a divorce may result from a continuing course of abusive and humiliating treatment of one spouse by another as in the case of conduct calculated to torture the complaining spouse's mental or emotional health and affecting his or her bodily health. *Elrod v. Elrod*, 41 Tenn. App. 540, 296 S.W.2d 849 (1956).

Action of wife in holding gun on husband and threatening to kill him under such circumstances that he was justified in believing that she intended to kill him constituted cruel and inhuman treatment or conduct even though the gun contained blanks. *Schwalb v. Schwalb*, 39 Tenn. App. 306, 282 S.W.2d 661 (1955). Trial court properly granted one spouse a divorce on the grounds of inappropriate marital conduct under T.C.A. § 36-4-101(11) where the other spouse's actions in pursuing their child with a firearm ultimately caused the child's death; although the other spouse's actions were directed primarily at the child, the actions constituted cruel and inhuman treatment toward the spouse. *Bolin v. Bolin*, 99 S.W.3d 102 (Tenn. Ct. App. 2002).

Where the mother testified to the father's cursing, rages, and throwing of personal property in front of the mother and her daughter by a previous marriage, the father did not testify at trial, and the trial court in its opinion noted that it was in the best position to evaluate the credibility of the parties, a judgment granting a divorce to the mother due to the father's inappropriate marital behavior under T.C.A. § 36-4-101(11) was affirmed on appeal. *Buss-Flinn v. Flinn*, 2003 Tenn. App. LEXIS 351 (Tenn. Ct. App., 2003). Wife was properly granted a divorce because testimony supported the trial judge's finding that the husband had been guilty of inappropriate marital conduct; the wife proved that the husband had a volatile temper and vented his anger at her in public places and in front of other individuals, he called her vile names and threatened to use a shotgun or

baseball bat on her and on one occasion he threatened to kill her, and got so violent that the police took him into custody. *Nigro v. Nigro*, 2003 Tenn. App. LEXIS 485 (Tenn. Ct. App. 2003).

SEPARATION. Husband proved the existence of grounds for divorce under T.C.A. § 36-4-101(15) in that the parties, with no minor children, had lived separately for more than two years; because no statutory defense existed for this ground; the doctrine of unclean hands was inapplicable to deprive the husband of his right to relief provided by the legislature; and under T.C.A. § 36-4-102, the wife's action for legal separation did not deprive the husband of entitlement to divorce. The court, pursuant to T.R.A.P. 36, declared the parties divorced pursuant to T.C.A. § 36-4-129 and modified the trial court's judgment accordingly. *Edmisten v. Edmisten*, 2003 Tenn. App. LEXIS 354 (Tenn. Ct. App. 2003).

ABANDONMENT. It is not required that the abandoned spouse solicit a reconciliation where the abandonment was willful. *Bailey v. Bailey*, 6 Tenn. App. 272 (1927). There is no necessity that a petition for divorce based on the charge of abandonment and refusal or neglect charge that such abandonment and neglect was premeditated, intended or willful. *Page v. Turcott*, 179 Tenn. 491, 167 S.W.2d 350 (1943).

Irreconcilable Differences

INITIAL PROCEDURE. Under T.C.A. § 36-4-103, irreconcilable differences may either be asserted as a sole ground for divorce or as an alternate ground with any other cause set out in T.C.A. § 36-4-101 or § 36-4-102. If the defendant is a nonresident, personal service may be effectuated by service upon the secretary of state pursuant to T.C.A. § 20-2-215. In lieu of service of process, the defendant may enter into a written notarized marital dissolution agreement that makes specific reference to a pending divorce by a court and docket number, or states that the defendant is aware that one will be filed in Tennessee and that the defendant waives further service and waives filing an answer to the complaint. The waiver of service is valid for a period of 180 days. The agreement may include the obligation and payment of alimony, in solido or in futuro, to either of the parties. The signing of a marital dissolution agreement is in lieu of service of process for the period the waiver is valid. It constitutes a general appearance before the court, is an answer which gives the court personal jurisdiction over the defendant, and constitutes a default judgment for the purpose of granting a divorce on the grounds of irreconcilable differences.

THE WAITING PERIOD. Complaints for divorce on the ground of irreconcilable differences must have been on file for 60 days before being heard if the parties have no unmarried child 18 years of age, or at least 90 days if the parties have an unmarried child under 18 years of age. The requirement that a complaint be on file 90 days before being heard does not mean necessarily that a decree entered upon a hearing held less than 90 days subsequent to the filing is void; moreover, even if voidable, the decree cannot be reversed through a collateral attack by the children of the parties to the divorce suit. *Gentry v. Gentry*, 924 S.W.2d 678 (Tenn. 1996). A trial court is correct in refusing to declare a final divorce decree void because of noncompliance with the 90-day requirement. It can only be attacked directly and not by the spouse over the spouse's child support obligation. *Pardue v. Pardue*, 2002 Tenn. App. LEXIS 447 (Tenn. Ct. App. 2002).

THE FINAL DECREE. There is no requirement of a hearing prior to divorce where the parties have signed a marital dissolution agreement. Nor is the court required to make an independent investigation prior to signing the parties' divorce decree. *Vaccarella v. Vaccarella*, 49 S.W.3d 307 (Tenn. Ct. App. 2001). The court must find in its decree that the parties have made adequate and sufficient provision by written agreement for the custody and maintenance of any children of that marriage and for the equitable settlement of any property rights between the parties. A final decree may be entered, despite the provisions of T.C.A. §§ 36-4-107 and 36-4-114 to the contrary, without the plaintiff being required to testify as to the material facts constituting irreconcilable differences or any attempts to reconcile such differences. If there has been a contest or denial of the grounds of irreconcilable differences, no divorce may be granted on the grounds of irreconcilable differences. However, a divorce may be granted on the grounds of irreconcilable differences where there initially has been a contest or denial but later a properly executed marital dissolution agreement is presented to the court. *Lew v. Lew*, 2003 Tenn. App. LEXIS 5 (Tenn. Ct. App. 2003).

Stipulated Grounds and Defenses

Under T.C.A. § 36-4-129, in both actions for divorce and legal separation, the parties may stipulate the grounds, the defenses to them, or both. In one case, the court should have found that both parties engaged in an inappropriate course of conduct over many months that rendered continued cohabitation as husband and wife unacceptable pursuant to T.C.A. § 36-4-129(b) rather than "cruel and inhuman treatment" pursuant to T.C.A. § 36-4-101(11), where the parties' relationship had disintegrated and their love and affection had been extinguished. *Earls v. Earls*, 42 S.W.3d 877 (Tenn. Ct. App. 2000). A court may, upon stipulation to or proof of any ground for divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone. The trial court is not required to make a written finding that both parties were at fault or which party was less at fault in its order awarding a divorce to the husband "alone." *Varley v. Varley*, 934 S.W.2d 659 (Tenn. Ct. App. 1996). The court should have found that both parties engaged in an inappropriate course of conduct over many months that rendered continued cohabitation as husband and wife unacceptable pursuant to T.C.A. § 36-4-129 rather than "cruel and inhuman treatment" pursuant to T.C.A. 36-4-101, where the parties relationship had disintegrated and their love and affection had been extinguished. *Earls v. Earls*, 42 S.W.3d 877 (Tenn. Ct. App. 2000). The trial court was not required to state with specificity in its order a finding that both parties were entitled to a divorce or exactly what one spouse's inappropriate marital conduct was, given that spouse's admitted adultery and the fact both parties admitted in the divorce proceeding to conduct which would entitle the other to a divorce. *Fulbright v. Fulbright*, 64 S.W.3d 359 (Tenn. Ct. App. 2001). Because T.C.A. § 36-4-129 gives trial courts the power to grant a divorce "if either or both parties were entitled to a divorce," the trial court only needed to hear sufficient proof during the fault portion of the trial to determine if the parties are entitled to a divorce; any further proof beyond that would have been cumulative and needless. Tenn. R. Evid. 403 specifically states a court may exclude relevant evidence if presentation would be a "waste of time, or needless presentation of cumulative evidence." Having found both husband and wife to be at fault, a trial court did not abuse its discretion by declaring them to be divorced rather than awarding a divorce to either the husband or the wife alone. The court's limiting the proof did not violate wife's due process rights where the wife had had an opportunity to be heard and presented sufficient proof to satisfy her burden of

proving grounds for divorce by showing the husband's fault. *Mumford v. Mumford*, 2003 Tenn. App. LEXIS 623 (Tenn. Ct. App., 2003).

Pleadings

STATEMENT OF GROUNDS FOR DIVORCE. Under T.C.A. § 36-4-106, the complaint must set forth the grounds for the divorce in substantially the language of T.C.A. § 36-4-101 or T.C.A. § 36-4-102. On motion of the defendant, the court must require the plaintiff to file a bill of particulars, setting forth the facts relied on as grounds for the divorce, with reasonable certainty as to time and place. The legislative intent in requiring pleadings to set forth the grounds for the divorce in substantially the language of the statute was to avoid the insertion of scurrilous matter in divorce bills. *Farrar v. Farrar*, 553 S.W.2d 741 (Tenn. 1977). The provision that the causes of the complaint shall be set out with reasonable certainty cannot be construed as requiring a husband bringing suit under T.C.A. § 36-4-101(8), to allege that he did not move from the state where his wife resided for the purpose of obtaining a divorce since the requirements to this effect in § 36-4-106 are as to proof and not as to pleading and notice as to what will be proven is carried to the defendant by the clear provisions of the Code. *Baeyertz v. Baeyertz*, 171 Tenn. 190, 101 S.W.2d 689 (1937). When the cause relied on the petition for divorce is willful or malicious desertion under former § 36-4-101(4), or cruel and inhuman treatment under former § 36-4-102(a)(1), not only must the allegation be made "in words fully equal and definite in their meaning" but the requirements of particularity and specifications with circumstances as to time and place as required by this section must be observed with particular care, but even in these cases only "reasonable certainty" and not "mathematical certainty" is required. *Page v. Turcott*, 179 Tenn. 491, 167 S.W.2d 350 (1943). The requirement that the bill must set forth the cause for complaint with reasonable certainty does not mean mathematical certainty but rather that it must convey such notice of defendant that he may defend intelligently. *Akins v. Akins*, 61 Tenn. App. 506, 456 S.W.2d 354 (1969).

IDENTIFICATION OF THE PARTIES AND EACH CHILD. Under T.C.A. § 36-4-106, the complaint must also allege the full name of the husband, the full maiden name of the wife, their *mailing* addresses, the dates and places of their birth, the race or color of each spouse, the number of previous marriages of each spouse, the date and place of the marriage of the parties, the number of their children who are minors at the time of the filing of the complaint, and the social security numbers of the parties and all children born of the marriage. In lieu of a mailing address, either party may designate an agent for the service of process throughout the proceedings. If either party shows to the satisfaction of the court that the *residential* address of the other party is relevant and necessary in order to prove the allegations contained in the complaint, to defend against the allegations, to ascertain information necessary to determine value or ownership of property, or to ascertain other data necessary to evaluate and agree upon a property division or custody, the court may order either party to reveal such residential address to the other party.

OTHER PROCEEDINGS. Under T.C.A. § 36-4-106, the complaint must also recite other litigation concerning the custody of a child of the marriage in which either party has participated in Tennessee or any other state.

VERIFICATION OF THE COMPLAINT. Under T.C.A. § 36-4-107, the complaint must be verified by an affidavit that the facts stated in the complaint are true to the best of the plaintiff's

knowledge and belief for the causes mentioned in the complaint. The statute implies, and older cases hold, that the complaint must also state that that it is not made out of levity or in collusion with the defendant. *DeArmond v. DeArmond*, 92 *Tenn.* 40, 20 *S.W.* 422 (1892). A person seeking a divorce must strictly comply with the statute including the taking of an oath. *Turner v. Bell*, 198 *Tenn.* 232, 279 *S.W.2d* 71, cert. denied, 350 *U.S.* 842, 76 *S. Ct.* 83, 100 *L. Ed.* 751 (1955). However, if the defendant is not prejudiced by the delay, an amendment offered to cure a verbally defective affidavit offered during the trial is not too late. *Fitzpatrick v. Fitzpatrick*, 131 *Tenn.* 54, 173 *S.W.* 444 (1914). A cross complaint in a divorce action was fatally defective for failure of accompanying affidavit to include statement as to collusion or levity. *Rayl v. Rayl*, 64 *S.W.* 309 (*Tenn. Ch. App.* 1900).

RESIDENCE REQUIREMENTS. Under T.C.A. § 36-4-104, a divorce may be granted: (1) if the acts complained of were committed while the plaintiff was a bona fide resident of Tennessee, even if he or she is not now a resident; (2) so long as the plaintiff has resided in Tennessee six consecutive months prior to the filing of the complaint, even if the acts complained of were committed out of the state and the plaintiff resided out of the state at the time; or (3) so long as the defendant has resided in Tennessee six months next preceding the filing of the complaint, even if the acts complained of were committed out of the state and the plaintiff resided out of the state at the time.

Where a husband who resided in South Carolina brought suit in that state for divorce and wife who at time was residing in Tennessee appeared specially in the South Carolina action to contest jurisdiction alleging she was resident of Tennessee, the determination of the South Carolina court as to residency on the date of such determination was res judicata in Tennessee. However, where wife charged a specific act of cruel and inhuman treatment occurring after such date in Tennessee, the wife could bring divorce action in Tennessee regardless of an allegation of residence for six months. *Atchley v. Atchley*, 585 *S.W.2d* 614 (*Tenn. Ct. App.* 1978). A verified answer and counterclaim filed by plaintiff in Texas in which she asserted that she resided in that state did not mean that Tennessee was without jurisdiction. Subject matter jurisdiction was not based upon the wife's domicile, but upon the fact that the defendant was domiciled in Tennessee for six months preceding the filing of the plaintiff's complaint in Tennessee. *Vermillion v. Vermillion*, 892 *S.W.2d* 829 (*Tenn. Ct. App.* 1994).

Facts which warrant notice by publication are jurisdictional and must appear on the face of the petition; and a decree of divorce granted on a petition defective in that respect is void. *Copeland v. Green*, 4 *Tenn. App.* 463 (1927). Where trial judge granted divorce it must be treated by Court of Appeals on appeal as a finding of fact that either the plaintiff, or the defendant, or both, were domiciled in the county, and if either or both were so domiciled the court had jurisdiction. *Bernardi v. Bernardi*, 42 *Tenn. App.* 282, 302 *S.W.2d* 63 (1956). The word "reside" involves the idea of a domicile, and the word "residence" as used in divorce statutes should be construed as equivalent to "domicile." *Brown v. Brown*, 150 *Tenn.* 89, 261 *S.W.* 959 (1923); *Tyborowski v. Tyborowski*, 28 *Tenn. App.* 583, 192 *S.W.2d* 231 (1945).

VENUE. Under T.C.A. § 36-4-105, the complaint may be filed: (1) in the county where the parties resided at the time of their separation; (2) in the county in which the defendant resides, if a resident of the state; or (3) if the defendant is a nonresident of the state or a convict, then in the

county where the applicant resides. The limitation on venue is to be availed of as a personal privilege, does not affect the court's jurisdiction over the subject matter, and accordingly may be waived. *Kelley v. Kelley*, 195 Tenn. 649, 263 S.W.2d 505 (1953). Where the plaintiff did not object to venue in the original divorce suit, her objection was waived. *Kane v. Kane*, 547 S.W.2d 559 (Tenn. 1977). Where the defendant husband had a summer residence in Giles County, where he was living at the time of the separation, but his domicile, when his wife filed her bill for divorce, and for 30 years prior thereto had been in Davidson County, a decree dismissing her bill, filed in Giles County, for lack of jurisdiction was proper on the theory that complainant should have filed her bill in Davidson County. *Brown v. Brown*, 150 Tenn. 89, 261 S.W. 959 (1923). Venue in the case would be properly vested in a court having jurisdiction in the county in which the parties resided at the time of their separation, as the husband's involuntary presence in the county by virtue of his incarceration did not establish that he was a resident of that county. *Ferguson v. Ferguson*, 2002 Tenn. App. LEXIS 775 (Tenn. Ct. App. 2002).

MINORS AS PARTIES. Minors may prosecute and defend divorce actions without the necessity of a next friend or a guardian ad litem, as this section makes no distinction between adults and minors. *Holman v. Holman*, 35 Tenn. App. 273, 244 S.W.2d 618 (1951); *Talley v. Talley*, 51 Tenn. App. 622, 371 S.W.2d 152 (1962), cert. denied, 375 U.S. 915, 84 S. Ct. 216, 11 L. Ed. 2d 154 (1963).

TEMPORARY MUTUAL INJUNCTIONS. Because of T.C.A. § 36-4-106, upon the filing of a complaint for divorce or legal separation, except on the sole ground of irreconcilable differences, temporary injunctions are in effect against both parties until the final decree of divorce or order of legal separation is entered, the complaint is dismissed, the parties reach agreement, or the court modifies or dissolves the injunction. Written notice of the injunctions must be served with the complaint. The injunctions restrain both parties from transferring marital property, ending insurance coverage, disparaging the other party, or relocating a child outside Tennessee or more than 100 miles from the marital home.

VERIFICATION OF ANSWER. Under T.C.A. § 36-4-110, the defendant “may appear according to the rules of the court and answer the bill upon oath or affirmation.” Hence, an answer and cross bill which does *not* seek a divorce need not be verified. *Canning v. Canning*, 59 Tenn. App. 678, 443 S.W.2d 502 (1968), overruled on other grounds, *Fox v. Fox*, 676 S.W.2d 956 (Tenn. 1984).

THE DEFENSE OF THE OTHER PARTY’S ADULTERY. The statutory defenses to a divorce action listed in § 36-4-112 and § 36-4-120 are affirmative defenses under Tenn. R. Civ. P. 8.03. *Thomasson v. Thomasson*, 755 S.W.2d 779 (Tenn. 1988). Under T.C.A. § 36-4-112, it is a good defense if the defendant alleges and proves that the plaintiff has been guilty also of adultery. But a defense to a divorce on ground of adultery is not a defense to a divorce on another ground. *Fox v. Fox*, 676 S.W.2d 956 (Tenn. 1984); *Stanfill v. Stanfill*, 742 S.W.2d 267 (Tenn. Ct. App. 1987); and *Wilder v. Wilder*, 863 S.W.2d 707 (Tenn. Ct. App. 1992).

THE DEFENSE THAT ADULTERY HAS BEEN FORGIVEN. Condonation of adultery in divorce cases will be available, though not relied on in the pleadings, if it appears in the proof that

the injured party, with full knowledge of the facts, has forgiven the offense or has procured or connived at its commission. *McClanahan v. McClanahan*, 104 Tenn. 217, 56 S.W. 858 (1900).

THE DOCTRINE OF UNCLEAN HANDS. Unclean hands is not listed as statutory defense to an action for divorce and, except for fraud and deceit upon the court, which are always available as defenses in any court, the clean hands principle does not apply in divorce litigation. *Chastain v. Chastain*, 559 S.W.2d 933 (Tenn. 1977); *Bush v. Bush*, 684 S.W.2d 89 (Tenn. Ct. App. 1984).

DEFENSE TO ALLEGATION OF CRUEL AND INHUMAN TREATMENT. Although cruel and inhuman treatment as a ground for divorce cannot be condoned in the same sense as adultery and thereby in legal contemplation wiped out, nevertheless it may be forgiven and cannot thereafter be used as a ground for divorce except upon some revival or new act which brings back to life the former misconduct previously forgiven. Where a wife continued to live with her husband after his beating her, she forgave or condoned his action. *Schwalb v. Schwalb*, 39 Tenn. App. 306, 282 S.W.2d 661 (1955). Where husband and wife agreed to effect a reconciliation after occurrence of alleged acts of wife amounting to cruel and inhuman treatment but agreement was never consummated, the husband had the right to change his mind on the matter and having changed his mind could rely on such conduct in a suit for divorce. *Elrod v. Elrod*, 41 Tenn. App. 540, 296 S.W.2d 849 (1956). Acts constituting cruel and inhuman treatment, even though forgiven, are not wiped out but may be revived by some new act of cruel and inhuman treatment. *Murrell v. Murrell*, 45 Tenn. App. 309, 323 S.W.2d 15 (1958).

DEFENSE TO ALLEGATION OF FAILURE TO MOVE TO TENNESSEE. Under T.C.A. § 36-4-117, if the divorce is sought by one spouse on the ground of the other's refusal to remove with the plaintiff to this state, and of the defendant's willful absence for two years without reasonable cause, the plaintiff must prove endeavors to induce the defendant to live with him or her after the separation, and that the plaintiff did not move from the state where he or she resided for the purpose of obtaining a divorce.

JURIES. Under T.C.A. § 36-4-113, issues may be tried by a jury, but the jury does not try the whole case or render a verdict for one party or the other. A trial judge has the authority to determine which issues should be submitted to the jury but may not deprive a litigant of the right to have the substantial disputes as to matters of fact passed upon by the jury. *Wright v. Quillen*, 909 S.W.2d 804 (Tenn. Ct. App. 1995).

PROOF. Under T.C.A. § 36-4-114, even if the defendant admits the facts, the court must, before decreeing a divorce (except in a divorce on the ground of irreconcilable differences), hear proof and either dismiss the bill or petition or grant a divorce. A divorce should not be granted without corroborating testimony where it is practicable to obtain such corroborating testimony. *Greene v. Greene*, 43 Tenn. App. 411, 309 S.W.2d 403 (1957); *Crews v. Crews*, 743 S.W.2d 182 (Tenn. Ct. App. 1987). Even though the husband admitted to allegations of adultery in the divorce petition, that was not an agreed-upon stipulation, and the court should have held an evidentiary hearing to hear proof of the facts prior to having granted the divorce. Statutes must be interpreted in *pari materia*, and thus the meaning of "stipulation" in T.C.A. § 36-4-129 must be construed in light of the express terms of T.C.A. § 36-4-114. *Hyneman v. Hyneman*, 2003 Tenn. App. LEXIS 680 (Tenn. Ct. App. 2003).

RECONCILIATION AGREEMENTS. Under T.C.A. § 36-4-126, during the pendency of any suit for divorce or legal separation, the court may, upon the written stipulation of both the husband and wife that they desire to attempt a reconciliation, enter an order suspending any and all orders and proceedings for such time as the court may determine advisable under the circumstances, so as to permit the parties to attempt such reconciliation without prejudice to their respective rights. During the period of the suspension, the parties may resume living together, and their acts and conduct in so doing will not amount to condonation of any prior misconduct. A reconciliation agreement between husband and wife containing a property settlement binding in the future is not promotive or conducive of separation of the parties and is valid. *Hoyt v. Hoyt*, 213 Tenn. 117, 372 S.W.2d 300 (1963) (overruling *Copeland v. Boaz*, 68 Tenn. 223 (1877)). See also *Minor v. Minor*, 863 S.W.2d 51 (Tenn. Ct. App. 1993).

THE FINAL DECREE OF DIVORCE. Under T.C.A. § 36-4-119, the court may pronounce the marriage void from the beginning, dissolve it forever, or decree separation for a limited time. Yet, a decree awarding a husband a divorce on grounds of cruel and inhuman treatment and awarding wife a divorce on grounds of desertion is self emasculating and cannot stand. *Brewies v. Brewies*, 27 Tenn. App. 68, 178 S.W.2d 84 (1943).

THE DECREE OF LEGAL SEPARATION. Under T.C.A. § 36-4-120, the court may annul the marriage, order a separation, or grant other relief. In an action for separate maintenance where none of the statutory grounds for divorce are pleaded, a divorce may not be decreed merely because it appears that there is no hope of reconciliation between the parties. *Stephenson v. Stephenson*, 201 Tenn. 253, 298 S.W.2d 717 (1957).

ATTORNEY FEES. Under T.C.A. § 36-4-122, the court may decree costs against either party. If property is sequestered, either in the power of the court or in the hands of a receiver, the court may order the costs to be paid out of such property. Costs include attorney fees. The trial court has wide discretion in determining whether to require one spouse to pay for the other's legal expenses incident to divorce litigation. *Loyd v. Loyd*, 860 S.W.2d 409 (Tenn. Ct. App. 1993). In determining compensation for attorneys, the amount and character of service rendered, labor, time and trouble involved, character and importance of litigation, amount of money or value of the property involved, professional skill and experience called for, and character and standing of the attorneys are questions which should be determined by the court having original jurisdiction. *Folk v. Folk*, 210 Tenn. 367, 357 S.W.2d 828 (1962).

Other Matters

PARENTAGE. Under § T.C.A. 36-2-304, a man is *rebuttably* presumed to be the father of a child if: (1) the man and the child's mother are married or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce; (2) before the child's birth, the man and the mother have attempted to marry each other; (3) after the child's birth, the man and the mother have married or attempted to marry each other *and* the man has acknowledged his paternity of the child in a writing filed under the putative father registry established by the Department of Children Services, or the man has consented in writing to be named the child's father on the birth certificate, or the man

is obligated to support the child under a written voluntary promise or by court order; (4) while the child is under the age of majority, the man receives the child into the man's home and openly holds the child out as his natural child; or (5) genetic tests have been administered as provided in T.C.A. § 24-7-112, an exclusion has not occurred, and the test results show a statistical probability of parentage of 95% or greater.

AGREEMENTS BETWEEN SPOUSES ABOUT PROPERTY. Under T.C.A. § 36-3-501, an *antenuptial* agreement entered into by spouses concerning *property* owned by either spouse before the marriage which is the subject of such agreement is binding if it is determined, in the discretion of a court, to have been entered into by the spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse. The knowledge element of T.C.A. § 36-3-501 means that the spouse seeking to enforce an antenuptial agreement must prove, by a preponderance of the evidence, either that a *full and fair disclosure* of the nature, extent, and value of his or her holdings was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent spouse's holdings. *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996). Where a husband did not disclose full extent of his estate prior to executing ante-nuptial agreement, the agreement was ineffective, and the widow was entitled to take elective share as surviving spouse. *Williams v. Williams*, 868 S.W.2d 616 (Tenn. Ct. App. 1992). A voluntary and knowing waiver or limitation of *alimony* in an antenuptial agreement is not per se void and unenforceable as contrary to public policy, and such provisions will be fully enforced, unless enforcement will render one spouse a public charge. *Cary v. Cary*, 937 S.W.2d 777 (Tenn. 1996). Although antenuptial agreement provided that property owned "partially or wholly" by either party would not be subject to division, that phrase in an antenuptial agreement cannot overcome the statutory definition of marital property, which includes the *increase in value of separate property* during the marriage if each party substantially contributed to its preservation and appreciation. *Wilson v. Wilson*, 987 S.W.2d 555 (Tenn. Ct. App. 1998). Even though marriage in and of itself would not be sufficient consideration, the couple's waiver of rights to each other's estate was sufficient to support a *postnuptial* agreement. *In re Estate of Wiseman*, 889 S.W.2d 215 (Tenn. Ct. App. 1994).

SUITS AGAINST THE OTHER SPOUSE. Interspousal tort immunity is totally abolished in this state and all decisions to the contrary are overruled. *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983). Tort claims by one spouse against the other may be litigated as a part of a divorce proceeding or separately.

CONFIDENTIALITY OF MEDIATION. Under T.C.A. § 36-4-130, when the parties to a divorce action choose to mediate their dispute, all records, reports, and other documents developed for the mediation are confidential and privileged. Communications made during a mediation may be disclosed only: (1) when all parties to the mediation agree, in writing; (2) in a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation; (3) when documents are otherwise subject to discovery and were not prepared specifically for use in and actually used in the mediation; (4) when the parties to the mediation are engaged in litigation with a third party and the court determines that fairness to the third party requires that the fact or substance of an agreement resulting from mediation be disclosed; or (5) when the disclosure

reveals abuse or neglect of a child by one of the parties. The mediator may not be compelled to testify in any proceeding.

MEDIATION IN CASES OF DOMESTIC ABUSE. Under T.C.A. §§ 36-4-131 and 36-6-107, in cases of divorce, legal separation, or the custody of a child, if an order of protection is in effect or if there is a court finding of domestic abuse or any criminal conviction involving domestic abuse within the marriage, the court may order mediation or refer either party to mediation only if: (1) the victim of the abuse agrees to mediation; (2) mediation is provided by a certified mediator who is trained in domestic and family violence; and (3) the victim is permitted to have in attendance at mediation a supporting person of the victim's choice. No victim may provide monetary compensation to a non-attorney advocate for attendance at mediation.

GUARDIANS AD LITEM. Under T.C.A. § 36-4-132, in a case for divorce not legal separation, the court may appoint a guardian ad litem for any minor child of the marriage. The statute does not specify the precise role of the guardian: investigator of the child's circumstances, reporter to the court of his or her conclusions about a child's best interest, advocate for a particular result in behalf of a child, or a combination of the three. The reasonable fees or costs of the guardian must be borne by the parties and may be assessed by the court as it deems equitable. The guardian is immune from liability while acting within the scope of the appointment.