Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 25 August 2011

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am self-employed as a solo practitioner with a general law practice.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1987

BPR number: 12799

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee, BPR number 12799. I was licensed to practice in October 1987. My license is currently active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Since completion of my legal education, I have had the following employment and experience:

(a) **Parker, Lawrence, Cantrell & Dean**, Nashville, Tennessee, 1987 to 1992.
Associate attorney.

The major portion of my practice was insurance defense work, specifically, defending auto accidents, uninsured and underinsured motorist claims, slip and falls, workers compensation cases, product liability cases, homeowners policy claims, and also assisting with medical malpractice cases and commercial litigation, and the like. I also represented a water and sewer utility district in general business matters, and filed and handled the utility's eminent domain cases. In addition, I also prepared Wills, handled estate matters, prepared partnership agreements and other contracts, handled some lien suits, and handled other general business matters as requested.

I was given a lot of responsibility as an associate attorney, and worked on many cases from beginning to resolution without a great deal of supervision. My specific responsibilities included written discovery, depositions, motions, interviewing clients and witnesses, drafting and finalizing documents, trial preparation, research, settlement negotiations, and trials.

(b) **Tennessee Attorney General's Office**, Nashville, Tennessee, 1992 to 1993.
Assistant Attorney General in the General Civil Division.

I assisted in defending the State of Tennessee in two lawsuits about the Arlington Developmental Facility near Memphis, Tennessee, where intellectually and developmentally disabled people from ages 4 to 80 lived.

One lawsuit was filed by the U.S. Department of Justice under the Civil Rights of Institutionalized Persons Act of 1980. The second lawsuit was filed by a public interest group, under 42 U.S.C. § 1983, which alleged violation of Constitutional and federal statutory rights, and sought class action status. In both lawsuits, the plaintiffs alleged that the people at Arlington were receiving unconstitutional medical care, psychiatric and psychological treatment, nursing care, physical therapy, occupational therapy, and special education. The plaintiffs also alleged that the residents were subject to life-threatening violations of fire safety codes.

I was a full-time associate counsel working with a lead attorney, a part-time attorney, and several experts on the case. In one year, we had several pre-trial hearings, handled written discovery and produced at least 200,000 documents, handled 50 to 60 depositions of staff and employees, handled experts' depositions, went on numerous tours of the facility with counsel and experts, worked with expert consultants to improve conditions at the facility, prepared the case for trial, and tried the case in four weeks in the U.S. District Court, Western District of Tennessee. The pretrial hearings were all handled by the lead attorney, although I attended court with her. We had divided up the case by subject matter areas. I did

most of the work on the psychiatric and psychological treatment issues, the nursing issues, and special education issues pretrial and at trial.

While I was at the Attorney General's Office, I also wrote an opinion, and appeared in trial court in Memphis, Tennessee on a ballot/election case.

(c) **Inter-City Products Corporation (USA),** now known as International Comfort Products (USA), Lewisburg, Tennessee, 1993 to 1996.
In-house attorney.

I was responsible for handling all the corporation's claims and lawsuits. The corporation was one of the largest manufacturers of residential and light commercial heating and air-conditioning equipment in the United States, with total annual sales over $500 million. The corporation was partially self-insured.

At any one time, I had 200 claims and lawsuits to defend in 30 different states. The corporation was plaintiff in about one or two matters. I hired outside attorneys, and managed their handling of the lawsuits.

Specific areas of practice included product liability (about 90% of the claims and lawsuits), personal injury, employment and labor law issues, patent infringement, transportation undercharge claims (involving federal law), independent contractor issues, distributorship issues, workers compensation claims, and collections matters. I also performed some corporate secretarial functions (such as board resolutions, minutes, etc.), and giving general business advice as requested by management.

To help me in my work for this corporation, I attended training and received certification in 1995 as a Fire and Explosion Investigator, from National Association of Fire Investigators. I also attended tech classes offered to installers of products manufactured by the corporation, and received "Top Tech" award in two of those classes.

(d) **Solo law practice**, 1996 to present.
Details about my practice are provided in response to Question 7 below.

Before completing my legal education, I was employed as follows:

(aa) During my second and third years of law school, I worked as a Law Clerk about twenty hours a week for the following law firms in Nashville, Tennessee:
Parker, Lawrence, Cantrell & Dean, Nashville, Tennessee, 1987;
Saturn & Mazur, Nashville, Tennessee 1986-1987; and
Manier, Herod, Hollabaugh & Smith, P.C., Nashville, Tennessee 1985-1986.

(bb) Upon my graduation from college I worked as Chemist for Metropolitan Nashville Water and Sewerage Department, Nashville, Tennessee, from1981 to 1983, in the laboratory, analyzing water and wastewater samples.

(cc) From 1983 to 1984, I was Merchandise Manager for Petra, a Christian rock group which was internationally known at the time. We traveled across the U.S. and Canada. I was responsible for selling t-shirts and other merchandise at concerts, and supervising local folks who helped me with sales.

(dd) During college, from 1978 to 1981, I worked full-time as Associate Teacher-Counselor at Crockett Academy, Woodmont Boulevard, Nashville, Tennessee. This was a residential facility for emotionally disturbed teenagers which was operated by the Tennessee Department of Mental Health. My work included group sessions and behavior modification.

I have also been employed in a few part-time or temporary jobs prior to attending law school.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am a solo practitioner with a general law practice since 1996. I practice both civil and criminal law. The percentage is about 88% civil and 12% criminal. I handle divorces, both contested and not, which are about 26% of my total practice. I also handle post-divorce matters and child support, custody and visitation matters for parents who have not been married, which is about 24% of my total practice. I prepare simple wills and handle probate estate matters (about 11%). The remainder of my recent practice includes small business formations and advice, contracts drafting and review, real estate matters, personal injury cases, conservatorship, dependency and neglect cases, termination of parental rights, collections, employment issues, and restraining order issues.

In past years, I have also had adoptions, guardianships, will contest disputes, business and partnership disputes, unemployment compensation hearings, residential and commercial lease matters, bankruptcy, and workers compensation cases, and a case involving constructive trust issues, in addition to the types of matters already described above. I have also done civil and criminal appeals. Criminal law was 50% of my practice at one time.

To date I have not been willing to limit my practice to any one area. I enjoy the diversity and keeping up with the law in many areas. However, my primary focus has been on litigation.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I have practiced law about twenty-four years. My practice has been mostly litigation in Circuit, Chancery, Juvenile, and General Sessions (including City) courts. I have appeared before many judges in a number of counties in Tennessee, namely, Williamson, Davidson, Maury, Rutherford, Cheatham, Hickman, Marshall, Sumner, Carroll, Montgomery, Robertson,

Dickson, Lewis, Lawrence, Marshall, Bedford, Wilson, Coffee, Cannon, Warren, Shelby, Smith, Putnam, and Washington Counties. My trial court appearances have been on motions and trials or final hearings in both civil and criminal cases. I have had at least two jury trials on criminal cases. I have also represented a few clients in administrative hearings with the Social Security Administration and unemployment compensation Appeals Tribunal. I have filed at least one claim with the Tennessee Claims Commission. I handled an appeal to court from an adverse agency decision on a gun permit. I associated with another attorney on a disability insurance case filed under the ERISA law in federal court. I have had at least ten appeals to the Tennessee Court of Appeals in the following areas: divorces, termination of parental rights, a dispute over sale of a dental practice, a probate estate in which the deadman's statute and a prenuptial agreement were at issue, and a real estate disclosure case. I have had at least two appeals to the Tennessee Court of Criminal Appeals. In most of these appellate cases, I have made oral arguments. I have appeared a few times in U.S. Bankruptcy Court for the Middle District of Tennessee. I have been the sole lawyer for my clients in these matters (except the disability / ERISA matter) since 1996, and have completely handled all aspects of these cases (except the disability / ERISA matter) including filing pleadings, doing discovery, drafting motions and appearing at motion hearings, preparing other paperwork for the proceedings, handling settlement negotiations and, when cases did not settle, handling the trials or final hearings. I go to court about three days in a typical week.

When I worked as in-house counsel for a corporation from 1993 to 1996, I managed lawsuits going on in at least 30 different states simultaneously. While in that role, I testified in trial court in Austin, Texas, was present at a products liability jury trial in Ohio, represented the corporation in at least one mediation and I discussed proceedings in lawsuits with many outside attorneys across the country. I reported to the corporation's General Counsel regarding my work, however, I was the only lawyer at the corporation who was personally involved in the activities in these lawsuits.

When I worked for the Tennessee Attorney General's office, I was a full-time associate counsel working with a lead attorney, a part-time attorney, and several experts on the case. In one year, we had several pre-trial hearings, handled extensive and voluminous discovery, prepared the case for trial, and had a trial lasting four weeks in the U.S. District Court, Western District of Tennessee. The pretrial hearings were all handled by the lead attorney, although I attended court with her. We had divided up the case by subject matter areas. I did most of the work on the psychiatric and psychological treatment issues, the nursing issues, and special education issues pretrial and at trial.

While I was at the Attorney General's Office, I also wrote an opinion which to the best of my memory was solely authored by me but signed by attorneys in positions of authority at the office. Also, I appeared in trial court in Memphis, Tennessee as the only attorney on behalf of the State on a ballot/election case.

In my early years as a lawyer with the law firm in Nashville, I did a lot of litigation activities on insurance defense cases, such as drafting pleadings, handling written discovery and depositions by myself on behalf of clients with limited supervision by partners. I prepared

motions for summary judgment for partners. I assisted with trials. I filed several eminent domain cases on behalf of the utility district, and handled nearly all of that work by myself. I was sole attorney on a jury trial in an eminent domain case in Davidson County. I was appointed on a habeas corpus case in Davidson County, which I handled by myself. The general business and will/estate matters I handled then were handled by myself, after some initial instructions from partners.

Throughout my entire legal career, I have taken care to do ample research before filing complaints or petitions, and to research and be prepared concerning the law and facts of my case before every court appearance.

I have given some further information about my experiences in answers to questions 5 and 7 above.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I have handled thousands of legal matters. All of them have been important, and I found them all interesting. A few of the more noteworthy are the following:

(a) *State of Tennessee v. Cecil L. Groomes.*

This was a criminal case. Mr. Groomes was convicted of especially aggravated robbery and received a 22-year sentence. He and three other young men were involved in a carjacking at Cool Springs Mall on Sunday afternoon of Labor Day Weekend in 1997. The victim was shot in his chest at point-blank range with a pistol, and his car was stolen from him.

I was the sole attorney representing the defendant in Circuit Court, Williamson County, Tennessee, No. I-1097-381, on appeal to Court of Criminal Appeals, and on application to the Tennessee Supreme Court. This case received television and newspaper coverage at the time the victim was shot. It also received newspaper coverage at trial. Many of the potential jurors at trial had heard and seen press coverage about the case. This incident was also noteworthy because it happened in the afternoon at Cool Springs Mall, a place frequented by many Williamson Countians which has been considered to be a "safe" place.

(b) *United States Department of Justice v. State of Tennessee* (U.S. Dist. Ct., W.D. Tenn.).

I have described this case in answer to questions 5 and 8 above. I worked as associate counsel representing the State of Tennessee on this case from mid-1992, when the discovery

phase began, through the trial which took place in fall of 1993. I worked with another full-time attorney who was chief counsel on the case, one part-time attorney, and several experts.

The U.S. Department of Justice alleged that the people at Arlington Developmental Facility near Memphis, Tennessee, were receiving unconstitutional levels of medical care, psychiatric and psychological treatment, nursing care, physical therapy, occupational therapy, and special education. The plaintiffs also alleged that the residents were subject to life-threatening violations of fire safety codes. The case was filed pursuant to the Civil Rights of Institutionalized Persons Act of 1980. The procedural history of the Justice Department case is reported in *U.S. v. State of Tennessee*, 925 F.Supp. 1292 (W.D. Tenn. 1995). Soon after this case was filed by the Department of Justice, a civil rights case was filed by a public interest group on behalf of about five named plaintiffs who resided at Arlington. They alleged that the low levels of care given the Arlington residents violated their rights under the U.S. Constitution and federal statutes. The plaintiffs sought class action status.

The case was significant from a policy point of view for the State of Tennessee. These cases were also significant in my legal career because of the amount of work involved. In the space of one year in the Justice Department case, we had numerous meetings with people employed at Arlington in order to prepare our case, had several pre-trial hearings, had extensive written discovery and produced at least 200,000 documents, handled 50 to 60 depositions of staff and employees, handled experts' depositions, went on numerous tours of Arlington with counsel and experts, worked with expert consultants to improve conditions at the facility, prepared the case for trial, and tried the case in an expedited four-week trial in the U.S. District Court, Western District of Tennessee.

(c) I was involved in litigating two other civil cases which were significant in my legal career because of the number of parties and the amount of damages involved, so I will list them here. However, these cases were settled before trial.

(i) *Sverdrup Corporation v. Hurst Boiler Company; Nashville Resource Recovery Limited; Enerco Systems, Inc.; The Equity Group; Armstrong Tire Company; Third National Bank; David J. White; Industrial Development Board of Metropolitan Government; Shred Pax Corporation; Safeco Insurance Company of America.*

This case was actually three cases which were consolidated in Chancery Court for Davidson County, Tennessee, Case Nos. 89-284-II, 89-1945-II, and 90-2125-I. They were active from 1989 to 1992.

The case was filed to recover damages caused when the construction of a co-generation facility was not completed, and the facility could not be operated. A co-generation facility is one which uses electricity to generate steam which is then sold. I had sole responsibility for representing Hurst Boiler Company, the defendant which supplied the huge boilers which were designed to produce the steam. The boilers were the largest component of the project. There were no court appearances required while I

was handling this case; however, I left the law firm to go to work for the Attorney General's Office before the case was settled.

The significance of the case was the number of parties, and thus the complexity of the issue of who and what caused the damages, and the extent that each of the remaining parties contributed to causing the damages; and the amount of damages, which were in the millions of dollars.

(ii) *Spalding v. Ramada Inn; Music Valley Inns, Inc.; McDevitt & Street Company; Adkisson, Harrison & Rick; J.A. Hobbs & Sons Construction; Lee Company; Nashville Swimming Pool Company; Comfortzone Corporation; Piedmont Natural Gas Company; and Nashville Gas Company.*

This case was originally filed in Circuit Court, Davidson County, Tennessee, in 1987, and was removed to U.S. District Court, Middle District, Tennessee in Nashville. It was settled about 1990.

This was a carbon monoxide poisoning case. The case was filed on behalf of plaintiff was staying in the Ramada Inn near Opryland, when he died during the night from carbon monoxide poisoning. His wife was permanently disabled from carbon monoxide poisoning. I was associate attorney representing Comfortzone Corporation, the defendant which made the gas-fired pool water heaters. I assisted the partner at the firm who was lead counsel on the case; however, I appeared at some of the depositions on this case by myself.

The significance of this case was (i) the amount of damages, alleged to be several million dollars; and (ii) the procedural logistics of coordinating the extensive discovery and working out a scheduling order with the numbers of attorneys involved in this case. We appeared in court for scheduling conferences and settlement conferences on this case.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have been listed as a Rule 31 family mediator since 1997. I have served as mediator in divorce and post-divorce cases which were pending in trial court in Williamson and Hickman Counties, and a case pending in Marshall County. I was appointed on some cases. I was chosen by the parties' attorneys on other cases. The most significant case was *Jayme Hentrich vs Craig*

Hentrich, Chancery Court for Williamson County, Tennessee, Case No. 28648, in April 2003, which involved substantial assets as well as custody and visitation issues.

I served as a volunteer mediator with the Neighborhood Justice Center in Nashville, Tennessee, in 1999. These mediations involved criminal matters. The District Attorney's Office in Nashville or the courts send them for mediation before prosecution and/or trial.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I served as conservator for an elderly woman from 2003 to 2004. My responsibilities included paying her bills, working with the people who were responsible for her healthcare, arranging for sale of her home and personal property when that became necessary, and filing accountings and other necessary papers with the Chancery Court in Williamson County, Tennessee.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

None.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I submitted an application for a Circuit Court judgeship for the 21st Judicial District to the Tennessee Judicial Selection Commission. The Commission met July 12-13, 1999. My name was not submitted to the Governor as a nominee.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other

aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

(a) Belmont College, now known as Belmont University, Nashville, Tennessee.
Attended: 1977 to 1981.
Degree: Bachelor of Science Degree in Chemistry. *Cum laude*.

(b) Vanderbilt University School of Law, Nashville, Tennessee.
Attended: 1984 to 1987.
Degree: J.D. Degree

PERSONAL INFORMATION

15. State your age and date of birth.

Age 52.

Date of birth: July 10, 1959.

16. How long have you lived continuously in the State of Tennessee?

52 years (since birth).

17. How long have you lived continuously in the county where you are now living?

13 years (May 1998 to present).
I previously lived in Williamson County 14 years (1964 to 1978).

18. State the county in which you are registered to vote.

Williamson County, Tennessee.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state

whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

The only violations I have are for traffic / parking tickets, as follows:

May 31, 1996, General Sessions Court for Williamson County Tennessee, speeding citation, attended driving school, court record shows that case was retired.
October 1996, Maryland, did not attend court, paid fine $70 for speeding ticket.
September 22, 1998, City Court of Franklin, Tennessee, No. 22435, speeding citation, attended traffic school and paid $15 fee, completed process November 1998, court record shows that case was retired.
May 2001, City Court of Franklin, Tennessee, No. 2065, parking ticket, paid $6.00 by mail.
July 2001, City Court of Franklin, Tennessee, No. 2302, parking ticket, paid $6.00 by mail.
March 2007, City Court of Franklin, Tennessee, No. 302441, parking ticket, paid $11.00 by mail.
July 2009, City Court of Franklin, Tennessee, No. 132902, citation for seatbelt violation, did not attend court, paid fine of $10 by mail.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes.

Other:

Rutherford County v Delinquent Taxpayers including Todd Wethington, Chancery Court for Rutherford County, Tennessee, Case No. 11CV-0498 and 2011-RC-250, filed August 2, 2011. I was served with the complaint as a holder of an attorneys fee lien on Mr. Wethington's real estate.

Lawsuits for collection of attorneys fees handled by C&C Service Corporation for me:

Judy Oxford, Attorney vs Daryl Martin, filed June 30, 2011 in General Sessions Court for Williamson County, Tennessee, Case No. 94GSV-2011-CV-1930. Case continued indefinitely due to Mr. Martin filing bankruptcy.

Judy A. Oxford, Attorney vs Megan Elizabeth Webster Yurcik, filed June 29, 2011 in General Sessions Court for Davidson County, Tennessee, Case No. 11GC12873. Return on service showed that Ms. Yurcik was not found.

Judy A. Oxford, Attorney vs Kelley Campbell, filed May 7, 2008 in General Sessions Court for Davidson County, Tennessee, Case No. 08GC11214. Judgment for me against Ms. Campbell in the amount of $4,983.36 plus interest and costs.

Judy Oxford, Attorney vs James R. Reed, filed June 19, 2007 in General Sessions Court for Williamson County, Tennessee, Case No. 94GSV-2007-CV-43353. Agreed judgment for me against Mr. Reed for $3,512.31 plus costs.

Traffic matters as described above in Number 20.

Personal injury case. *Judy Oxford vs City of Franklin*, Circuit Court of Williamson County, Tennessee, Case No. 94CC1-2002-CV-9592, filed September 5, 2002, and voluntarily dismissed and closed on October 12, 2004.

Terry W. Battle v. Judy A. Oxford, Circuit Court of Williamson County, Tennessee, No. 97634, filed in November 1997 by my criminal client who was already a career offender, after he was found guilty by a jury on theft charges. My client also sued Judge Donald P. Harris who ruled on all motions and presided at trial of the case, the Assistant District Attorney of Williamson County who prosecuted the case, and the Sheriff's Department of Williamson County who transported my client from the prison to the courthouse and housed him at the county jail during motion hearings and trial. Mr. Battle alleged that I violated his civil rights and rendered ineffective assistance of counsel because I failed to file a number of motions on his behalf, failed to get his medical records, and similar. We filed a motion to dismiss soon after the lawsuit was filed. The trial court dismissed the complaint because of a lack of factual basis for the complaint. Mr. Ballard appealed; the Court of Criminal Appeals dismissed the appeal because it was untimely filed.

Divorces:

Divorce from John M. Slick, filed in 1990 in Chancery Court for Sumner County, Tennessee, Case No. 90DII-4. Divorce granted on December 3, 1990 based on irreconcilable differences.

Divorce from David R. Fisher, filed in 1994 in Second Circuit Court for Davidson County, Tennessee, Case. No. 94D-4356. Divorce granted on March 7, 1995 based on irreconcilable differences.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

St. Paul's Episcopal Church, 510 West Main Street, Franklin, Tennessee.

Williamson County-Franklin Chamber of Commerce, Franklin, Tennessee.

Williamson County Republican Career Women, Franklin, Tennessee. Vice-President Elect for 2012.

Williamson County Republican Party, 104 East Main Street, Franklin, Tennessee.

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches

or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

The Tennessee John Marshall American Inns of Court,
Franklin, Tennessee, Member 1998-2003, and 2011 to present.

Williamson County Bar Association,
Member from 1996 to present; President (2001-2002); Vice-President (2000-2001); Treasurer (1999 to 2000); Secretary (1998 to 1999).

Lawyer's Association for Women, Marion Griffin Chapter,
Nashville, Tennessee, Member from 1987 to present; Treasurer (1992-1993); Chair, Banquet Committee (1993-1994); Chair, New Admittee Breakfast Committee (1991); Member, Program Committee (1988-1989).

Tennessee Lawyers' Association for Women,
Charter member since 1988; Secretary (1995-1997); Member, Convention Planning Committee (1992).

American Bar Association,
Member from 1987 to present; also a member of the General Practice, Solo and Small Firm Division.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

None.

30. List the citations of any legal articles or books you have published.

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

None.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I submitted an application for appointment as U.S. Bankruptcy Judge for the Middle District of Tennessee in February 1999.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached are the following items, all of which were solely prepared by me, without any input from others:

(a) Brief filed in the Court of Appeals of Tennessee on behalf of a mother whose parental rights were terminated by the Juvenile Court for Williamson County, Tennessee. The Court of Appeals reversed the trial court decision. I was appointed to represent the mother on the appeal. (Addendum consisting of case law is not attached.)

(b) Affidavit and Memorandum in Support of Motion to Dismiss for lack of jurisdiction which I filed in a divorce case on behalf of an out-of-state client. The Motion to Dismiss was a form motion; however, the Affidavit and Memorandum were the result of my own

effort. (Copy of case law and treatises cited are not attached here.)

(c) Brief filed as the court directed regarding constructive trust issues. (The case law and statutes cited are not attached here.)

(d) Trial Brief prepared in a real estate case about the truthfulness of property disclosures. I represented the sellers of this real estate. The case was dismissed by the court.

(e) Motion for Summary Judgment, and Memorandum in Support of Motion filed in a partnership case. I represented the defendant who claimed that there was no partnership. Defendant prevailed in this case. (The other materials also filed with this Motion are not attached here.)

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I want this position as Circuit Court judge. I will work with energy and dedication to meet the challenge of this office. My legal education is excellent. Over twenty-four years of practicing law, I have acquired broad experience in many areas of the law, both civil and criminal. I have a thriving solo practice which I believe demonstrates that I have a strong work ethic. I am fair in my day-to-day dealings with other people, and I would be a fair and impartial judge. I am practical, and can communicate well with different types of people. I believe all of these things taken together, in addition to my character and personality, make me qualified for this position. I would work very hard to apply the law to the cases that would come before me.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I have served on the Board of Directors of the Legal Aid Society since 2007.

I have accepted every request or appointment by a court to represent an indigent person on both civil and criminal cases, except for a few cases where there was a conflict of interest. In addition, I have accepted pro bono cases, and I am on the list of volunteer attorneys for Williamson County, Tennessee. My first appointed case was a habeas corpus case filed by an inmate when I was still a fairly new lawyer. I currently have a pro bono divorce case, and am representing a father in a case filed in Juvenile Court to terminate his parental rights. I have given every appointed and pro bono client the best of my effort, equal to the effort given to my retained clients' cases.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

This is the position of Circuit Court Judge for the 21st Judicial District, which is Hickman, Lewis, Perry, and Williamson Counties. There are four Circuit Judges. The current vacancy is the Division III Circuit Judge. This judge hears all civil cases filed in both circuit and chancery court, and criminal cases. The four judges in this district rotate between civil and criminal dockets every two years. The Division III Circuit Judge is currently assigned to hear civil cases in Williamson County, and criminal cases in Lewis and Perry Counties. The criminal case assignment will change to Hickman County in 2012. The most obvious impact my selection would have on the court would be to make the court more diverse. I would bring to the court energy and dedication, and a strong sense of justice. I would hear the parties who come before me, and apply the law to their cases.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I conduct character and fitness interviews of persons who have taken the bar exam in Tennessee and either live in Williamson County or indicate a desire to work as a lawyer in Williamson County. (District 6 Investigating Committee for the Board of Law Examiners for Tennessee.) I have been doing this since 2003. I would like to continue to do this work.

I have been taking care of the flower gardens on the 6th Avenue side of St. Paul's Episcopal Church in Franklin, Tennessee, since 2002. I continue to plant, fertilize, water, weed, and try to improve the garden every year at my own expense (except for the water which is

provided by the church). I spend a few hours there every week from spring to fall. I want to continue to do this work.

I am the President of the Board of Directors for the owners association of the office condominium park where I maintain my law office. I have been on the Board since 2007. I would resign from this Board if I were appointed judge.

I am open to having other community involvement in accordance with and subject to the constraints of the Code of Judicial Conduct.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I believe the variety of experiences I have had give me a broader perspective to better understand the parties and lawyers who appear in court, and apply the law to their cases.

I grew up in Fairview, Williamson County, Tennessee, and graduated from Fairview High School. My father worked on an assembly line in a factory. I was totally self-supporting from the time I was nineteen years old, working full-time and also attending college full-time and maintaining high grades. After college, I worked for three years in non-legal employment before starting law school. As you can see from my previous answers, I have worked in a variety of legal settings and a number of different areas of both civil and criminal law in the last twenty-four years.

I am hard-working and industrious. I have always tried to do my best and continually sought to improve my performance of my work. I have also focused on my own personal and spiritual growth. I am curious. I have traveled in forty-four states of the United States, and in nineteen other countries. I am teaching myself Spanish. I am interested in people and in history. I understand suffering, because of my own experiences with divorce, the death of my baby ten years ago, and other losses.

If selected for this judgeship, I would devote myself wholeheartedly to this task, to being fair and impartial, to following the law, and endeavoring to assure justice for all who come before this court.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, I will uphold the law even if I disagree with the substance of the law.

I do not believe I have had to confront this situation in my law practice. I have had several experiences with clients who have wanted me to do something that I believed the law did not permit me to do, and I insisted on following the law. However, in these circumstances, I cannot say I disagreed with the law.

I can still hear my first-year constitutional law professor exhorting us students over and over to "be schizophrenic", that is, keep our own personal views completely separate from what the law is. I believe that I can do this if I were appointed judge.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A.
Peggy Evans
1301 Lavada Place
Brentwood, TN 37027
615-371-0583
615-498-1988

B.
James B. Ford
9679 Aurora Court
Brentwood, TN 37027
615-308-8502
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C.
Robert H. Plummer, Jr.
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104 South Margin Street
P.O. Box 1361
Franklin TN 37064

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D.
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2003 Cantwell Ct.
Spring Hill, TN 37174
615-397-7242
rondaspurlock@msn.com

E.
Edwin L. Trowbridge
421 Logan's Circle
Franklin, TN 37067
615-790-3556

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Circuit Court for the 21st Judicial District of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: September 20, 2011.

Judy A Oxford
Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

Judy A. Oxford
Type or Printed Name

Judy A Oxford
Signature

September 20, 2011
Date

12799
BPR #

QUESTION 34

(a) Brief filed in the Court of Appeals of Tennessee on behalf of a mother whose parental rights were terminated by the Juvenile Court for Williamson County, Tennessee. The Court of Appeals reversed the trial court decision. I was appointed to represent the mother on the appeal. (Addendum consisting of case law is not attached.)

FILED

04 NOV -1 AM 8:30

APPELLATE COURT CLERK
NASHVILLE

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

IN RE:
D[redacted] D[redacted], DOB 8-4-95,
M[redacted] H[redacted], DOB 10-24-97,
W[redacted] B[redacted], IV, DOB 6-20-00.

L[redacted] B[redacted] AND K[redacted] B[redacted],
Petitioners—Appellees,

VS.

V[redacted] H[redacted],
Respondent—Appellant.

Appeals No. M2004-01572-COA-R3-JV

Williamson County Juvenile Court
Docket No. 41460
Legal File No. 21608

BRIEF OF APPELLANT

JUDY A. OXFORD # 12799
Attorney at Law
1224 Columbia Avenue
Franklin, TN 37064
615-791-8511

ATTORNEY FOR APPELLANT
V[redacted] H[redacted]

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2. Whether the trial court erred in terminating appellant's parental rights when there was not clear and convincing evidence that appellant willfully failed to pay support for her three children or willfully failed to visit with them during a period of four consecutive months immediately prior to the filing of the petitions.

3. Whether the appellant, V[redacted] H[redacted], the mother, was denied effective assistance of counsel when she was not allowed to testify at trial, such that the Order of the trial court terminating her parental rights should be vacated and the appellant given a new trial.

STATEMENT OF THE CASE

Appellees-petitioners [redacted] and [redacted] filed their three Petitions to Terminate Parental Rights on November 3, 2003. One petition was filed for each of three children, for whom appellant-mother is the biological mother, and three separate respondents are father (TR, p. 14, 20, 26).

No answer to the Petitions was filed.

On January 7, 2004, appellant-mother [redacted] filed her three Motions to Set Visitation, one motion for each child (TR, p. 32-34).

On January 26, 2004, there was a hearing on the Motions to Set Visitation. The Motions were continued to March 3, 2004, to be heard at the same time as the Petitions to Terminate Parental Rights (TR, p. 36). An attorney was appointed to represent appellant-mother (TR, p. 36, 37).

On February 4, 2004, the court appointed Court Appointed Special Advocate (CASA) to investigate, make findings and recommendations, appear at all court proceedings, and monitor the care and treatment of the children (TR, p. 38).

Trial was had on the Petitions to Terminate Parental Rights on March 3, 2004 (TR, p. 39). The parental rights of appellant-mother were terminated as to all three children (TR, p. 39).

A Notice of Appeal to the Court of Appeals for the Middle District of Tennessee was filed by appellant-mother [redacted] on June 23, 2004 (TR, p. 50). New counsel was appointed to represent appellant-mother on appeal on July 14, 2004 (TR, p. 52.)

The record on appeal consists of one volume of the technical record which will be referred to as "TR" plus the appropriate page number; a transcript of the hearing on June 3, 2004 which will be referred to as "Transcript of hearing on June 3, 2004"; and an audiotape of the hearing on June 3, 2004. The record on appeal also includes the transcript of evidence at the hearing on March 3, 2004, which shall be referred to as "Transcript"; and two exhibits which

will be referred to "Exhibit" and the appropriate number; all of which are contained in the record for appeals no. M2004-00999-COA-R3-JV.

STATEMENT OF FACTS

Appellant-mother V[redacted] H[redacted] is the biological mother of three children, now aged 9, 7, and 4.

On May 1, 2003, D[redacted] M[redacted] filed a Petition for Dependent Neglect in the Juvenile Court for Williamson County, Tennessee (TR, p. 1). Mother was incarcerated in Williamson County Jail at the time, but was due to be released shortly (TR, p. 1). On May 1, 2004, a guardian ad litem was appointed for the three children (TR, p. 3). There was a preliminary hearing on May 1st, on the Petition. Mother was present at the hearing. Mother admitted in open court that her drug problem was the reason for the removal of the children from her custody. (TR, p. 4.) Mother agreed for D[redacted] M[redacted] to have custody of her three children on a temporary basis. (TR, p. 6-7.) D[redacted] M[redacted] was always willing to keep trying to help the mother (Transcript, p. 18, l. 5; p. 54, l. 10; p. 55, l. 17). The three children were placed in the temporary custody of D[redacted] M[redacted], to give Mother a chance to go to drug rehab, and an adjudicatory hearing was set for July 28, 2004 (TR, p. 4).

On July 28, 2004, the date the hearing was to occur, K[redacted] and L[redacted] B[redacted] filed their Petition for Change of Custody (TR, p. 9). The B[redacted]' (appellees) Petition was heard, and there was also an adjudicatory hearing on Ms. M[redacted]'s Petition at the same time. (TR, p. 12). Mother was not present at this hearing. There is nothing in the record on appeal to show that appellant-mother had notice of the Petition filed by the B[redacted]. At the end of the hearing, the three children were placed in the legal and physical custody of the B[redacted]s (TR, p. 12). The Order was entered on August 7, 2004. This Order does not have a Certificate of Service, and there is no evidence in the record to show that Mother received written notice of the change of custody after this hearing.

On November 3, 2004, K[redacted] and L[redacted] B[redacted] (appellees) filed their three Petitions to Terminate Parental Rights (TR, p. 14, 20, 26). The Petitions were set for hearing on March 3, 2004.

Mother in fact did not have knowledge of the location of her children (Transcript of hearing June 3, 2004, p. 11, l. 22; p. 12, l. 24) until some time in November 2003. Appellant-mother became aware of the phone number for K[redacted] and L[redacted] B[redacted] (appellees--petitioners) and made a telephone call to L[redacted] B[redacted] around Thanksgiving 2003, or the first of December 2003, after the petitions to terminate parental rights had already been filed. (Transcript, p. 170, l. 13, l. 18-25.) Appellant-mother left a message on the B[redacted]' answering machine at that time, stating that she loved the children and she was still around. (Transcript, p. 174, l. 7.)

On January 7, 2004, Mother filed Motions to Set Visitation with all three children (TR, p. 32-24). At the hearing on January 26, 2004, Mother was not given any visitation (TR, p. 36). Instead, the Motions were continued to March 3, 2004 (TR, p. 36).

On March 3, 2004, after a lengthy hearing during which Mother did not testify, and little evidence was offered with respect to appellant-mother for the four-month period from July 3, 2003 to November 3, 2003, appellant-mother's parental rights were terminated (TR, p. 39). Mother requested a re-hearing so she could testify, but her request was denied (TR, p. 47-49).

ARGUMENT

FIRST ISSUE PRESENTED FOR REVIEW

Whether appellant-mother's right to due process was violated when the trial court found that her parental rights should be terminated based on facts not alleged in the petitions.

Standard of review. Whether appellant-mother's due process rights were violated is a question of law which is to be reviewed de novo by the appellate court, without any presumption of correctness attached to the findings made by the trial court. In the Matter of: B.G.J., 2004 WL 1906446, p. 2 (Tenn.Ct.App.).

Argument. The petitions (one for each of the three children) alleged that appellant-mother abandoned her children as defined in Tennessee statutes and case law, in that she willfully failed to pay support and failed to visit for at least four months prior to the date the petitions were filed, and that appellant-mother's parental rights should therefore be terminated.[1] The trial court announced its ruling at the conclusion of trial, and added a different ground for termination of parental rights:

> "I also find, although it wasn't mentioned in the petition, I find on – in the Court's own motion, I'm going to put into the record that I believe the proof has shown

[1] The petitions against appellant-mother also alleged that prior to these petitions being filed, the Juvenile Court had already found that the children were dependent and neglected due to abandonment by the mother. This second allegation was presumably also intended to serve as a separate basis for termination of appellant-mother's parental rights for abandonment. Appellant-mother avers, however, that in order to terminate rights based on abandonment, the termination must be based on some specific criteria set forth in the statute. In alleging the prior finding that the children were dependent neglected, appellee-petitioners were presumably referring to T.C.A. § 36-1-102(1)(A)(ii); however, this particular definition of "abandonment" does not apply in this case because the children were not placed in the custody of the Tennessee Department of Children's Services or a licensed child-placing agency. Therefore, this allegation of "abandonment" contained in the petition is meaningless for purposes of examining whether abandonment was proven in this case. Further, the trial court did not base its finding of abandonment on T.C.A. § 36-1-102(1)(A)(ii).

> that the conditions which led to the child's removal, and the child – the children being found dependent and neglected, and those conditions which would cause the children to be subjected to further abuse and/or neglect, and which therefore prevent the child's safe return to the care of the mother still persists. They persist today. . . .[T]hat's a choice she's made, but it's a choice that this court is going to have to consider adversely toward her."

Transcript, p. 383, l. 24.

To terminate parental rights, by statute, the petition "shall state" "[a]ny other facts which allege the basis for termination of parental rights and which bring the child and parties within the jurisdiction of the court." T.C.A. § 36-1-113(d)(2). In addition, Rules provide that a petition to terminate parental rights "shall set forth" "facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist as provided in T.C.A. § 37-1-147."[2] Tenn. R. Juv. Proc., Rule 39(a). The Rules further provide that the court "shall conduct an adjudicatory hearing to determine the issues raised by the petition and by any answer(s) filed." Tenn. R. Juv. Proc., Rule 39(f). Minimum rules of due process therefore require that any ground for terminating parental rights must be stated in the petition, and the hearing must be for determining whether grounds stated in the petition are proven. *See* State v. Wade, 863 S.W.2d 406, 408 (Tenn. 1993); Armstrong v. Tenn. Dept. Veterans Affairs, 959 S.W.2d 595, 597 (Tenn.Ct.App. 1997); Martin v. Sizemore, 78 S.W.3d 249, 267 (Tenn.Ct.App. 2001).

The ground for termination of parental rights alleged in the petition was abandonment based on appellant-mother's willful refusal to pay support and visit the children for at least four months prior to filing of the petitions. Mother was not given notice of or an opportunity to prepare for possible termination of her parental rights based on any other grounds. Therefore, when appellant-mother's parental rights were terminated by the trial court on any grounds other than abandonment based on appellant-mother's willful refusal to pay support and visit the

[2] T.C.A. § 37-1-147(a) provides that the juvenile court is authorized to terminate parental rights upon grounds set forth in T.C.A. § 36-1-101 et seq.

children for at least four months prior to filing of the petitions, appellant-mother's right to due process was violated.

SECOND ISSUE PRESENTED FOR REVIEW

Whether the trial court erred in terminating appellant's parental rights when there was not clear and convincing evidence that appellant willfully failed to pay support for her three children or willfully failed to visit with them during a period of four consecutive months immediately prior to the filing of the petitions.

Standard of review. It is not clear which standard of review applies in this case. On the one hand, the second issue presented for review arises from construction of the statute defining "abandonment", and application of the law to the facts in evidence at trial. These are questions of law which the court of appeals reviews under the de novo standard, without giving any deference to the trial court's conclusions. In the Matter of D.L.B., A Minor, 118 S.W.3d 360, 365 (Tenn. 2003).

On the other hand, the appellate court reviews the trial court's findings of fact de novo with the presumption of correctness, unless the evidence preponderates otherwise. Then the appellate court determines whether the facts clearly and convincingly establish the grounds for terminating the biological parent's parental rights. In re Z.J.S. and M.J.P., 2003 WL 21266854 (Tenn.Ct.App.).

Appellant-mother submits that under either standard, the trial court has erred, and that the trial court's decision must be reversed.

Argument. The petitions (one for each of the three children) alleged that appellant-mother abandoned her children as defined in Tennessee statutes and case law, in that she willfully failed to pay support and failed to visit for at least four months prior to the date the

petitions were filed, and that appellant-mother's parental rights should therefore be terminated.[3] This definition of abandonment stated in the petition, therefore, is the sole ground on which the case against appellant-mother could be proven and her parental rights terminated.

The allegation in the petitions causes us to look at the definition of "abandonment". T.C.A. § 36-1-102(1) provides, in part, as follows:

> (1)(A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child; . . . .
>
> (D) For purposes of this subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child;
>
> (E) For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation;. . . .

According to case law, there must be a "willful intent", "a settled purpose to forego all parental duties and to relinquish all parental claims to the child", and not just a mere failure to support or a mere failure to visit. In re: Brittany Swanson, a Minor, 2 S.W.3d 180, 184, 188-189 (Tenn. 1999). There must an element of intent to abandon the child or children. Means v. Ashby, 130 S.W.3d 48, 55 (Tenn.Ct. App. 2003); In the Matter of D.L.B., a Minor, 118 S.W.3d 360, 367 (Tenn. 2003). There must be a willful failure to support or a willful failure to visit for four consecutive months immediately before the filing of the petition which is currently before the court. This four-month period is to be computed from the date on which this current petition to

[3] See footnote 1 above, regarding the second allegation in the petitions against appellant-mother.

terminate was filed, and not some previous petition or prior date. In the Matter of D.L.B., at 366 (Tenn. 2003).

The petitions to terminate parental rights in this case were filed on or about November 3, 2003. The consecutive four-month period immediately prior to the filing of these petitions was the period from July 3, 2003 to November 3, 2003.

The proof offered at trial with respect to payment of child support and visitation during the four-month period from July 3, 2003 to November 3, 2003 was as follows:

- On May 1, 2003, a petition for dependent / neglect was filed, and the parties were in juvenile court; however, appellant-mother was in jail. Transcript, p. 54, l.10-24. At that time, Di[redacted] M[redacted], who had custody at the time and had been caring for the children, was willing to give appellant-mother a chance to go to drug treatment and get help. Transcript, p. 55, l. 17 to p. 56, l. 3. Court was recessed until the end of July 2003. Transcript, p. 56, l. 4. Ms. M[redacted] could not testify as to the date that appellant-mother was released from jail. Transcript, p. 56, l. 15.
- After appellant-mother was released from jail, appellant-mother did not call Ms. M[redacted]. Transcript, p. 56, l. 21.
- Appellant-mother did not appear in juvenile court for the hearing on July 28, 2003. Transcript, p. 60, l. 14.
- At the hearing on July 28, 2003, custody of the three children was given to the B[redacted]s (appellees-petitioners). Transcript, p. 60, l. 20.
- After the hearing on July 28, 2003, appellant-mother found out that the children were living with someone else, and called Ms. M[redacted] a few times; however, the conversations were not civil, and Ms. M[redacted] never told appellant-mother that the children were with the B[redacted]s. Transcript, p. 61, l. 3 and l. 25; page 94, l. 16.

Ms. M[redacted] also told appellant-mother she (Ms. M[redacted]) was not going to take her (appellant-mother's) telephone calls anymore, and Ms. M[redacted] in fact did quit taking appellant-mother's calls, contributing to appellant-mother's lack of meaningful contact with the children during the relevant four-month period of time. Transcript, p. 98, l. 22; p. 99, l. 12; p. 99, l. 22; p. 100, l. 11; p. 100, l. 24, p. 101, l. 15; p. 102, l. 2.

- In about October 2003, Ms. M[redacted] and Ms. B[redacted] drove to the J.C. Napier area on one occasion, where they saw appellant-mother who appeared to be under the influence of drugs. Ms. M[redacted] and Ms. B[redacted] did not speak with appellant-mother at that time. Transcript, p. 62, l. 5; p. 63, l. 11; p. 63, l. 21. Ms. M[redacted] did not see appellant-mother at any other time during the period from July 3, 2003 to November 3, 2004. Transcript, p. 94, l. 11.
- Ms. M[redacted] had no other information regarding appellant-mother during that four-month period, as to where appellant-mother had been living, whether appellant-mother had been working, whether appellant-mother had been in drug rehab, whether anyone had been helping appellant-mother, or any other fact regarding appellant-mother. Transcript, p. 94, l. 20; p. 95, l. 4; p. 95, l. 25.
- L[redacted] B[redacted] (appellee-petitioner) specifically asked Ms. M[redacted] not to give out her "personal information" such as address and telephone number, so appellant-mother would not have had Ms. B[redacted]' address or telephone number beginning July 2003 when the B[redacted] obtained custody of the children. Transcript, p. 169, l. 23. Appellant-mother became aware of the phone number and made a telephone call to L[redacted] B[redacted] (appellee-petitioner) around Thanksgiving 2003, or the first of December 2003, <u>after</u> the petitions to terminate parental rights had already been filed. Transcript, p. 170, l. 13, l. 18-25. Appellant-mother left a

message on the B[redacted]' answering machine at that time, stating that she loved the children and she was still around. Transcript, p. 174, l. 7.

- At the time the children came to live with L[redacted] B[redacted] (appellee-petitioner) in June 2003, and when she obtained custody of the children on July 28 or 29, 2003, Ms. B[redacted] did not believe it was important for the children to have some kind of meaningful relationship with their appellant-mother. Transcript, p. 181, p. 16.
- Appellant-mother failed to show up for court hearing on a criminal charge on October 15, 2003. Transcript, p. 222, p. 21.
- Harry Boyko, CASA volunteer, testified that he interviewed appellant-mother in 2004, but he did not obtain any information concerning whether she was working at that time. Transcript, p. 220, l. 16. Mr. Boyko did not testify as to any other relevant information about appellant-mother during the four-month period prior to the filing of the petitions.
- A friend of appellant-mother's, namely Yvonne Smith Keaton, testified at trial, but she gave no specific testimony about appellant-mother with respect to the period from July 3, 2003 to November 3, 2003. Transcript, p. 263, l. 23 et seq.
- The sister of appellant-mother, namely T[redacted] H[redacted], testified at trial, but she gave no specific testimony about appellant-mother with respect to the period from July 3, 2003 to November 3, 2003. Transcript, p. 263, l. 13 et seq.
- The boyfriend of appellant-mother and father of one of these children, namely W[redacted] B[redacted], III, testified at trial, but he gave no specific testimony about appellant-mother with respect to the period from July 3, 2003 to November 3, 2003. Transcript, p. 296, l. 13 et seq.

There is little evidence offered as to what appellant-mother was doing or not doing during the relevant four-month period. There was no evidence of any intent on appellant-mother's part to willfully abandon her children, and no evidence of any settled purpose to forego all parental duties and relinquish all parental claims to the children. Her telephone calls to Ms. M[redacted], who had appellant-mother's children previously, and who had been willing to allow appellant-mother time to try to cope with her drug addiction, were not taken. Appellant-mother was not given the address or telephone number where her children were. There was no evidence she knew where her children were, that she had the ability and the means to visit them or call them until after the petitions were filed, that she had a conscientious disregard or indifference to parenting these children during this four-month period of time. In fact, arguably, Ms. M[redacted] and the B[redacted] (appellees-petitioners) took steps to cut off appellant-mother's access to the children, and after cutting off access, then claimed mother abandoned the children.

The vast majority of all the testimony relating to the appellant-mother was evidence about the years from 2000 through early 2003. There was testimony about neglect of the children during this prior period of time, but neglect was not the basis of this petition to terminate parental rights. There was little testimony about mother during the relevant four-month period from July to November 2003.

There was testimony about appellant-mother's efforts to see the children <u>after</u> the petitions for termination of parental rights were filed; but this testimony is also not relevant to the issue of abandonment during the four-month period from July to November 2003.

The testimony actually offered about appellant-mother is not sufficient to establish abandonment during the relevant consecutive-four-month period prior to the filing of the petitions to terminate parental rights. The evidence offered does not establish even a preponderance of the evidence regarding abandonment, and certainly does not establish by clear and convincing evidence that mother willfully abandoned these children.

Therefore, the court could not properly find grounds for termination based on this particular definition of abandonment, and the court could not properly proceed to consider the issue of the best interests of the children with respect to termination.

The order of the trial court terminating mother's parental rights must be vacated.

THIRD ISSUE PRESENTED FOR REVIEW

Whether the appellant, V[redacted] H[redacted], the mother, was denied effective assistance of counsel when she was not allowed to testify at trial, such that the Order of the trial court terminating her parental rights should be vacated and the appellant given a new trial.

This first issue is believed to be a matter of first impression for this court.

Appellant-mother had the right to have counsel at trial. In support of this proposition, appellant-mother points to certain Rules. First, the juvenile court is required to advise the party in a termination of parental rights case that the party has the right to be represented by counsel throughout the case and that counsel will be appointed if the party requests appointment of counsel. Tenn. Sup. Ct. R. 13, Section 1(d)(2). Second, in this case, the Tennessee Rules of Juvenile Procedure apply. Tenn. R. Juv. Proc., Rule 1(b). The juvenile court is required to appoint an attorney for a party who wishes to have an attorney but cannot afford to hire one to represent him or her in a termination of parental rights case. Tenn. R. Juv. Proc., Rules 28(b)(2) and 39(f)(2). In the instant case, the appellant, V[redacted] H[redacted], was found to be indigent; an attorney was appointed to represent her at the trial in Juvenile Court (and a new attorney was appointed to represent her on appeal).

Appellant-mother submits that in a parental rights termination case, the right to have an attorney should mean the right to have the effective assistance of counsel. See McMann v. Richardson, 397 U.S. 759, 771 (1970).

The rights of a parent in a termination of parental rights case are constitutionally-protected rights. For example, a biological parent is entitled to receive constitutionally-adequate service of process, that is, service which is more than "a mere perfunctory act undertaken simply to satisfy the technicalities of some statute." In re Z.J.S. and M.J.P., 2003 WL 21266854, at 6 (Tenn. Ct. App. June 3, 2003). Further, "[a] biological parent's interest in the care and custody of a child is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." Id., at 9. "[T]his right extends to all biological parents who have sought or exercised their parenting rights." Id., at 9. "Because a decree terminating a biological parent's parental rights obliterates the parent-child relationship and, in the eyes of the law, relegates a biological parent to the role of a complete stranger to his or her child, . . . both the federal and state constitutions require an individualized determination of the existence of the required statutory grounds before the courts may terminate a biological parent's parental rights." Id., at 9. In addition, "federal and state constitutions likewise require a heightened standard of proof in termination cases because of the fundamental importance of the rights and interests at issue." Id., at 9.

The significance and importance of the right to parent one's child ought to be deemed by the court to be on par with the protection of the liberty interests of a criminal defendant. A biological parent in a parental rights termination case who has an attorney representing him or her, ought to have the right to the "effective" assistance of counsel at trial.

To be "effective" means that counsel meets minimum standards of professional practice, and that the attorney's work falls within the range of acceptable professional practice. In the context of a criminal case, "ineffective assistance of counsel" means that counsel's performance was deficient, and that counsel's deficient performance prejudiced the defense so as to render an adversary proceeding unfair and the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984); Tyler v. United States, 166 F.3d 1215 (6th Cir.1998). Courts in Tennessee have interpreted this standard to mean that first, the petitioner must

demonstrate that counsel's representation fell below "the range of competence demanded of attorneys in criminal cases", Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), and second, the petitioner must show that there is a reasonable probability that, but for the counsel's defective representation, the result of the proceeding would have been different. Goad v. State, 938 S.W.2d 363, 370 (Tenn. Crim. App. 1994).

Although there are no hard-line rules for determining when an attorney's representation of a criminal defendant falls below "the wide range of reasonable professional assistance," courts have recognized cases where an attorney's representation was determined to be significantly deficient as to violate the represented criminal defendant's constitutional rights. See, e.g., Duff v. State, 2002 WL 31528506 (Tenn. Crim. App. 2002) (holding a failure to call a witness with clear exculpatory evidence met the first prong of denial of counsel); Clardy v. State, 2002 WL 122922 (Tenn. Crim. App., Jan. 23, 2002) (holding that failure to object to an erroneous jury charge was a denial of counsel).

Counsel is required to make meaningful preparations for trial. United States ex rel. Spencer v. Warden, Pontiac Correctional Center, 545 F.2d 21 (7th Cir. 1976). Meaningful preparation includes preparation both as to the law and the facts. In State v. Kimbrell, 2003 WL 1877094 (Tenn. Crim. App., April 15, 2003), the Tennessee Court of Criminal Appeals held that a trial strategy was so significantly deficient as to constitute a denial of counsel when the trial strategy was based upon an inadequate understanding of the Rules of Evidence and when the counsel's "inadequate preparation" resulted in his inadequate understanding of the rule. Id., p. 16-18.

Courts have also determined that an attorney's failure to pay attention and understand the trial proceedings rises to the level of ineffective assistance of counsel in a criminal case. In Javor v. United States, 724 F.2d 831 (9th Cir. 1984), the Ninth Circuit held that "when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." Id. at 833.

See also Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (holding that, where defense counsel was asleep during significant portions of the trial, a determination of per se prejudice was appropriate because "unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client").

In the instant case, there are at least two instances in which trial counsel for this appellant demonstrated a failure to have adequate knowledge about the applicable law and facts. One instance is shown at page 368 of the transcript, line 22, when trial counsel stated that he conceded that the petitioners demonstrated the statutory grounds for abandonment of the children for four months prior to the filing of the petition. Trial counsel then went on to say, "I would disagree . . . that nothing that has happened since then is at all relevant towards any determination that the Court has the best interest determination to make. . . ." A second instance is on page 365, line 1 of the transcript, when petitioners' attorney referenced the positive test for cocaine, and counsel for appellant showed he was not even aware that appellant's admission about failing the cocaine test had already been in evidence. Trial counsel advised appellant-mother not to testify at trial because he thought this would keep out evidence of her failing the drug screen; however, that evidence had already come in.

The Tennessee Supreme Court has held that the right of a criminal defendant to testify at the defendant's own trial is a fundamental right, and as such, that right may only be waived personally by the defendant, and not by defendant's attorney. Momon v. State, 18 S.W.3d 152, 161-163 (Tenn. 1999). A criminal defendant has a clearly established constitutional right to testify at trial. That right is deemed so important in Tennessee that it is now protected by procedures requiring the client's decision to be put on the record. Id. at 157. Where the lawyer made the unilateral decision that the client would not testify at trial, the client was granted a new trial. Id. at 161-162. A lawyer has a duty to explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the

representation. Tenn. Sup. Ct. R. 8, RPC 1.4(b). When the client makes those decisions, the lawyer is to abide by those decisions. *See* Tenn. Sup. Ct. R. 8, RPC 1.2(a).

Appellant-mother submits that a parent in a rights termination proceeding should also be deemed to have a fundamental right to testify at trial. In the instant case, appellant-mother was denied the opportunity to testify at trial, and present evidence that might show that she did not willfully abandon her children. She could have testified about the agreement she and Ms. M[redacted] had regarding the care of her children so as to show there was no willful abandonment; her side of the story with respect to her efforts to have visitation, in order to show that she did not willfully abandon her children; her attempts at drug rehab which occupied her efforts, in order to show that she did not willfully abandon her children. Because the appellant was denied her right to testify, she was unable to present evidence regarding her "intent" with respect to the children. During appellant-mother's presentation of proof, beginning at Transcript, p. 263, l. 10, and continuing to Transcript, p. 280, l. 21, nothing was stated as to whether or not appellant-mother had made the decision whether to testify or not. One witness was called, and then trial counsel merely stated, "Ms. H[redacted] rest (sic)". Transcript, p. 280, l. 21. At the hearing on the motion for rehearing in order to give mother an opportunity to testify, trial counsel for appellant-mother told the court that he had recommended to appellant-mother that she not testify. Transcript of hearing, p. 10, l. 9. His recommendation was based on the fact that appellant-mother had failed a drug screen on the day of the hearing (March 3, 2004), and he thought he could keep out evidence of the drug screen if she did not testify. However, that evidence had already come in. Further, at the motion hearing on June 3, 2004, trial counsel advised the court that appellant-mother does want to be heard by the court, and trial counsel did not agree with this decision, and therefore filed a motion to withdraw. Transcript of hearing June 3, 2004, p. 10, l. 9. If appellant-mother had been properly advised regarding the evidence that had been presented (i.e., that the fact she failed the drug screen was already in evidence), appellant-mother probably would have testified. A reasonable inference is that counsel did not want

appellant-mother to testify, and that trial counsel made the decision unilaterally that she would not testify. Later, appellant-mother became insistent that she be allowed to testify. Appellant-mother told the court at the motion hearing on June 3, 2004, that she was not given proper notice of the hearing on July 28, 2003 at which the Br[redacted]s were given custody of her children, that she did not receive the papers regarding the hearing, that her children to her knowledge were not supposed to be with anyone other than Ms. M[redacted], that she was in court for the termination hearing on March 3, 2004, and that for six hours she did not get to say anything. Transcript of hearing June 3, 2004, p. 11, l. 20.

These Issues were not raised in the trial court, and are raised for the first time on appeal, which is not proper procedure. In the Matter of: B.G.J., 2004 WL 1906446, p. 6 (Tenn.Ct.App.). However, appellant-mother points out that her counsel on appeal was not appointed until after trial counsel had already filed the Notice of Appeal in this case.

Appellant should have the opportunity to testify at the termination hearing on March 3, 2004. In light of the other evidence presented with regard to abandonment during the four months prior to the filing of the petitions, it can be reasonably inferred that appellant-mother's failure to testify probably affected the outcome of this case. Therefore, the decision of the trial court should be reversed, and this case remanded for a new trial.

CONCLUSION

Wherefore, for the reasons set forth hereinabove, the appellant, V[redacted] H[redacted]s, urges this Honorable Court to reverse the judgment of the trial court, and to dismiss the petitions to terminate Ms. H[redacted]s parental rights, or in the alternative, to grant a new trial.

Respectfully submitted,

Judy A Oxford

JUDY A. OXFORD # 12799
Attorney at Law
1224 Columbia Avenue
Franklin, TN 37064
615-791-8511

ATTORNEY FOR APPELLANT
V[redacted] H[redacted]

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and exact copy of the foregoing document by depositing the same in the U.S. Mail with postage prepaid to:

C. Diane Crosier
Attorney for Petitioners
136 Fourth Avenue South
Franklin, TN 37064

Deana C. Hood
Guardian Ad Litem
304 Public Square
Franklin, TN 37064

Sharon Guffee
Attorney for W[redacted] B[redacted] appellant
143 Fourth Avenue North
Franklin, TN 37064

on this the 1st day of November, 2004.

Judy A Oxford
Judy A. Oxford

QUESTION 34

(b) Affidavit and Memorandum in Support of Motion to Dismiss for lack of jurisdiction which I filed in a divorce case on behalf of an out-of-state client. The Motion to Dismiss was a form motion; however, the Affidavit and Memorandum were the result of my own effort. (Copy of case law and treatises cited are not attached here.)

IN THE CHANCERY COURT FOR RUTHERFORD COUNTY, TENNESSEE

2008 JUN -6 AM 11:52

MARILYN BLAKE, Plaintiff,	)	
v.	)	No. 08-0432 DR
DAVID A. STAMP, Defendant.	)	

MOTION TO DISMISS

Pursuant to Rule 12.02(2), the defendant, David A. Stamp, moves this court to dismiss the complaint for divorce filed in this case. In support of this motion, the defendant would show that based on the complaint and the affidavit of David Stamp attached hereto, defendant David Stamp lacks minimum contacts with the State of Tennessee sufficient to permit this Court to exercise jurisdiction over him pursuant to T.C.A. §20-2-214 without violating the due process clause of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

Judy A Oxford

Judy A. Oxford #12799
Attorney for Defendant
400 Sugartree Lane, Suite 520
Franklin, TN 37064
615-791-8511

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, postage prepaid, to the following on this 5th day of June, 2008:

I and faxed 615-896-1027

Kerry Knox
Castelli & Knox, LLP
316 West Lytle Street, Suite 110
Murfreesboro, TN 37130

Judy A Oxford
Judy A. Oxford

This motion is expected to be heard on June 20, 2008, at 8:00 a.m.

IN THE CHANCERY COURT FOR RUTHERFORD COUNTY, TENNESSEE

MARILYN BLAKE, Plaintiff,	)	
v.	)	No. 08-0432 DR
DAVID A. STAMP, Defendant.	)	

AFFIDAVIT OF DAVID A. STAMP

STATE OF SOUTH DAKOTA)
COUNTY OF Brookings_____)

I, David A. Stamp, after being duly sworn, state as follows:

1. I am the defendant in the above-styled case, and I am competent to testify in this proceeding and have personal knowledge of the facts stated herein.

2. I reside at 324 Elm Avenue, South Dakota, 57006. I have lived at this address for approximately 7 years.

3. Marilyn Blake and I were married on November 24, 2007, in Washoe County, Nevada. We have not ever lived together.

4. I am retired. I do not have any assets in the state of Tennessee.

5. I have had contact with Marilyn Blake in Tennessee only through e-mail or telephone, and 2 short visits. I have never resided in Tennessee or worked in Tennessee. I grew up in the State of South Dakota, spent my working career of about 36 years in the U.S. Navy almost entirely on the west coast of the United States, and otherwise have always lived and worked in South Dakota.

6. I intend to pursue an annulment in the State of Nevada where we were married. I do not want to pursue any contested divorce action in the State of Tennessee.

Further affiant sayeth not.

MARY A. NELSON
NOTARY PUBLIC
SEAL SOUTH DAKOTA

David A. Stamp

Sworn to and subscribed before me this 29 day of May, 2008.

Mary A Nelson
Notary Public

My Commission Expires: 2-14-2012

presented to Chancellor Corlew in open ct 6/20/08

IN THE CHANCERY COURT FOR RUTHERFORD COUNTY, TENNESSEE

MARILYN BLAKE, Plaintiff,	)	
v.	)	No. 08-0432 DR
DAVID A. STAMP, Defendant.	)	

Copy

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The defendant, David Stamp, submits this Memorandum in further support of his Motion to Dismiss, for the consideration of the court.

Plaintiff has filed a complaint for divorce in which she requests a divorce or annulment, a judgment against defendant for amounts expended as a result of defendant's fraud and misrepresentation, and for attorneys fees and costs.

Defendant has filed a Motion to Dismiss on grounds that David Stamp lacks minimum contacts with the State of Tennessee sufficient to permit this Court to exercise jurisdiction over him pursuant to T.C.A. §20-2-214 without violating the due process clause of the Fourteenth Amendment of the United States Constitution. Defendant David Stamp's supporting affidavit shows that he has never lived in Tennessee, he has never worked in Tennessee, he owns no assets in Tennessee, the parties were not married in Tennessee and the parties have never lived together. The only connection to Tennessee is the fact that Marilyn Blake is a resident of Tennessee, and that defendant David Stamp had two short visits with her in Tennessee prior to the marriage. Therefore, defendant submits that there are insufficient minimum contacts to allow this court to exercise personal jurisdiction over him.

Personal jurisdiction over a non-resident defendant can be acquired only when the non-resident voluntarily submits to the court's authority, or where there has been adequate notice

and when the non-resident party has sufficient minimum contacts with Tennessee. Hymel v Hymel, 1997 WL 170336 (No. 01A01-9703-CV-00136), p.2 (Tenn.Ct.App. April 11, 1997) (copy attached). There has not been any voluntary submission to the court's authority in this case. Mr. Stamp was served by certified mail, and does not contest the notice in this case. Therefore, the only way this court could have personal jurisdiction over Mr. Stamp is if he has sufficient minimum contacts with Tennessee.

Defendant submits the following cases in support of his position that he has insufficient minimum contacts with Tennessee to permit the court to have personal jurisdiction over him:

1. In the Hymel case, the court held that when the husband was a life-long resident of Louisiana and the parties were married in Louisiana, and the husband had never resided in Tennessee, did not own any real estate in Tennessee, and had not transacted business in Tennessee, there had not been established sufficient minimum contacts warranting the Tennessee court to exercise personal jurisdiction over the husband. That court found that even the husband's agreement to pay alimony pendente lite was not sufficient to waive husband's defense of lack of personal jurisdiction. Hymel, 1997 WL 170336 at p.2. The appellate court in the Hymel case directed the dismissal of the case where the requisite contacts with Tennessee were missing. Id.

2. In Miller v Miller, 1987 WL 15143 (Tenn.Ct.App. August 5, 1987), the mother filed a petition in Tennessee court regarding child support, alimony, and contempt against the father with respect to a divorce decree which had been entered in Florida. The father had made two visits to Tennessee to pick up and drop off his children for visitation. The appellate court found that to be insufficient minimum contacts with Tennessee "to render maintaining an action against him involving monetary obligations substantially fair or just". Miller, 1987 WL 15143 at p.4. The trial court's dismissal of the case was affirmed.

In further support of defendant's position, he cites the following treatises:

1. Garrett's Tennessee Divorce, Alimony and Child Custody with Forms, Second Revised Edition, § 8:4 at page 129 (copy attached): "In personam jurisdiction over the parties is mandatory for a determination of alimony, property division. . . ."

2. Richards on Tennessee Family Law, Second Edition, § 6-3(b) at page 105 (copy attached): "...[the court] may not bind an absent spouse to orders concerning property division and support without personal jurisdiction over him or her."

As an alternate position, defendant suggests that the court could grant the plaintiff a divorce, as she is a resident of Tennessee, as long as there is no judgment of any kind against defendant.

Respectfully submitted,

Judy A Oxford

Judy A. Oxford # 12799
Attorney for Husband
400 Sugartree Lane, Suite 520
Franklin, TN 37064
615-791-8511

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been ~~mailed, postage prepaid~~ hand-delivered, to the following on this 20th day of June, 2008:

Kerry Knox
Castelli & Knox, LLP
316 West Lytle Street, Suite 110
Murfreesboro, TN 37130

Judy A Oxford

Judy A. Oxford

QUESTION 34

(c) Brief filed as the court directed regarding constructive trust issues. (The case law and statutes cited are not attached here.)

IN THE GENERAL SESSIONS COURT FOR DAVIDSON COUNTY, TENNESSEE

LUCY PFEIFFER / GLORIA PFEIFFER Plaintiff	)	
v.	)	No. 06GC12712
VIRGINIA BOWMAN GRADY Defendant	)	

PLAINTIFF'S BRIEF

Plaintiff Lucy Pfeiffer / Gloria Pfeiffer files this Brief for the court's consideration on the issues as stated in court on April 5, 2007, and states as follows:

1. **Statute of Limitations, and Fraudulent Concealment.**

The court has already made the finding that there was a constructive trust on the funds at issue in this case. There is no specific statutory limitation of action provision expressly providing for suits on constructive trusts. T.C.A. § 28-3-110 provides for a 10-year statute of limitations for "[a]ll other cases not expressly provided for". A copy of this statute is attached. Therefore, T.C.A. § 28-3-110 applies, and the statute of limitations is 10 years.

When did this statute of limitations begin to run? Plaintiff submits that it was when she knew or should have known the facts that gave rise to this lawsuit, and that this was in May 2006. The parties testified that the bank statements were always sent to defendant Virginia Grady at her home. Therefore, plaintiff Lucy Pfeiffer never had access to those statements. Plaintiff Lucy Pfeiffer also testified that she has significant vision problems, and she lives in Queens, New York. She wanted Ms. Grady to have the information needed to access the funds at the time Ms. Pfeiffer directed her to. So, for all these reasons the bank records were sent to Ms. Grady, and Ms. Pfeiffer was never given a copy of them by Ms. Grady nor did Ms. Pfeiffer have any other means of accessing those records. The testimony was undisputed that plaintiff Lucy Pfeiffer and defendant Virginia Grady had frequent telephone contact through the years, and that it was not until May 2006 that Ms. Grady ever indicated that the money was no longer in the accounts. Ms.

Pfeiffer testified that there were discussions about the money in the accounts during that time. In May 2006 plaintiff Lucy Pfeiffer was for the first time on notice that the money was gone. Therefore, it is plaintiff's contention that defendant concealed this information from her for 10 years, and that Ms. Grady fraudulently concealed this information from her. Ms. Pfeiffer immediately took measures to have her daughter, Gloria Pfeiffer, investigate this for her. She filed her lawsuit in July 2006. She has filed this case in a timely manner.

Defendant cited the case of Sibley v. McCord, 173. S.W.3d 416 (Tenn. Ct. App. 2004) (copy of case attached) in her Memorandum in support of her proposition that defendant did not fraudulently conceal facts. However, an examination of the facts of that case, and the elements of fraudulent concealment cited therein, supports the plaintiff's position. In the Sibley case, the defendant law firm had actually provided an accounting of funds to the plaintiff more than three years before suit was filed, so that the plaintiff actually had the documents on which to base any claim of conversion. In the case at hand, all the bank records were sent by the bank to Ms. Grady's address in Tennessee, and Ms. Grady has never provided any of the documents to Ms. Pfeiffer. Although Ms. Pfeiffer has provided to the court all the records that she was able to obtain from the Bank, in the form of an affidavit with attachments, Ms. Grady has now filed with her Memorandum a bank document which dates as late as 1998, a document which has not been filed before, and which is a document which the Bank had not provided to Ms. Pfeiffer. It is noteworthy that this bank document has now appeared at this late date. At the court appearance on April 5, 2007, which was the seventh court date set in this case, Ms. Grady's attorney also submitted copies of bank records that she had from 1998, and notably these also were not documents that were obtainable from the bank at the present time. These incidents of late production lead one to re-analyze the testimony of Ms. Grady in this case, i.e., that the Bank cannot provide documents, and causes one to realize that Ms. Grady has never testified that she does not have any of the bank records. The bank record attached to the defendant's

memorandum clearly shows the address of Ms. Grady in Franklin, Tennessee, and Ms. Grady has not offered any proof that she ever provided these records to Ms. Pfeiffer who lives in New York. Plaintiff therefore submits that Ms. Grady likely has more bank records in her possession, and the fact that these records have not been produced to date leads one to the conclusion that these records support the plaintiff's position in this case. Further, Ms. Grady had frequent and regular communication with Ms. Lucy Pfeiffer from 1993 until May 2006, and whenever Ms. Pfeiffer discussed the money in the bank and possible use of it, Ms. Grady did not ever indicate that the money and accounts no longer existed, and until May 2006 she had been successful in getting Ms. Pfeiffer to change her mind about going ahead to give the money to her grandchildren. Therefore, plaintiff submits that the 4-prong test has been met, in that Ms. Grady had a duty to disclose but remained silent and failed to disclose material facts, that plaintiff could not have discovered the cause of action under the circumstances, that Ms. Grady had knowledge of the facts giving rise to the cause of action, and that the defendant concealed material facts from the plaintiff by withholding information or making use of some device (i.e., verbal manipulation) to mislead the plaintiff.

2. **Duties of Trustee of Constructive Trust.**

A trustee of a constructive trust has a duty to disclose and provide an accounting of funds in the trustee's possession. McNeill v. Dobson-Bainbridge Realty Co., 195 S.W.2d 626, 629 (Tenn. 1946) (copy attached). A trustee must disclose the material facts to the beneficiary or principal of the trust funds which will "enable him to form a reasonably correct opinion and conclusion as to his best interest". Id. The court in McNeill stated that even the fact that no actual fraud was intended does not change this rule. Id. Further, the court in McNeill held the trustee absolutely liable for all consequences.

Tennessee has statutes which set out the duties of a trustee, and remedies when the trustee breaches his or her duties. These statutes include T.C.A. §§ 35-15-810, 35-15-813, and

35-15-1001 (copy of each is attached). The trustee has a duty to keep adequate records of the administration of the trust. T.C.A. §§ 35-15-810. The trustee "shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust". T.C.A. § 35-15-813. Obviously, in the case at hand, Ms. Grady has failed to fulfill either one of these duties. Ms. Grady had a duty to disclose to Ms. Pfeiffer an accounting of the funds back at the time the funds were in the bank, and a continuing duty to disclose up to the present day, and she has failed to do so. The burden of proof for accounting for the funds, and whether the funds were properly used, rests with Ms. Grady. She has failed to render any proof whatsoever as to where these funds were spent.

The remedies set forth in the statute include compelling the trustee to pay money or restore property (which would include money), voiding an act of the trustee, tracing trust property wrongfully disposed of and recovering the proceeds (which would include making the defendant repay the money), or order any other appropriate relief. T.C.A. § 35-15-1001. In the case at hand, plaintiff is requesting this Court to give her a judgment against defendant Virginia Grady in the full amount claimed, plus interest from 1996 to present.

3. **Additional argument.**

The memo/e-mail dated 6/9/2006 submitted with defendant's memorandum is hearsay, is immaterial to the issues at hand, was not offered at the trial, and should be stricken from the record in this case.

4. **Request for Relief.**

(a) The plaintiff recognizes that this court stated in the April 5, 2007 hearing that the dollars in the account ending in 244 were in the joint names of Pfeiffer and Grady in 1998, and the court indicated that there would be no judgment entered on behalf of Pfeiffer for these funds.

Plaintiff respectfully requests the court to re-consider this in light of the law submitted above with respect to the duties of the trustee and the remedies available. Plaintiff submits that even though those funds at one time in 1998 had Pfeiffer's name on them, too, defendant still has not accounted for the funds to plaintiff, and plaintiff has consistently stated that she has never authorized Ms. Grady to do anything with those funds until May 2006 when it was too late and Ms. Grady had already spent the funds.

(b) Plaintiff therefore again requests the court to grant her judgment in the amount of $10,000 plus interest from 1996 to the present time and court costs. At the rate of 4% per year, the interest would be $4,000, but plaintiff would be entitled to the statutory rate of 10% per year.

Respectfully submitted,

Judy A Oxford

Judy A. Oxford #12799
Attorney for Plaintiff
400 Sugartree Lane, Suite 520
Franklin, TN 37064
(615) 791-8511

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been mailed, postage prepaid, to counsel for defendant, Nathan Moore, Attorney at Law, 306 Gay Street, Suite 100, Nashville, TN 37201, on this 28th day of April, 2007.

Judy A Oxford

Judy A. Oxford

QUESTION 34

(d) Trial Brief prepared in a real estate case about the truthfulness of property disclosures. I represented the sellers of this real estate. The case was dismissed by the court.

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

URSULA DANIELS,

Plaintiff,

-vs-

BRETT WICKHAM; and
SUSAN WICKHAM,

Defendants.

~~Filed 6/16/04~~
not filed — case dismissed
However, was served on
Larry Wilson

No. 02-903
Part III

TRIAL BRIEF

Pursuant to Local Rule 29, the defendants, Brett Wickham and Susan Wickham, submit this Trial Brief for the court's consideration.

Plaintiff's cause of action arises out of her purchase of the real property located at 4944 Hickory Woods East, Antioch, Tennessee. Defendant Brett Wickham was the owner per the Deed on this property. Defendant Susan Wickham married Brett after he bought the property, and resided on the property at the time of the sale. Plaintiff closed on the purchase of this real property on December 5, 2001. The plaintiff filed her complaint on or about March 22, 2002, and her amended complaint on or about April 5, 2002.

In essence, plaintiff complained that the Wickhams falsely assured her she could plant trees in the back yard when there was a TVA easement there preventing planting of trees, and that the Wickhams concealed "a very serious flooding problem" that they knew about and were asked about.

Plaintiff sought rescission of her purchase of the real estate. Plaintiff also sought judgment for damages "in an amount as the finder of fact determines to be just and proper, and that such judgment be trebled as provided for in TCA 47-18-109", which is the Tennessee Consumer Protection Act, plus attorneys fees, expenses, and court costs.

All issues with respect to the easement and damages pursuant to the Tennessee Consumer Protection Act have been dismissed.

The proof at trial will involve several matters, including but not limited to the following:

1. The Residential Property Disclosure Statement signed by the Wickhams. The Tennessee Residential Property Condition Disclosure form signed by the Wickhams asked: "ARE YOU (SELLER) AWARE OF ANY OF THE FOLLOWING? . . . . 10. Flooding, drainage or grading problems?" (emphasis added.) The box for "No" was checked. Other statements on the Disclosure form are also important, as are the Tennessee statutes covering this Disclosure form.

2. Plaintiff's allegation that Ms. Wickham "affirmatively advised plaintiff that there was no flooding problem" (see Amended Complaint, paragraph 9) which is denied by defendants.

3. The credibility of the parties and witnesses.

4. Other circumstantial evidence which tends to prove or disprove the plaintiff's allegations. The court will need to give due consideration to the common meaning of the terms "flooding, drainage, or grading" and the term "problem", the age, experience, knowledge, truthfulness and demeanor of the parties, testimony about the typical way in which defendants' maintained their home, the communication between the parties after the sale of the home but prior to plaintiff filing suit, the fact that plaintiff's allegations have shifted over time, the defendants' denials of any knowledge of any problem claimed by plaintiff, and the fact that plaintiff was licensed as a real estate agent in her home state prior to her move to Nashville.

5. Plaintiff's waiver of her right to an inspection by a licensed engineer or licensed inspector before she closed on the purchase of this property.

6. Plaintiff's conveyance of an easement to TVA in exchange for $1900 on or about January 9, 2002. This matter relates to the issue of ratification, which precludes rescission as a remedy.

7. Plaintiff's failure to make an offer of restitution and tender of property to

defendants prior to filing suit. This matter relates to the defense that required conditions for rescission have not been met, and therefore plaintiff is precluded from that remedy.

8. The lack of documentary evidence the plaintiff has to prove her allegations of "flooding" and her damages. Defendants submit that there has been spoliation of evidence by plaintiff which should bar her recovery.

9. The lack of expert proof offered by plaintiff to prove her claims. This is more specifically addressed in the motion in limine previously filed by defendants.

10. Whether plaintiff carries her burden of proof. Plaintiff has the burden to prove by a preponderance of the evidence that the Wickhams knew that there was "a very serious flooding problem" in the garage, that this fact was material, that the Wickhams concealed this fact when they were under a duty to disclose this fact, that the Wickhams intentionally concealed this fact with the intent to deceive the plaintiff, that the plaintiff was not aware of this fact and would have acted differently if she had known of the concealed fact, and that plaintiff sustained damage as a result of the concealment of the fact. Plaintiff must also prove that she relied upon the representation made by the defendants, and that she was justified in relying on that representation (i.e., that it must have been reasonable for plaintiff, in light of the circumstances, and her intelligence, experience, and knowledge, to accept the representation without making an independent investigation or inquiry).

11. Whether plaintiff proves her damages, if any. Defendants submit plaintiff is not entitled to rescission.

Defendants request the court to award judgment to defendants, and dismiss the complaint.

Defendants request the court to make specific findings of fact and conclusions of law.

Respectfully submitted,

Judy A Oxford

Judy A. Oxford #12799
Attorney for Brett Wickham and
Susan Wickham
1224 Columbia Avenue
Franklin, TN 37064
615-791-8511

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, postage prepaid, to the following:

Lawrence Wilson
Attorney for Plaintiff
2400 Crestmoor Road, Suite 109
Nashville, TN 37215

on this 16th day of June, 2004.

Judy A Oxford

Judy A. Oxford

QUESTION 34

(e) Motion for Summary Judgment, and Memorandum in Support of Motion filed in a partnership case. I represented the defendant who claimed that there was no partnership. Defendant prevailed in this case. (The other materials also filed with this Motion are not attached here.)

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

WALTER HASKEN Plaintiff	)	
vs.	)	No. 03-3456 III
WILLIAM ROARK Defendant	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant, William Roark, moves the court for summary judgment pursuant to Rule 56, Tennessee Rules of Civil Procedure, on grounds that there is no genuine issue of material fact, and this defendant is entitled to judgment as a matter of law.

In support of this motion, defendant William Roark relies on the depositions of plaintiff Walter Hasken and defendant William Roark, and plaintiff's answers to interrogatories and requests for production of documents, all of which are filed simultaneously herewith. Defendant also submits the accompanying Statement of Material Facts and the Memorandum in Support of this motion.

The defendant, William Roark, requests the Court to grant summary judgment and dismiss the complaint.

Respectfully submitted,

Judy A Oxford

Judy A. Oxford # 12799
Attorney for Defendant
1224 Columbia Avenue
Franklin, TN 37064
615-791-8511

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, postage prepaid, to the following:

James V. Mondelli
Attorney at Law
5115 Maryland Way
Brentwood, TN 37027

on this the 13th day of Sept, 2004.

Judy A Oxford
Judy A. Oxford

This motion is expected to be heard on Oct 29, 2004 at 9:00 a.m.

PURSUANT TO LOCAL RULE, YOU ARE ADVISED THAT FAILURE TO FILE AND SERVE A TIMELY WRITTEN RESPONSE TO THIS MOTION WILL RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING.

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

WALTER HASKEN Plaintiff	)	
vs.	)	No. 03-3456 III
WILLIAM ROARK Defendant	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant William Roark files this Memorandum in Support of his Motion for Summary Judgment for the Court's consideration.

Facts. The plaintiff, Walter Hasken, filed his Complaint for Declaratory Judgment on November 21, 2003. He has requested the Court to enter judgment finding that the parties had a partnership, and awarding plaintiff fifty percent (50%) of all the income of the business from July 2001 to "the present" (November 2003). Plaintiff also requests prejudgment interest, costs, attorneys fees, and other expenses of the lawsuit.

The business at issue entails handling the insurance coverage for a healthcare provider located in Nashville, Tennessee. More specifically, defendant William Roark works as the insurance agent responsible for all the insurance needs of Dialysis Clinic, Inc. (Deposition of defendant, page 37.) Defendant has done this particular work since February 2001, and continues to do so. (Deposition of defendant, pages 17-19, 23-24, 48.) He has only one client, which is Dialysis Clinic, Inc. Defendant obtains quotes for insurance premiums, negotiates with various insurance companies, oversees the renewal process each year, and essentially does whatever is needed to take the burden off the client of maintaining necessary insurance coverage. (Deposition of defendant, pages 45, 49; Deposition of plaintiff, page 49.) In exchange, he receives a commission paid by the various insurance companies from whom the client buys coverage. (Deposition of defendant, page 27.) His commission is in the range of about $60,000 per year during the time which is the subject of this lawsuit. (Deposition of

defendant, page 27.) Defendant has numerous expenses each year. (Deposition of defendant, pages 35-36.)

Plaintiff Walter Hasken wants to take one-half of defendant Roark's income for this insurance agency work. Plaintiff Hasken essentially alleges in his complaint the following things: that he is responsible for taking the defendant Roark out of retirement in order to get him back into the insurance business; that defendant Roark was allegedly to do all the insurance agency work for Dialysis Clinic, Inc. and keep all the income until July 1, 2001 at which time plaintiff's non-compete agreement which directly related to the Dialysis Clinic account would expire; that beginning July 1, 2001, the parties allegedly agreed that plaintiff would receive 50% of the commissions; but that defendant later changed his mind and decided he would only pay plaintiff a "finders fee" consisting of a fixed number of monthly payments; that defendant in fact paid monthly payments for about two years; but plaintiff is not satisfied and believes defendant should pay him 50% of all the income he has earned as a result of being the insurance agent for Dialysis Clinic since July 1, 2001.

In plaintiff's deposition, however, plaintiff admitted that he could not be involved with the Dialysis Clinic account until July 1, 2001 because he had a non-compete agreement with his previous employer that prevented it. (Deposition of plaintiff, pages 6, 14-16.) Plaintiff further admitted that when defendant Roark obtained the insurance agency work of Dialysis Clinic Inc., and got the signed "agent of record" letters from Dialysis Clinic, Inc. in about February 2001, that defendant did not ever state that he would give plaintiff Hasken a portion of the account when his non-compete agreement expired. (Deposition of plaintiff, page 22.) Further, plaintiff admits that defendant Roark told him he "had the account" and defendant told Dialysis Clinic Inc that plaintiff Hasken would not be involved. (Deposition of plaintiff, page 26.) Plaintiff admits that during the period of time his non-compete agreement was still in effect (thus prohibiting him from approaching Dialysis Clinic, Inc. to become an insurance client or doing any insurance work for Dialysis Clinic, Inc.), nevertheless, he tried to get defendant Roark to agree to let him

be involved and give him 50% of the commissions after July 1, 2001. Plaintiff acknowledges that defendant Roark did not accept this 50/50 deal. (Deposition of plaintiff, pages 27-31.) When the non-compete agreement expired on July 1, 2001, plaintiff again approached defendant Roark requesting new "agent of record" letters that included him as a co-agent with defendant, defendant Roark again did not agree. (Deposition of plaintiff, page 31.) Plaintiff admits that from the beginning, defendant Roark had total control of this insurance account, and that defendant Hasken "was eliminated". (Deposition of plaintiff, page 40.) Plaintiff acknowledges that defendant Roark did not ever make any commitment other than to make certain monthly payments of a fixed amount to him, and that plaintiff accepted this and agreed to it. (Deposition of plaintiff, pages 41-42.) Plaintiff admits that defendant Roark "fulfilled every obligation" that he had to plaintiff. (Deposition of plaintiff, page 44; e-mail from plaintiff Hasken to defendant Roark, dated June 30, 2003, copy attached to Answer, also is labeled "Document 7" in Plaintiff's Responses to Defendant's First Set of Interrogatories.) Plaintiff admits that the parties never had any joint accounts, that they did not have any letterhead that listed both their names as agents, that plaintiff did not ever advance any funds or make any financial contribution to this insurance agency, that any income plaintiff received from defendant was reported by him on his income tax return as regular income (and not partnership income), and that plaintiff never contributed to any expense or entertainment of the client. (Deposition of plaintiff, pages 59-60.) Plaintiff has received approximately $30,000 as a "finder's fee" paid by defendant. (Deposition of defendant, pages 35-36.)

Defendant Roark testified that he never had any agreement with plaintiff Hasken to be in a partnership arrangement with him, and in fact did not want any such arrangement. Defendant Roark did not want to play "second fiddle" to plaintiff. (Deposition of defendant, pages 10-12.) Defendant paid out all sums that he agreed to pay to plaintiff (deposition of defendant, pages 35-36), and he knows of no reason why he should have to pay any more money to plaintiff.

Standard of Review. As stated by the Tennessee Supreme Court in Godfrey v. Ruiz, 90 S.W.3d 692 (Tenn. 2002):

> Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). The party seeking summary judgment has the burden of persuading the court that its motion satisfies these requirements. *See Byrd*, 847 S.W.2d at 211; *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991). When considering a summary judgment motion, courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *See Guy*, 79 S.W.3d at 534; *Byrd*, 847 S.W.2d at 215. Summary judgment should therefore be granted only when the facts and conclusions to be drawn from the facts permit a reasonable person to reach but one conclusion. *See Guy*, 79 S.W.3d at 534; *Carvell*, 900 S.W.2d at 26.

Godfrey, 90 S.W.3d at 695. Defendant submits that the facts establish that these parties did not have a partnership. A reasonable person can reach but one conclusion in this case, which is that the parties did not have a partnership, and, therefore, summary judgment should be granted and the complaint dismissed with prejudice.

Law and Argument. The issue is whether these parties had a partnership. According to the Tennessee Supreme Court in Bass v. Bass, 814 S.W.2d 38 (Tenn. 1991),

> In Tennessee, a partnership is defined as an association of two or more persons to carry on as co-owners a business for profit, T.C.A. § 61-1-105(a), and the receipt of a share of the profits of that business is prima facie evidence that a partnership exists, T.C.A. § 61-1-106(4). In determining whether one is a partner, no one fact or circumstance may be pointed to as a conclusive test, but each case must be decided upon consideration of all relevant facts, actions, and conduct of the parties. *Roberts v. Lebanon Appliance Service Co.*, 779 S.W.2d 793, 795 (Tenn. 1989). If the parties' business brings them within the scope of a joint business undertaking for mutual profit—that is to say if they place their money, assets, labor, or skill in commerce with the understanding that profits will be shared between them—the result is a partnership whether or not the parties understood that it would be so. *Pritchett v. Thomas Plater & Co.*, 144 Tenn. 406, 232 S.W. 961, 969-70 (1921). Moreover, the existence of a partnership depends upon the intention of the parties, and the controlling intention in this regard is that ascertainable from the acts of the parties. *Wyatt v. Brown*, 39 Tenn.App. 28, 281 S.W.2d 64, 67 (1955). Although a contract of partnership, either express or implied, is essential to the creation of partnership status, it is not essential that the parties actually intend to become partners. *Wyatt*, 281 S.W.2d at 67. The existence of a partnership is not a question of the parties' undisclosed intention or even the terminology they use to describe their relationship, nor is it necessary that the parties have an understanding of the legal effect of their acts. *Roberts*, 779 S.W.2d at 795-96. It is the intent to do the things which constitute a partnership that determines whether individuals are partners, regardless if it is

> their purpose to create or avoid the relationship. *Wyatt*, 281 S.W.2d at 67. Stated another way, the existence of a partnership may be implied from the circumstances where it appears that the individuals involved have entered into a business relationship for profit, combining their property, labor, skill, experience, or money."

Bass, 814 S.W.2d at 41.

In the case at hand, both the plaintiff and defendant acknowledge that there was not an agreement between the parties to be partners. The plaintiff himself acknowledged that he was the defendant's employee, that he accepted the payment terms set forth by defendant, that the defendant was in control. The plaintiff himself admitted that he was hoping that the defendant would come around and eventually agree to a long-term relationship, which in the eyes of the plaintiff was a partnership. It is apparent from the admissions of the plaintiff, and other statements made during the parties' depositions, that the parties did not enter into "a joint business undertaking for mutual profit". These parties did not intend to do those things that would create a partnership. The law presumes that in a partnership the parties will act like partners would act, "combining their property, labor, skill, experience, or money", "carry[ing] on as co-owners", "plac[ing] their money, assets, labor in skill in commerce with the understanding that profits will be shared between them".

There are no facts alleged in this case that support the legal definition of a partnership. When defendant Roark secured the insurance agent agreement with the client, Dialysis Clinic, Inc., plaintiff admittedly was in a position (because of his non-compete agreement) that he could have no involvement whatsoever with the business that defendant Roark was performing. On July 1, 2001, when plaintiff was in a position to be able to participate, defendant Roark made it quite clear that there would be no "combining" of money, no "carry[ing] own as co-owners", and definitely no "sharing of profits". Plaintiff Hasken admits that Roark had total control. Plaintiff Hasken admitted that defendant Roark paid him all he ever agreed to pay him. Plaintiff Hasken is only suing at this time because he has been unsuccessful in extorting more money from defendant Roark. He wants the court to find that there is a partnership; however,

by his own admission, there is not a partnership. Plaintiff's wishing for a different arrangement does not turn the parties' arrangement into a partnership.

Under these circumstances, there is only one conclusion that a reasonable person can reach: there is no partnership between these parties, there never was a partnership between these parties, and the complaint should be dismissed.

Respectfully submitted,

Judy A Oxford

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, postage prepaid, to the following:

James V. Mondelli
Attorney at Law
5115 Maryland Way
Brentwood, TN 37027

on this the 13th day of Sept., 2004.

Judy A Oxford

Judy A. Oxford