The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. 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 Council 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 www.tncourts.gov). The Council 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 document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@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 a Circuit Court Judge for the 3rd Judicial District, State of Tennessee

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

1984, BOPR #010695

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, see answer to No. 2

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).

9/06-present **Circuit Court Judge**, 3rd Judicial District, State of Tennessee

9/98-9/06 **General Sessions Court & Juvenile Court Judge** for Greene County

4/92-9/98 **Assistant Federal Defender**, Federal Defender Services of Eastern Tennessee, Inc.

9/86-4/92 **Private Practice of Law**

Thomas J. Wright, P.C. practicing in an association of attorneys:

Dietzen, Atchley & Wright;

Summers, McCrea & Wyatt, P.C.;

Stophel & Stophel, P.C.

7/85-9/86 **Federal Judicial Law Clerk**

Chief U.S. District Judge Thomas G. Hull, Eastern District of Tennessee

8/83-6/85 **Coordinator of Ministry to the Legal Profession**, Josh McDowell Ministry, Campus Crusade for Christ

1993-2000 **Adjunct Faculty**, Walters State Community College teaching various classes in the Legal Assistant Program and at the East Tennessee Regional Law Enforcement Academy

1991-1992 **Adjunct Faculty**, Chattanooga State Community College teaching Business Law

1994-2005 **Partner**, T-N-T Explosive Growth Poultry Production. Contract broiler production operation. It was a family farm partnership, in which I was a general partner.

I have also assisted, advised, managed, overseen and/or worked in all other aspects of family business interests in commercial and residential real estate, farming operations in hay, silage, tobacco, dairy, and beef production, software as a service, and athletic equipment sales.

During law school I earned my tuition by working in the Panhellenic Building at U. T. and as a Law Clerk at Carty, Garlington & Boswell in Knoxville. I also worked as a Law Clerk at Gulf Coast & Great Plains Legal Foundation during the Summer of 1982.

Prior to law school I worked as a counselor at Kanakuk Camp, in construction, landscaping, in a warehouse for a delivery service, and as a dishwasher and busboy at a restaurant.

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 presently a Circuit Court Judge in the 3rd Judicial District of Tennessee. The District is made up of Greene, Hancock, Hawkins, and Hamblen counties. My colleagues and I rotate through the counties on a monthly basis. I hear civil matters almost exclusively at this point, but my docket has been 90% civil and 10% criminal throughout my tenure as Circuit Court Judge. I also hear Chancery Cases as well as out of district cases when needed due to recusal of other judges.

When I was elected our district had no formal case assignment system, no local rules, and no system designating courtroom use among the 4 circuit judges. Within a year of my election, with assistance from my colleagues, we instituted a formal and random case assignment system, a courtroom assignment system, and, implemented our first set of Local Rules. Once the pending cases had been assigned to individual judges, I undertook a review of all pending cases assigned to me and found cases that had been languishing for over 10 years. I worked hard on this backlog and within two years had brought my docket current to the point that most cases are disposed of within 12 months and very few remain pending longer than 24 months. A further description of my work as Circuit Judge is found in answer to Section 10, below.

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 Council 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 Council. Please provide detailed information that will allow the Council 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.

Almost all of my legal career has been devoted to litigation in both trial and appellate courts. I have been involved in thousands of State and Federal civil, criminal, and administrative trials as an attorney, judge, and a Federal Judicial Law Clerk. As an attorney I worked on approximately 50 appeals in the Tennessee Court of Appeals, the Tennessee Court of Criminal Appeals, the Tennessee Supreme Court, the United States Circuit Court of Appeals for the Sixth Circuit and the United States Supreme Court. My current judicial responsibilities are discussed in No. 7, above, and No. 10, below.

Private Practice

My private practice overwhelmingly involved litigation. During that time approximately 80% of my practice was civil litigation, 10% criminal litigation, and 10% non-litigation such as

writing a will, incorporating a business, or drafting documents for transactional matters.

I have practiced in a large firm doing primarily civil defense work and business-related litigation, a small firm doing primarily plaintiff's personal injury and criminal defense work, and as a sole practitioner handling a variety of cases. I have handled everything from paternity to products liability and from car wrecks to complicated criminal conspiracies.

Federal Defender

Prior to my election as the General Sessions and Juvenile Judge of Greene County, I worked for six years as the Assistant Federal Defender for the U.S. District Court in Greeneville, Tennessee, exclusively handling federal criminal cases from arraignment through exhaustion of the appellate process. During this time I litigated 34 criminal appeals in the United States Court of Appeals for the Sixth Circuit and authored several petitions for a writ of certiorari which were filed in the U.S. Supreme Court.

While a majority of the federal cases involved drugs and/or guns, I also represented individuals charged with complicated business embezzlements and alleged fraudulent transactions. Because federal charges often involve an alleged conspiracy, and because these alleged conspiracies typically extend outside East Tennessee, I represented people from many different cultures, locations and ethnicities.

Summary

I have seen the viewpoint of the business owner, the injured claimant, the distraught parent, the disgruntled customer and the criminally accused. I have experienced the viewpoint of the trial judge who must balance all the competing interests while making life-changing decisions.

I have sentenced people to prison, but not so often that I have become immune to the significance of such a deprivation of liberty. I have removed children from abusive situations and permanently terminated parental rights more times than I want to remember, but I have not become calloused to the preeminent rights of parents and the possibility that they can be successful with the right assistance. I have learned what it is like for a police officer to conduct a traffic stop or respond to a domestic violence call, and have also learned how important judicial decisions can be in the effectiveness of law enforcement and in keeping the public and the police safe.

Having represented many litigants on both sides of a wide variety of litigation, I am keenly aware that each case is the single most important and serious case for those involved, no matter how much is at stake. As a trial judge I have tried to reflect this awareness by listening attentively, considering carefully, and deciding thoughtfully and in a timely manner.

I believe the breadth of my experience as an attorney and as a judge provides perspective and, in turn, facilitates understanding. Understanding is essential to the administration of justice. We must understand the legal and the practical issues presented by each case. We must understand the viewpoints of the individuals and the lawyers involved in each case. And we must understand the consequences and implications of our decisions. Without such understanding we can create well-intentioned injustice.

With such understanding comes wisdom, or at least a good measure of common sense. Sometimes common sense gets lost in the details of legal analysis. I believe my experience,

perspective, and understanding will sustain a common sense approach to the cases coming before the Court of Appeals.

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

As Judge Hull's law clerk I was involved in many cases that could be considered "of special note," but two stand out to me as exceptional cases. I worked with him on the Hawkins County Textbook case, a/k/a "Scopes II," providing the draft opinion for him. The final decision is found at *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. TN 1986). The case received national publicity and was the subject of a book, Battleground, by Stephen Bates. The decision juxtaposed two essential constitutional liberties: the right to free exercise of religion and the right to be free from a religion established by the state. It also involved the state's interest in public education and the parental privacy interest in raising a child without interference from the state.

The other noteworthy case from my clerkship is *State Industries v. Mor-Flo Industries*. It was a complex patent infringement case involving multi-million dollar damages in which I provided Judge Hull with the draft opinion, which was upheld by the United States Court of Appeals for the Federal Circuit. The District Court decision is found at 639 F. Supp. 937(E.D. TN 1986). Because of the complexity and specialty of patent litigation, all appeals go to the Federal Circuit Court of Appeals rather than the regional circuit where the dispute arose. No new legal principle was established in the case but our analysis withstood the scrutiny of the federal appellate process and Judge Hull and I were gratified by the result.

As an attorney I handled the following cases that entailed significant legal issues:

Sitz v. Goodyear Truck Tire Center, 762 S.W.2d 886 (Tenn. 1988). The main issue involved whether the knowledge requirement for Second Injury Fund liability in a worker's compensation case (found at Tenn. Code Ann. §50-6-208(a)) also necessarily applies to Second Injury Fund liability under subsection (b). This was an issue of first impression.

Summers v. Thompson, 488 U. S. 977 (1988). This was a challenge to the Tennessee statutory provisions allowing a municipal judge to be terminated at will by the governing body of the municipality. We challenged the law as a violation of the Separation of Powers doctrine found in the Tennessee and United States Constitutions. In addition, in the petition to the U. S. Supreme Court we raised the issue of whether the doctrine of Separation of Powers contained in Article III, Section 1 of the United States Constitution is applicable to the States through the Due Process and Equal Protection Clauses of the 5th and 14th Amendments to the United States Constitution.

Hamilton County Board of Education v. Asbestospray, et al, approximately 1988-1991, United States District Court for the Eastern District of Tennessee at Chattanooga. I was associate counsel representing the Board of Education in its lawsuit against the manufacturers of various asbestos-containing insulation products which it believed it was compelled to remove from its school buildings to ensure student safety. The Board sought reimbursement for the costs of removing these materials.

The case involved massive discovery efforts as both the school board and the defendants attempted to trace the materials found in the school buildings to their original manufacturers. The case also involved a significant legal question regarding the statute of limitations. Initially there was a class action filed against the manufacturers on behalf of all such school districts. After Hamilton County opted out of the class action, there was an issue as to whether the filing of the initial class action tolled the statute of limitations; and, whether the limitations period was inapplicable to the school board by application of the *nullum tempis* doctrine. The United States Court of Appeals for the Sixth Circuit agreed with our position that the *nullum tempis* doctrine prevented application of the statute of limitations against the county.

United States Pipe and Foundry v. Johnson, 927 F.2d 296 (6th Cir. 1991). The significant issue in this case was whether Tennessee's Second Injury Fund, which is funded by private employer contributions, is entitled to the State's sovereign immunity under the 11th Amendment to the U. S. Constitution, and therefore immune from suit in Federal Court.

United States v. Christian, 942 F.2d 363 (6th Cir. 1991). Whether, in a drug conspiracy case, the *Pinkerton* doctrine applies to co-conspirator's crimes which are not specifically enumerated under the drug conspiracy statute, 21 U.S.C. Sec. 846. Also, whether application of the *Pinkerton* doctrine in this situation violates Due Process.

University of Tennessee v. Faulkner, was an administrative proceeding in which the University rescinded the Ph. D of a University of Tennessee Space Institute graduate student, based upon alleged plagiarism in the dissertation. At the direction of a professor/dissertation advisor Mr. Faulkner took some previously unpublished data, provided by the professor, redid the calculations and confirmed the results then prepared the information for publication, but without attribution of the original reports. The real issue was not whether the dissertation work should be deemed plagiarism but whether the University acted fairly. We argued that Mr. Faulkner was entitled to Due Process and that the University failed to provide it. The University provided the charges, the prosecutor, and the judge who would make the determination. In fact, the "judge" was actually a faculty member of the University. This case was the first proceeding in the memory of University officials in which a student challenged the University decision to rescind a diploma. An Associated Press report about the proceedings was picked up nationally and reported by numerous newspapers and other media sources. Subsequently, the Professor who advised and guided Faulkner's dissertation work was investigated and charged in connection with an alleged "diplomas for contracts" scheme in which it was claimed that he helped employees of NASA obtain advanced degrees in exchange for them steering consulting contracts to his private firm.

United States v. Wilson, 9 F.3d 111 (table) (6th Cir. 1995). Whether one can "launder" proceeds from an unlawful transaction before he/she is in receipt of the proceeds. A money laundering conviction was reversed because a wire transfer of funds from the bank of a defrauded company to the defrauding defendant's bank account was not a "monetary transaction in criminally derived property" under 18 U.S.C. Sec. 1957.

United States v. Washington, 60 F.3d 829 (table) (6th Cir. 1995). The question presented was whether the Fifth Amendment protection of *Doyle v. Ohio*, that a defendant cannot be impeached at trial by post-*Miranda* silence, should extend to post-arrest but pre-*Miranda* silence when it is shown that the defendant was aware of his right to remain silent before being

administered his *Miranda* warnings.

United States v. Baker, March 1996, United States District Court for the Eastern District of Tennessee at Greeneville. This was a drug and gun case resulting from a traffic stop. The drugs were in the defendant's pants and two loaded pistols were in the truck. The defendant pleaded guilty to the drug charge but went to trial on the charge of using or carrying a firearm during and in relation to a drug trafficking crime.

Baker was significant as the first such case to go to trial in the Eastern District of Tennessee following the United States Supreme Court decision of *Bailey v. United States*, which held that the "use" prong of the charged statute meant more than simply storing a gun near drugs to provide protection if necessary (*Bailey* was a reversal of Sixth Circuit law). The issue at trial became whether the defendant "carried" the guns "in relation to" the drug offense. We had to develop new jury instructions in conformance with *Bailey*. Mr. Baker was acquitted at trial.

United States v. Freshour, December 1993, U. S. District Court for the Eastern District of Tennessee at Greeneville. This case was significant as the first major Medicaid fraud case tried in the Eastern District of Tennessee. It called into question the payment and approval systems of the Tennessee Medicaid office and highlighted the absurdity of portions of the Medicaid manual with its reimbursement codes, descriptions and rates. My client was acquitted of 53 counts at trial. Although the jury convicted Ms. Freshour on two counts, I was successful in having those two counts of conviction overturned by the Sixth Circuit Court of Appeals. *United States v. Freshour*, 64F. 3d 664 (Table)(6th Cir. 1995).

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.

As a judge over the last 22 years my goal has been to treat everyone appearing in court equally, fairly, and respectfully. In large part, justice is more about the process than the result. I firmly believe in the axiom that "the law is no respecter of persons." I am committed to ensuring that all litigants, whether appearing in suits or shackles, have an opportunity to present their case to a judge who is seeking to understand their perspective, discern the truth, fairly apply the law, and issue an impartial judgment that is not dependent upon the identity of the parties.

Circuit Court Judge

As Circuit Court Judge I preside over a variety of civil and criminal cases. Approximately 90% of the cases I have presided over have been civil and 10% have been criminal.

The civil cases consist of approximately 50% domestic relations, 30% torts, and 20% other types of cases. I conduct jury trials and bench trials. I am responsible for case management of the cases designated to me, courtroom management when I am presiding in court, and, all research

and writing required for my rulings.

I also regularly consider and rule upon, often outside the regular workday, search warrants, judicial subpoenas, and asset forfeiture warrants for the Third Judicial District Attorney's office and for the numerous law enforcement agencies operating within the district.

General Sessions and Juvenile Court Judge

As the General Sessions Court and Juvenile Court Judge for Greene County, I presided over almost every type of civil and criminal matter imaginable. Some of the most significant matters arose in juvenile court. Cases of abuse, dependency and neglect, and termination of parental rights were common.

On the criminal side I heard everything from speeding tickets to preliminary hearings in first degree murder cases. On the civil side there was a monetary jurisdictional limit, but no limit to the range of disputes that I was called upon to resolve, from collections to coon dog custody.

Greene County was the most populous county in the State of Tennessee with only one judge handling all General Sessions and Juvenile Court cases. As a result, I held court every day of the work week, morning and afternoon (and sometimes late into the night), to keep up with the caseload. I implemented innovative docket control measures to streamline the process and initiated a bad check program, with the assistance of the District Attorney and the Sheriff, that has kept thousands of bad check cases out of court and put hundreds of thousands of dollars back in the pockets of victims. I also successfully advocated for implementation of courthouse security measures. I secured donated equipment from the United States Marshal's office to assist our Sheriff in keeping the public and judicial employees safe.

Noteworthy Cases

Treatment Court.

This does not involve an individual case, but for the individuals and their families whose lives have been changed through Treatment Court this is the most noteworthy matter I have been involved in as a judge. My staff and I instituted a drug and alcohol treatment program to address the cause of so much heartache and so much crime--substance abuse. After several years presiding over the General Sessions Court, which serves as the entry point into the Criminal Justice system in Greene County, as well as having a front row seat to the devastating impact of substance abuse on our families, I began a Treatment Court.

With a federal grant and training, as well as the assistance of a treatment provider and a host of other team members, the DUI Treatment Court was created to address the real issue at the heart of repeat DUI offenses. Treatment Court provides an opportunity for people with addiction problems to resolve their legal issues and receive treatment along with other assistance to restore their lives.

Treatment court offers hope and an opportunity to stop the recidivism that almost always follows in a person with untreated addiction issues. To be sure, participants in the program are punished for their crimes, but as an incentive to get clean they receive a reduction in the length of their jail term by entering into a program of treatment, support, intensive supervision and

judicial oversight and encouragement.

I chose to target multiple offense DUI cases because of the potential to save more than just the addict's life. Impaired drivers don't just destroy their own lives, they sometimes take other lives.

The program is a resounding success thanks to the team and the hard work of the participants. The program cost the County nothing and we held our Treatment Court meetings after the normal workday had concluded. My successor in Greene County has expanded the program to a Drug Court encompassing all offenses as meth and opiate abuse reached epidemic proportions in Greene County.

In re: Shiann Marie Horner, Greene County Juvenile Court (2001). In the context of a custodial placement decision, the issue was whether the priority list of prospective guardians for a child found at Tenn. Code Ann. Sec. 34-2-103 overrides the best interest analysis required by Tenn. Code Ann. Sec. 36-6-106. In affirming my decision the Court of Appeals said the best interest "of a child whose custody is being decided is the alpha and omega of the determination." *In re: Horner*, 2003 WL 1452997 (Tenn. App. 2003).

State of Tennessee v. Hensley, Greene County Juvenile Court (2004). I conducted the transfer hearing for a juvenile defendant charged, with others, of murdering his sister. It was a vicious murder in which the victim received 151 stab wounds. I ruled that the defendant should be transferred to Criminal Court to stand trial as an adult. My decision was affirmed by the Criminal Court and Court of Criminal Appeals. The noteworthy issue from my part in the case was whether the defendant should have been appointed a guardian *ad litem* during the juvenile proceedings because his mother had a conflict of interest in that she was also the mother of the victim. The Court of Criminal Appeals affirmed my handling of the issue. *State v. Hensley*, 2006 WL 2252736 (Tenn. Crim. App. 2006).

Fountain v. Tennessee Department of Children's Services, Jefferson County Chancery Court (2013). Whether the administrative procedures involved in the DCS designation of a person as an "indicated" perpetrator of child sexual abuse violate Due Process.

Combs v. Horton Maddox & Anderson, PLLC, Hamilton County Circuit Court (2008). This was a complicated legal malpractice case involving an underlying products liability claim that could have been pursued under Tennessee law or maritime law as the accident occurred on the Tennessee River, a navigable waterway. Prior to the two week trial of the case I ruled that the first law firm's failure to pursue the maritime claim could not have been the legal cause of the plaintiff's loss because the potential to pursue the maritime claim still existed at the time the plaintiff retained the second law firm. Thus, even if the first firm was negligent in failing to pursue the maritime claim, their negligence could not have been the legal cause of plaintiff's loss since the claim was viable at the time plaintiff employed the second firm. The situation had not been previously addressed by the appellate courts of Tennessee.

Fowler v. Morristown-Hamblen Hospital Association, et al, Hamblen County Circuit Court (2018). This was a proposed class action on behalf of all uninsured patients of the hospital and other healthcare facilities asserting a private right of action against the Hospital under Tenn. Code. Ann. §68-11-262, which limits the amount a healthcare facility may charge an uninsured patient. This statute does not expressly provide for a private right of action for violations of its provisions. I held that Tenn. Code. Ann. §1-3-119 precluded plaintiffs from pursuing an implied

private right of action. Plaintiff's then challenged the constitutionality of the statute precluding implied private rights of action. (Tenn. Code Ann. §1-3-119). Plaintiffs claimed the statute contravened the Open Courts Provision found in Article I, Section 17 of the Constitution of the State of Tennessee. I held that the statute did not violate the Open Courts Clause. My rulings were affirmed by the Court of Appeals. *Fowler v. Morristown Hamblen Hospital Association*, 2019 WL 2571081(Tenn. App. 2019).

Harvey v. Cumberland Trust and Investment Company, Hamblen County Circuit Court (2013). At issue was whether the Tennessee Uniform Trust Code empowers the Trustee of a disabled child to enter into a pre-dispute arbitration agreement that would apply to the child. I held that the Trustee had such power. The Tennessee Supreme Court agreed. *Harvey v. Cumberland Trust and Investment Company*, 532 S.W.3d 343 (Tenn. 2017).

Smith v. State of Tennessee, Hamblen County Criminal Court, (2012-19). This was a notorious double murder case in Northeast Tennessee. Mr. Smith sought post-conviction relief as a result of a report from the United States Department of Justice acknowledging that an FBI forensic hair examiner testified in a manner that "exceeded the science" in *Smith's* case. This alone is an important and unusual matter, but the significance of the case is its extraordinary procedural history and the demonstration of the lengths to which our criminal justice system goes to ensure Due Process.

It began in 1984 with the slaying of two country store owners. Mr. Smith was tried, convicted, and sentenced to death. His conviction was reversed. He was tried, convicted, and sentenced to death again. His death sentence was reversed. He was tried and sentenced to death a third time. The death sentence was again overturned on appeal from Smith's first post-conviction proceeding. By the time the case reached me in 2012 we were preparing for another trial on the issue of imposing the death penalty when the District Attorney's Office entered into an agreement with Mr. Smith's attorneys for imposition of a life sentence rather than going forward with a fourth trial on the death penalty. At that point, the nightmare seemed to have come to an end for the victims' families, but then the FBI and Department of Justice sent Mr. Smith a letter letting him know that their forensic hair analysis testimony had "exceeded the science." After a trial I ruled that while the hair analysis may have exceeded the scope of science, it had nothing to do with Mr. Smith's conviction and did not establish that he was actually innocent of murder. Therefore he was not entitled to reopen his Post-Conviction Petition.

Hyde v. State of Tennessee, Hamblen County Criminal Court (2011). This case involved the interpretation of the Post-Conviction DNA Analysis Act. The defendant sought DNA testing on an instrument he had inserted into a rape victim on the theory that the analysis would show no epithelial skin cells or mucous membrane cells of the victim because he was actually innocent of the offense and had not inserted this instrument. I found that the Post-Conviction DNA Analysis Act did not apply to this situation, because by its specific terms it applies only to the process of comparing DNA from one specimen to DNA from another specimen for identification purposes. Because the type of analysis sought by the defendant was outside the scope of our statute I dismissed the Petition and the Court of Criminal Appeals upheld my ruling. *Hyde v. State*, 2013 WL 3958648 (Tenn. Crim. App. 2013).

In re: A Transfer of Structured Settlement Payment Rights by Laurel J. Shanks, Hamblen County Circuit Court (2013). This case involved a matter of first impression in the interpretation of the Structured Settlement Protection Act found at Tenn. Code Ann. §47-18-2601. My

interpretation of the statute in ruling in the case was upheld by the Court of Appeals. *In re: Shanks*, 2014 WL 2193658 (Tenn. App. 2014).

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

I oversee the finances and investments of an elderly aunt as her power of attorney.

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

I have probably already told the Commission more than it wants to know.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar 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.

June 12, 2013 application for the Court of Criminal Appeals. Public hearing was June 27, 2013. My name was submitted to the Governor as a nominee.

August 30, 1996 application for the Court of Criminal Appeals. Uncertain of the date of the meeting at which the application was considered. My name was submitted to the Governor as a nominee.

January 1995 application for the Court of Criminal Appeals. Public hearing was January 30, 1995. My name was submitted to the Governor as a nominee.

I also applied, and was nominated, for appointment to Chancery and Circuit Court positions prior to my election as General Sessions and Juvenile Court Judge, but I cannot locate documentation to specify the dates.

EDUCATION

14. List each college, law school, and other graduate school that 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.

University of Tennessee, College of Law, 1980-83

Doctor of Jurisprudence with High Honors

Order of the Coif

Moot Court Board

Jessup International Law Moot Court Team: 3rd Place Brief in Regional Competition

Advocate's Prize Moot Court Competition: Best Brief Award, Semi-Finalist

American Jurisprudence Award: Decedent's Estates

Dean's List

Worked every Summer and part-time during school to pay for Law School

University of Arkansas, College of Business, 1977-80

Bachelor of Science with Honors

Major in Finance and Real Estate

Beta Gamma Sigma National Honor Society

Honors Finance Program - - Portfolio Management

Dean's List

Maintained honors academic standing while playing on the Arkansas Rugby Team and holding several leadership positions in my social fraternity and a student ministry.

University of Kansas, 1976-77. Transferred to Arkansas

PERSONAL INFORMATION

15. State your age and date of birth.

61 years old. DOB: [redacted] 1958

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

Since 1985

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

Since 1992

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

Greene County

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 placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No

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. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

I have responded to one complaint before the Tennessee Board of Judicial Conduct. That complaint was dismissed.

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. *Nigel Reid v. Amy Gaby, et al*, 14CV132, Hamblen County Circuit Court; and, *Nigel Reid v. Robert Moore, et al*, 14CV096, Hamblen County Circuit Court. Both cases dismissed February 20, 2015.

Mr. Reid was a frequent litigant in Hamblen County for a number of years. I presided over these cases initially since all of my colleagues at the time recused themselves because Mr. Reid had either sued them or filed judicial complaints against them. For the most part, Mr. Reid was an interesting and likable fellow, but from time to time he struggled with mental health issues and tended to file a lawsuit against anyone who disagreed with him. Besides myself and the other judges in the district at the time, he sued the Circuit Court Clerk, the County Commission, the Sheriff, the Police Chief, a newspaper reporter, and the newspaper publisher, among others. He added me to his lawsuits as a defendant after I issued an Order dismissing the case against the newspaper reporter and issued a Notice and Citation of Contempt for his use of offensive and unnecessary profanity in Court records.

Mr. Reid's cases against me were summarily dismissed upon motion of the Attorney General's Office.

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 that you have held in such organizations.

Asbury United Methodist Church: Sunday School Teacher, Bible Study Leader, Certified Lay Speaker, Youth Leader, Confirmation Mentor, Leadership Team, Staff-Parish Relations Committee Chair, Finance Committee, Nominations Committee (various dates as needed)

First United Methodist Church of Morristown Bulgaria Mission Team: 2015-present, Team Leader 2019

Holston United Methodist Home for Children: Board of Trustees 2006-13, Program Services Committee Chair 2012-13

YoungLife: Greene County Committee, Vice-Chair 2014-present, Volunteer Leader 2018-

present

Fellowship of Christian Athletes (Greene County): President 2012-13, Board Member 2008-present

Tennessee Farm Bureau

West Point Parent's Club of Eastern Tennessee

Army A Club

Walters State Community College: Advisory Committee for the Legal Assistant Program

Boy Scouts of America, Sequoyah Council: Advisory Board

Boys & Girls Club of Greeneville/Greene County: Founding Board Member, Volunteer, Supporter

YMCA of Greeneville/Greene County: President 1998; Multiple Board Terms, Human Resources Committee Chair 2017; CEO Search Committee Chair; Soccer, Basketball, T-Ball Coach

Greene County Tennis Association: President (approx. 2008)

Olde Towne Tennis Club

Greeneville High School Football Booster Club: President 2009-10

Greeneville Arts Council

Main Street Greeneville

Friends of Greeneville/Greene County Library

Republican Women of Greene County, 2008-present

Loyal Order of the Moose

Link Hills Country Club

Greeneville Theatre Guild

Rural Resources Farm and Food Education Center

Tennessee Senior Olympics: District and State-wide competitions. Field event competitor-shot put, discus, javelin

Greeneville City Schools: Volunteer Assistant Track Coach-Throwers

Isaiah 1:17 House: Greene County Founding Task Force 2019

27. Have you ever belonged to any organization, association, club or society that 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.

Yes. I was a member of a male social fraternity, Sigma Alpha Epsilon, during undergraduate school.

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 that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Judicial Conference 2006-present

Pattern Jury Instruction Committee-Civil 2007-present

Judicial Family Institute 2008-present

Chairperson 2017-present

Vice – Chair 2016-2017

Public Trust and Confidence in the Courts 2010-present

Vice – Chair 2016-present

Bench-Bar Committee 2012-2016

GAVELS Program Judicial Speakers Bureau 2011-present

Judicial Mentor Program 2012-present

Executive Committee 2016-2017

Annual Conference Co-Chair 2016-2017

SCALES Civics Education Program in the Third Judicial District Co-Chair January 2015

CACES (Court of Criminal Appeals) Civics Education Program in the Third Judicial District

Chair November 2015

CACES (Court of Appeals) Civics Education Program in the Third Judicial District

Chair April 2020

Tennessee Judicial Foundation 2006-present

Founded the Thomas G. Hull Scholarship 2012

Tennessee Trial Judges Association 2006-present

Study Committee for Judicial Resource Allocation and/or Redistricting 2017

Tennessee Bar Foundation 2009-present

Court Historical Society (U.S. District Court for the Eastern District of Tennessee)

Vice-President, Northeast Division 2009-present

Greene County Bar Association

Hamblen County Bar Association

Hawkins County Bar Association

Although I no longer pay dues to belong to the Tennessee Bar Association or the American Bar Association, I am active in bar activities, taking on judicial interns, speaking, and sitting as judge for the high school mock trial competition. Though more than 10 years ago, I believe my work on an ABA YLD Ethics Committee, in which we drafted a Model Code of Professionalism, was significant.

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

Elected Fellow of the Tennessee Bar Foundation

State of Tennessee ADAT Award of Excellence

TAADAS Voice of Recovery Award Finalist

Doak-Balch Civic Responsibility and Outstanding Character Award from Tusculum College and First Tennessee Human Resource Agency

Award Plaque from Greene County DUI Treatment Court Team for establishing Treatment Court

Award Clock from Walters State Community College for teaching/speaking at the Law Enforcement Training Academy

Award Certificate from CASA of Northeast Tennessee for implementing program in Greene County Juvenile Court

Award Certificate from Greene County Health Council for leadership in implementing America's Promise and the Reality Program as Juvenile Judge.

"Banking on our Kids" Moral Kombat Hero Award, First Tennessee Human Resources Agency for Juvenile Court Programs

Award Plaque from Greeneville City School System for cooperative efforts in addressing truancy, school violence, and other areas affecting education and juvenile justice.

Who's Who in the World

Appointed to the Civil Justice Advisory Group for the Eastern District of Tennessee by

Chief U.S. District Judge James H. Jarvis

Who's Who in American Law

Selected as one of The Business Journal's "40 under Forty" recognizing professional achievement and leadership in Upper East Tennessee and Southwest Virginia

Award Plaque from Inner-City Ministries for volunteer efforts at Legal Aid Clinic

J. C. Penney Golden Rule Award Nominee for *Pro Bono* activities

Who's Who in the South and Southwest

Who's Who in Practicing Attorneys

Who's Who Among Young American Professionals

Outstanding Young Men of America

Rated "Excellent" as a Law Clerk with the Federal Administrative Office of the Courts

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

"HIGHway Driving in Tennessee," Tennessee Bar Journal Vol. 52, No. 1 January 2016, with Christopher Graham

"Concubines, Dead Partners and the Standard of Clear and Convincing Evidence," Tennessee Bar Journal Vol. 51, No. 2 February 2015, with Ben Welch

"Oral Advocacy-Some Reminders," The Champion, June 1995, with Perry Piper

"Oral Advocacy-Some Reminders," Tennessee Bar Journal, November 1994, with Perry Piper

Amicus Defendente, Editor and Primary Contributor, October 1993-August 1998 (this was a quarterly publication distributed to criminal defense attorneys within the Eastern District of Tennessee and to Federal Defender Offices nationally. It contained summaries of recent appellate criminal cases as well as practical information and instruction on effectively representing federal criminal defendants.)

"Look Mom, No Staff!" Christian Legal Society Quarterly, Winter 1992

Advanced Worker's Compensation in Tennessee, National Business Institute, Inc. (1991), author of chapters on "Hearing Process and Practice," "Aggravations of Pre-existing Conditions," and "Recent Legislation."

Worker's Compensation in Tennessee, National Business Institute, Inc. (1991), author of chapters on "Current Medical Issues," and "Legislative Update."

"TV Advertising by Lawyers-What Have You Got to Lose?" *Res Nova*, Vol. III, No.3 June 1990

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.

"Overcoming Challenges Through Leadership," Tennessee Corrections Institute, August 2015

"Protecting A Client's Separate Assets," Family Law Conference for Tennessee Practitioners Sponsored by TAM, October 2015

"What Civil Court Judges Want You to Know," Knoxville Judicial Forum, Sponsored by National Business Institute, October 2015

"Protecting A Client's Separate Assets," Family Law Conference for Tennessee Practitioners Sponsored by TAM, December 2015

"Drugged Driving - Evidence in a DDUI Case," Tennessee Bar Association, March 2016, with Tom Kimball.

"Dealing with Circuit Court, Some Ethical Considerations," Greene County Bar Association, May 2016

"Protecting A Client's Separate Assets," 11th Annual Family Law Conference for Tennessee Practitioners, Sponsored by TAM, October 2016

"Effective Use of the Court's Contempt Power," Annual Cherokee CLE, Greene County Bar Association, October 2017

"Classifying Marital Assets," Annual Cherokee CLE, Greene County Bar Association, October 2017

"Protecting A Client's Separate Assets," 12th Annual Family Law Conference for Tennessee Practitioners, Sponsored by TAM, October 2017

"Effective and Ineffective Discovery Practices," 11th Annual Law Conference for Tennessee Practitioners Sponsored by TAM, November 2017

"The Tennessee Judicial System and the Quest for Judicial Independence," Tusculum University Arts and Lectures Series 2018

"You Can't Make Me – Effective Use of Contempt Power," First Judicial District Court Clinic Seminar, November 2019

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.

9/06-present Circuit Court Judge, 3rd Judicial District, State of Tennessee, elected.

9/98-9/06 General Sessions Court & Juvenile Court Judge, Greene County, Tennessee, elected.

Previous applications listed in answer to Question 13, above.

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

No

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

I was completely responsible for each of the attached legal writings.

ESSAYS/PERSONAL STATEMENTS

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

I am committed to serving the public and seek to do so in the way that best utilizes my strengths and experience. I believe my strengths lie in the areas important for this position. Analyzing both sides of an issue and deciding on the appropriate resolution has always come naturally to me. Quality research and writing skills, the companions of proper analysis, are assets I possess.

I have the experience, as a trial lawyer, and a judge, to understand how decisions will play out in "real life." Lawyers and trial judges sometimes scratch their heads and lament the appellate judges who "work in ivory towers" but do not understand the practical implications of their decisions. Because of my legal experience, I will not lose the realistic and pragmatic perspective I believe is important on an appellate bench.

36. State any achievements or activities in which you have been involved that 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)***

The struggle to achieve equal justice under the law is significantly affected by the availability of quality legal services for all citizens. Recognizing the powerless position of many inner-city residents and the inability of Legal Services to fill this void, I co-founded a legal aid clinic with Scott Brown in Chattanooga. We partnered with Inner-City Ministries for a physical location and vetting of the clients. I served as Director of this project as well as a volunteer lawyer, from 1987 until I left Chattanooga in 1992.

As a member of the Chattanooga Bar Association *Pro Bono* Committee, I assisted in the development and implementation of the first Bar Association *Pro Bono* Program since the creation of the Legal Services Corporation. I also served as a volunteer lawyer in this program.

As Judge I have worked with the Bar Association on Free Legal Advice Clinics and Expungements Clinics. Many low income residents have been assisted with expungements, divorces and other legal issues through these programs.

As juvenile judge in Greene County, I implemented a Court Appointed Special Advocates (CASA) program to help ensure equal justice for those least able to speak for themselves -- the abused and neglected children in our County.

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)***

I am seeking the Tennessee Court of Appeals opening in the Eastern Grand Division. There are 12 judges on the Court, 4 from each grand division. The Court hears civil appeals in three-judge panels throughout the state. The appeals originate in Circuit, Chancery, and in some cases, Juvenile Courts.

I would be a unique addition to this Court with prior service as a Circuit Court Judge, a General Sessions Court Judge and a Juvenile Court Judge. Statewide there is only one member of this Court who has served as a Circuit Court Judge. The vast majority of jury trials occur in Circuit Court and many of these jury trials end up on appeal. I have tried over 100 jury trials as an attorney and as a judge. I believe my considerable experience with jury trials would add an additional and underrepresented viewpoint to the Court.

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)***

My most important participation in community service has been to help provide the resources and opportunities needed by our youth so that every child can become a champion. Regrettably, I have had a perfect view of the devastating consequences of family dysfunction, violence, and addiction. Children need all the help they can get.

That is why, even though my own children left home years ago, I still work with high schoolers through YoungLife. I help coach the track team and mentor young people at Church. That is why I took the lead in implementing America's Promise in Greene County. It is why I gladly gave my time and money to serve on the founding Board of our Boys & Girls Club, the founding Task Force for our Child Advocacy Center, and the Nolachuckey District Council of the Boy Scouts, among other things. These are the type of activities and organizations that help repair the devastation we so often see.

Serving others keeps one's perspective more realistic and humble. As public servants we should take the lead in giving of our time and money. Public perception of the judiciary has taken some significant hits in the past few years in East Tennessee. When we take the lead in serving rather than being served, we can regain and maintain the public's respect for the judiciary.

I do not anticipate changing my level of community involvement.

39. Describe life experiences, personal involvements, or talents that you have that you feel

will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

One of the most significant experiences one may have is that of being a parent. Having children makes me want to leave this world a better place and reminds me of the issues that are truly important. Having grandchildren has only magnified these feelings.

In the early years, children easily reduce what seems complex and make it simple. Children are unimpressed by titles and positions. They keep us humble. Children inspire us with their unbiased acceptance of others and their unfiltered honesty. They are not bound by tradition or the status quo, and seek real answers to their "why" questions. These are attributes that are often lost in our judicial system. As children mature the "why" questions become more serious and may cause, a reexamination of our core beliefs. As adults, my children, as well as my spouse, are not afraid to challenge my reasoning or hold me accountable. They make me a better person and a better judge.

I have successfully run two contested elections for office, unseating a 16 year incumbent in my first campaign. I garnered almost 90% of the vote in my home county during my second campaign. Winning a contested election makes you appreciate the office you have been entrusted to occupy. Being accountable to the public requires you to stay connected to the community. And, I believe it has helped me keep a perspective that is practical and down to earth.

I was raised to respect others, work hard, and give back.

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 have twice taken an oath to do so and would resign my office before I would violate my oath.

An example from my experience as a judge in past years has been my application of the appropriate standard for summary judgment in a civil case.

I believe in giving a party leeway to develop their case, but if a party cannot prove an element of their case I see no reason to allow the case to languish in the courts at the expense of the opposing party. I prefer the "put up or shut up rule" applied in Federal civil cases in deciding motions for summary judgment. However, that was not the law of the State of Tennessee and I endeavored to follow the dictates of *Hannan v. Alltel* in adjudicating such motions before *Hannan* was overruled and the Federal standard reinstated for our cases.

I will always follow the law. Judicial office is a sacred public trust. I will safeguard that trust by administering justice with equality, integrity, and humility.

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 Council or someone on its behalf may contact these persons regarding your application.

A. Hon. Beth Boniface, Circuit Court Judge, 3rd Judicial District, [redacted]
B. Hon. Marcia Parsons, United States Bankruptcy Judge, Eastern District of Tennessee, [redacted]
C. Betty Mathes, Farmer and Homemaker, [redacted]
D. Trey Youngblood, Farm Bureau Insurance Agency Manager, [redacted]
E. Hon. W. T. Daniels, Mayor, Town of Greeneville, Tennessee, [redacted]

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 of Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, 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 application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: February 3, 2020.

Thomas J. Wright
Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

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

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and 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, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Thomas J. Wright
Type or Print Name

Thomas J. Wright
Signature

02/03/2020
Date

010695
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

N/A

IN THE CHANCERY COURT FOR JEFFERSON COUNTY, TENNESSEE

JOHNNY FOUNTAIN,	§	
Petitioner/Appellant,	§	
	§	
v.	§	**No. 10-9-150**
	§	
	§	
STATE OF TENNESSEE	§	
DEPARTMENT OF CHILDRENS	§	
SERVICES,	§	
Respondent/Appellee.	§	

MEMORANDUM OPINION

This case involves the appeal of a Final Order of the Commissioner of the Tennessee Department of Children's Services entered September 27, 2010. The Commissioner's Final Order adopted the decision and finding of Administrative Judge Marcum set forth in the Initial Order entered September 9, 2010. In that Initial Order Judge Marcum found "sufficient evidence to uphold the classification established by the Special Investigations Unit of the Department of the Children's Services that the Appellant is the indicated perpetrator in validated (sic) case of child sexual abuse involving JDB." (Initial Order, p. 17, Administrative Record).

This judicial review of the administrative decision of DCS was initiated by a Petition for Writ of Certiorari filed September 24, 2010 in this Court. The State filed a Response October 12, 2010. Subsequently, the Chancellor recused himself and the undersigned was designated to hear this matter by Order of the Supreme Court of Tennessee entered January 21, 2011.

Thereafter, Petitioner added a constitutional challenge to the appeal. Petitioner contends that the evidentiary/procedural framework of the administrative process for the DCS decision that a person is a indicated perpetrator in a validated case of child sexual abuse violates due process requirements. The Attorney General of the State was then served with notice and a copy of the pleadings in this matter; and, after several attempts at scheduling a hearing, this matter came on for hearing before the undersigned on November 27, 2012.

At the November 27, 2012 hearing Petitioner's due process challenge was argued in greater detail than anticipated by the State based upon the written arguments of the Petitioner. After discussion with counsel, the Court requested further briefing of the issue by the parties. The State served its Supplemental Brief November 27, 2012. Petitioner served a Response to the State's Supplemental Brief December 20, 2012, but the response was not received by the undersigned until January 4, 2013.

This action involves both the constitutional challenge of the Petitioner as well as the general "appeal" of the agency ruling pursuant to the Tennessee Uniform Administrative Procedures Act. ("UAPA"). T.C.A. §4-5-101, et seq. The "appeal" is referred to in the Act as a "review." T.C.A. §4-5-322. The general evidentiary review is confined to the record as it existed before the agency and is conducted by the court without a jury. T.C.A. §4-5-322(g).

This Memorandum Opinion will address whether Tennessee's administrative process is constitutional in the context of a child sexual abuse indication by DCS; and, whether the agency decision in this case is supported by substantial and material evidence. T.C.A. §4-5-322(h)(1) & (5). For purposes of the statutorily prescribed review, this Memorandum Opinion

contains this Court's findings of fact and conclusions of law required by T.C.A. §4-5-322(j).

1. **Factual Background**

Johnny Fountain served as a youth minister at New Market United Methodist Church. As part of his work in the church, he developed a significant relationship with JDB, the alleged victim of the sexual abuse. At the time of the administrative hearing, JDB was 17 years old. He was 16 at the time of the alleged abuse. It is undisputed that Mr. Fountain touched the genitals of JDB. Mr. Fountain claims that the touching of JDB's genitals was for the purpose of checking JDB for a hernia. A detailed recitation of all the testimony from the administrative hearing is contained in the Initial Order and will not be separately set forth here.

Under Tennessee Law anyone with knowledge of, or with reasonable cause to suspect, child sexual abuse is required to report the alleged abuse to the Department of Children's Services ("DCS"). T.C.A. §37-1-605. Such reports are then directed immediately to the local DCS office that would be responsible for an investigation. T.C.A. §37-1-605(b)(1). Each county DCS office is required to coordinate a Child Protective Team ("CPT") which is to conduct child protective investigations in reports of child sexual abuse. T.C.A. §37-1-607. The CPT is to determine within 60 days whether the reported abuse is to be classified as "indicated or unfounded." T.C.A. §37-1-406(I). The team is also to report it's finding to the DCS abuse registry. id.

In this case, DCS received a referral of possible inappropriate sexual behavior by Mr. Fountain toward JDB April 6, 2010. An investigation by a child protective services caseworker of DCS followed and the results of the investigation were apparently presented to the Jefferson

County Child Protective Investigative Team on May 20, 2010. The Team agreed with the classification of the allegation of sexual abuse against Johnny Fountain as "Allegation Indicated, Perpetrator Indicated." (Appeal Summary Section II, Administrative Record).

DCS has been tasked by the legislature with determining appropriate "administrative and due process procedures for the disclosure of the contents of its files and the results of it's investigations for the purpose of protecting children from child sexual abuse. . . ." T.C.A. §37-1-409(e)(1). Pursuant to that mandate, DCS has adopted both Rules and Regulations as well as Administrative Policies and Procedures. These rules, regulations, policies and procedures are located primarily in Tenn. Comp. R. & Regs. R. 0250-7-9 (hereafter: "Rule"), and DCS Administrative Policies and Procedures: 14.11 (hereafter: "A.P.&P."). These rules, regulations, policies and procedures provide the process which the State deems to be "due" to an "indicated" perpetrator of child sexual abuse.

Under the DCS rules, a person is to be classified as "indicated" if the "preponderance of the evidence, in light of the entire record, proves that the individual committed . . . child sexual abuse. . . ." Rule 0250-7-9-.05(1). This particular rule goes on to list eight separate factors which "may constitute a preponderance of the evidence" when they link the abusive act to the alleged perpetrator. id.

Once the alleged perpetrator has been deemed "indicated" the department is required to notify the individual in writing within 10 business days and inform the individual that a "formal file review by the Commissioner's designee may be requested." Rule 0250-7-9-.06. In cases of an emergency when an "indicated" individual poses an immediate threat to a child or

children to whom the alleged perpetrator has access, DCS conducts an emergency file review as soon as reasonably possible. A.P. & P. 14.11 C.1; Rule 0250-7-9-.07(2). This emergency file review is to be conducted by the Special Investigations Unit ("SIU") of DCS. A.P.&P. 14.11 C. 2-3.

Pursuant to DCS procedure an "emergency file review" was requested by SIU on May 26, 2010 in this case. The review was completed by a Case File Reviewer on May 28, 2010. (Appeal Summary, Sec. II, Administrative Record). The formal file review requires the reviewer to determine if the preponderance of the evidence proves that the individual committed child sexual abuse. Rule 0250-7-9-.06(8). If the reviewer determines that the standard has been met, the report is upheld and classified as "indicated." id. at (11). DCS then sends a notice to the alleged perpetrator within 10 business days regarding the results of the formal file review and advising the individual of his right to request a hearing to contest his designation as an indicated perpetrator before an administrative law judge. id.

The result of the emergency file review in this case was to uphold the validity of the identification of Mr. Fountain as the perpetrator of child abuse involving JDB. Mr. Fountain was advised of this finding by certified letter dated May 28, 2010. (Letter from Colette Crawley-Martin, Ex. 1, Administrative Record). The May 28 letter advised Mr. Fountain that, not only had he been identified as the perpetrator of child abuse, but that DCS was notifying the organization with which Mr. Fountain was associated about the child abuse; and, that he had a right to an administrative hearing if he disputed the finding. Instructions for how to request a hearing are also contained in that letter.

If the alleged perpetrator requests an administrative hearing, the rules require that the hearing be held, and an initial order entered within 90 business days of the notice sent after the formal file review. Rule 0250-7-9-.08(4)(a).

On June 4, 2010 Mr. Fountain made a written request for an administrative hearing to contest the child abuse allegation. (Ex. 1, P. 3 Administrative Record). By letter dated June 10, 2010 Administrative Judge Marcum notified Mr. Fountain that the requested hearing would be held August 2, 2010. This letter also provided basic information regarding the procedural and evidentiary framework for the hearing. (Scheduling Letter, Administrative Record). In addition, DCS Commissioner Miller also sent a letter dated June 10, 2010 providing further information about the hearing process and the Department's procedures for release of child abuse records. (Acknowledgment Letter, Administrative Record).

At an administrative hearing, Rule 0250-7-9-.11 requires that the State's case for "indication" be proven by a preponderance of the evidence, thus placing the burden of proof on the State. The administrative judge is charged with the "sole issue" of determining "whether the preponderance of the evidence, in light of the entire record, proves that the individual . . . committed child sexual abuse. . . ." Rule 0250-7-9-.10(2).

The administrative hearing in this case was held on August 2, 2010 and a 145 page Transcript of Proceedings from that hearing has been prepared for this Appeal. Administrative Judge Marcum entered her Initial Order September 9, 2010 finding that there was a preponderance of the evidence "which established that the Appellant committed child sexual abuse involving JDB." (Initial Order, P. 16, Administrative Record).

Following an administrative hearing the Commissioner of DCS reviews the Hearing Record and Initial Order and issues a Final Order. See, T.C.A. §4-5-315. If the alleged perpetrator is dissatisfied, an appeal to the Chancery Court may be filed within 60 days of the date of the Final Order. Rule 0250-7-9-.10(5); T.C.A. §4-5-322. Commissioner Miller adopted Administrative Judge Marcum's findings of fact and conclusions of law in entering a Final Order September 27, 2010. (Final Order, Administrative Record). This Appeal followed.

2. Discussion

Mr. Fountain has raised, for the first time in this appeal, a constitutional challenge to the process involved in labeling a person as a "indicated" perpetrator of child sexual abuse. Although an aggrieved party may pursue constitutional issues in administrative proceedings, Richardson v. Tennessee Board of Dentistry, 913 F2d, 446, 455(Tenn. 1995), such claims may also be raised initially in a Chancery Court review of an administrative decision. id. at 457-458.

Mr. Fountain's constitutional "challenge is to the appeals process set up by Department of Children's Services for a person identified as a sex offender." (Petitioner's Response to the Supplemental Brief of the State). Mr. Fountain goes on to say in his Response to the Supplemental Brief of the State that because judicial review of an administrative decision utilizes a "substantial and material" evidence standard rather than a preponderance of the evidence standard, "[t]hat simply cannot be fair when you are labeling someone as a sexual abuser of children." (id.).

Under UAPA Tennessee Courts are directed to review agency decisions to determine if they are supported by substantial and material evidence in light of the entire record. T.C.A. §4-5-

322(h)(5). Fact findings are not reviewed de novo and the reviewing court is prohibited from substituting "their judgment for that of the agency as to the weight of the evidence, even when the evidence could support a different result." Wayne County v. Tennessee Solid Waste Disposal Control Board, (citations omitted) 756 S.W.2d 274, 279 (Tenn. App. 1988). The "substantial and material evidence" standard is "something less than a preponderance of the evidence, but more than a scintilla or glimmer." (citations omitted) id. at 280. In determining whether the record contains substantial evidence to support the agency decision, a reviewing court may consider direct evidence, "circumstantial evidence or the inferences reasonably drawn from direct evidence." id. Also, UAPA requires reviewing courts to "take into account whatever in the record fairly detracts" from the weight of the evidence before the administrative fact finder. T.C.A. §4-5-322(h)(5).

A. Due Process Generally

As a starting point, it is noted that our Supreme Court has determined that the State Due Process provision found in Article 1, Section 8 of the Tennessee Constitution provides identical due process protection to that found in the 14th Amendment to the United States Constitution. Riggs v. Burson, 941 S.W.2d 44,51 (Tenn. 1997); Martin v. Sizemore, 78 S.W.3d 249, 262 (Tenn. App. 2001). Thus, decisions relating to the application of the federal due process provision are relevant to any analysis of Tennessee's due process provision.

Due Process does not apply to every decision made by the State but only to those decisions or actions which result in a deprivation of a constitutionally protected property or liberty interest. Rowe v. Board of Education, 938 S.W.2d 351,354 (Tenn.), cert. denied 520 U.

S. 1128 (1997). So the first step is to determine whether the State has taken action which deprives an individual of a liberty or property interest. If so, due process is required. If due process is implicated by State action the next step is to determine what process is due in that particular situation. Matthews v. Eldridge, 424 U.S. 319 (1976).

In this case, we will first determine whether Mr. Fountain had a liberty or property interest which was interfered with by the State; and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient, Hewitt v. Helms, 459 U.S., at 472." Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

B. Did the State deprive Fountain of a liberty or property interest?

As an initial matter, the Court notes that the State has not disputed Mr. Fountain's entitlement to due process in this case. Neither party has briefed the issue of whether due process is implicated in cases related to the release of information regarding individuals "indicated" as perpetrators of abuse.

This Court's research indicates that in almost every instance in which a state's action of listing an individual as a child abuser on a state registry has been considered, the courts have found a sufficient liberty or property interest to justify the application of Due Process. Humphries v. County of L. A., 547 F.3d 1117(9th Cir. 2008), amended 554 F.3d 1170 (2009), reversed on other grounds, 131 S.Ct. 447 (2010); Dupuy v. Samuels, 397 F.3d 493 (7th Cir. 2005); Doyle v. Camelot Care Centers., Inc., 305 F.3d 603 (7th Cir. 2002); Valmonte v. Bane, 18 F.3d 992 (2nd Cir. 1994); Burns v. Alexander, 776 F.Supp.2d 57 (W.D. Penn. 2011); Jamison v. State Dept. of Soc. Srvcs., 218 S.W.3d 399 (Mo. 2007); Lyon v. Dept. of Children and Family

Srvcs., 807 N.E.2d 423 (Ill. 2004); Covell v. Dept. of Soc. Servs., 791 N.E.2d 877 (Mass. 2003); Petiton of Preisendorfer, 719 A.2d 590 (N.H. 1998); Lee T. T. v. Dowling, 664 N. E.2d 1243 (N.Y. 1996); G. V. v. DPT. of Public Welfare, 52 A.3d 434 (Pa. Commw. 2012), appeal granted 2013 Pa. LEXIS 494 (3/21/13); W. B. v. Kentucky, 2011 Ky. App. LEXIS 47, Slip Op. No. 2010-CA-000361-MR (Ky. App. 3/11/2011), vacated on other grounds and remanded 388 S.W.3d 108(KY. 2013); Whiteside v. Department of Soc. and Rehab. Servs., 2002 Kan. App. Unpub. LEXIS 415 (Ks. App. 2002); Matter of allegations of sexual abuse at East Park High School, 714 A.2d 339, (N.J. Super. Ct. App. Div. 1998); Marold v. Fendetti, 1997 R. I. Super. LEXIS 84 (8/28/97); Cavarretto v. Department of Childrens and Family Srvcs., 660 N.E.2d 250 (Ill. App. 1996); S. W. v. Dept. of Children and Family Srvcs., 658 N.E.2d 1301 (Ill. App. 1995). Contra, Smith v. Siegelman, 322 F.3d 1290 (11th Cir. 2003); L. C. v. Tex. Dept. of Family and Protective Srvcs., 2009 Tex. App. LEXIS 8778 (11/13/2009).

More importantly, the Tennessee Court of Appeals has recognized a legally protected liberty interest in the factual context at issue in this case. Kelley v. Tennessee DCS, 2008 Tenn. App. LEXIS 211(4/3/2008). Because the State has not disputed Mr. Fountain's protected liberty interest in this case, and because Tennessee has recognized such interest in Kelley as well as through the promulgation of rules and regulations to provide Due Process to individuals in this situation, the Court will not engage in an extensive analysis of whether Mr. Fountain meets the "stigma-plus test" of Paul v. Davis, 424 U.S. 693 (1976).

Since Fountain has a protectable liberty interest implicated by his listing as an indicated child sexual abuser, we turn to the second step in the due process analysis: determining

what process is due in this situation. To answer this question, the Court must undertake the three part analysis set out in Matthews v. Eldridge, 424 U.S. 319, 335 (1976). The court must examine the interest of the individual, the interest of the State, and the risk of an erroneous deprivation of individual liberty. Id.

C. Application of Due Process to this Case

Due process is a flexible concept that calls for different procedural safeguards in different situations. Seals v. State, 23 S.W.3d 272 (Tenn. 2000). Procedural due process, the aspect of due process implicated in Fountain's challenge, involves the right to a fair procedure or set of procedures before one can be deprived of a protected interest by the State. Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000). At its essence, procedural due process encompasses notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319 (1976). The nature of the interests involved and the nature of any procedural safeguards, as well as the manner in which the safeguards are employed, and the timing of their employment, all figure in to determining whether a hearing is "meaningful."

In determining what process is due in each particular situation, a Court must consider three factors:

> (1) The private interest at stake:
>
> (2) The risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally
>
> (3) The government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Wilson v. Wilson, 984 S.W.2d 898, 902 (Tenn. 1998), cert. denied 528 U.S. 822 (1999); accord, Matthews v. Eldridge, 424 U.S. 319, 335 (1976). The more serious the potential deprivation, the more extensive the procedural safeguards must be. Saville v. Treadway, 404 F. Supp. 430 (W.D. Tenn. 1974).

In this particular case the deprivation an individual experiences when listed on the "indicated" child sexual abuse registry is significant. A person in Mr. Fountain's position, working with or around children, is stigmatized and suffers tremendous damage to his reputation when the designation of "child sex abuser" is disclosed to employers and/or entities with whom the alleged abuser works. In addition, the listing places significant limits on a person's liberty to engage in certain occupations or professions.[1] In this case, Fountain has alleged that he lost his job after twenty years at Carson-Newman College, and almost certainly is prohibited from continuing his activities as a youth pastor at his Church. There is no chance he will be able to work in a job where children would be accessible to him.

On the other hand, the State's interest is also significant: protection of children in this State and prevention of child sexual abuse. Presumably, the State also has an interest in "not stigmatizing the innocent and foreclosing them from employment and other opportunities." Matter of allegations, etc., supra at p. 348. Because there are significant interests involved for the alleged abuser, the child, and the State, the determination essentially hinges on determining

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[1]Being listed as a child sexual abuser can also impact family privacy, solidarity, and associations. See, Tingle v. Tennessee DHS, 863 F.2d 50, 1988 U. S. App LEXIS 16533 (6th Cir. 12/6/1988); Benitez v. Rasmussen, 626 N.W.2d 209, 218 (Neb. 2001); Watso v. Colo. Dept. of Soc. Srvcs., 841 P.2d 299 (Colo. 1992); Bohn v. County of Dakota, 772 F.2d 1433 (8th Cir. 1985), cert. denied 475 U.S. 1014 (1986).

whether the process provided by the State is adequate to minimize the risk of erroneous determinations while at the same time adequately protecting the State's interest in safeguarding children.

Tennessee's procedural scheme to provide an individual in Mr. Fountain's position with due process was outlined in detail in the Factual Background section, above. Undoubtedly as a result of Kelley, supra, and another unpublished Court of Appeals decision, Brown v. Tennessee DCS, 2004 Tenn. App. LEXIS 815 (11/30/2004),[2] Tennessee enhanced its administrative procedural safeguards sometime between 2008 and the present.

Previously, an individual could be listed as a child sex abuser "based solely upon a showing of only substantial and material evidence." id., slip op. at p. 7. Now, DCS rules require a finding by a "preponderance of the evidence, in light of the entire record," which proves that the individual committed child sexual abuse. Rule 0250-7-9-.05(1). In addition, while the current rule provides eight separate factors which "may constitute a preponderance of the evidence," the previous version of the rule contained five of the same factors, any one of which would **require** a finding of substantial and material evidence that the abuse occurred. Kelley, slip op. at p. 4. The previous version of the rule did not allow an investigator to consider all of the evidence relating to the alleged abuse when one of the five mandatory factors was met. Now, the rule affirmatively tasks the investigator with determining the preponderance of the evidence "in light of the entire

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[2]Both of these decisions involve analysis that is directly applicable to the instant case yet none of the three attorneys involved here referred this Court to these helpful decisions. And, the Attorney General's Office participated in both of these appellate decisions. Reference to these decisions would have assisted the undersigned in more quickly reaching the necessary conclusions of law.

record." Rule 0250-7-9-.05(1). Similarly, the administrative judge hearing an appeal of such a determination is required to utilize the preponderance of the evidence standard, with the burden of proof on the State, Rule 0250-7-9-.11(2) and to make that determination "in light of the entire record." Rule 0250-7-9-.10(2). Finally, the appeal to Chancery Court for review of the administrative decision, though deferential (substantial and material evidence), requires the court, in determining the substantiality of the evidence, to "take into account whatever in the record fairly detracts from its weight." T.C.A. §4-5-322(h)(5)(B).

Mr. Fountain has complained, as this Court understands the complaint, about the standard of review in the Chancery Court. This standard of review is supplied by UAPA, T.C.A. §4-5-322, and therefore Fountain has questioned the constitutionality of a statute. In evaluating such a challenge, the Court must "begin with the presumption that an act of the General Assembly is constitutional." Gallaher v. Elam, 104 S.W.3d 455 (Tenn. 2003).

Fountain asserts due process requires application of a less deferential standard of review in Chancery Court. However, the standard of review in the Chancery Court cannot be analyzed without the context of the procedural safeguards applied during the administrative process. In Kelley, supra, the administrative judge conducting the hearing made a determination that the alleged abuser "committed the acts by a preponderance of the evidence." id., slip op. at p. 9. Because the administrative judge applied the preponderance of the evidence standard the Court of Appeals concluded that the alleged abuser "received adequate process protection under Matthews." id. And, in Brown, supra, the Court of Appeals noted that

> [o]ur concern about the use of the substantial and material standard

> centers around that standard being the one used when making the initial determination. We have no such concerns about that standard being the one used on appellate review.

Id. slip op. at p. 8.

It appears then that the Court of Appeals would approve of the current procedural safeguards as satisfying due process even though the chancery court review is a deferential one. Under Tennessee's statutory and administrative process Mr. Fountain received timely and effective notice of DCS actions and his rights; he was provided with an investigation, emergency file review, and administrative hearing, all of which required a finding by a preponderance of the evidence that the abuse had occurred. He had the right to be present at the administrative hearing, to subpoena witnesses and produce evidence, to be represented by counsel, to confront the witnesses testifying against him, and to have the burden of proof placed upon the State; he received a detailed written decision within a reasonably short time after the hearing; and, he thereafter had the right to a review by the chancery court and subsequently the Court of Appeals. Similar process has been found to satisfy due process in the context of a state listing a person on a child sex abuse registry. See, Matter of allegations, etc., supra at p. 348; Whiteside v. Dept of Soc. & Rehab. Srvcs., supra.

It is difficult to imagine any additional procedure the State could provide before a person is listed as a "indicated" child sex abuser. The State could require a more stringent standard of proof such as "clear and convincing evidence." It could also provide for a *de novo* trial in the Chancery Court or simply a non-deferential review by the Chancery Court to determine if the State proved its case by a preponderance of the evidence. However, given the significant

interest of preventing child sex abuse it seems fair to draw the line at "preponderance of the evidence" rather than potentially allowing child predators to maintain access to vulnerable children even when the State can prove that it is more probable than not that they committed child sex abuse. The preponderance standard requires the State and the individual to share the risk of error, Santosky v. Kramer, 455 U.S. 745, 755 (1982), which seems fair in light of the significant interests involved on both sides. Burns v. Alexander, supra. Most courts that have considered the evidentiary standard in the context of a listing on a child abuse registry concur that due process requires application of the preponderance of the evidence standard at some stage of the process. See, e.g., Preisendorfer; Doyle; Lyon; Marold; Valmonte; W.B. v. Kentucky; Cavarretto, supra; see also, Covell, supra (substantial evidence standard approved). Contra, G. V. v. Dept. of Public Welfare, 52 A.3d 434 (Pa. Commw. 2012), appeal granted 2013 Pa. LEXIS 494 (3/21/13) (clear and convincing evidence required to maintain listing of individual on registry).

In addition, a *de novo* trial in Chancery would present an additional fiscal and administrative burden on the State which seems unnecessary in light of the significance of the State's interest in this situation and the procedural protections provided by the administrative "trial." The risk of erroneous inclusion on the abuse registry appears minimal so long as the State provides qualified and independent administrative judges to make the preponderance of the evidence determination.

Thus, this Court HOLDS that a more stringent standard of proof is not required and that the deferential standard of review in the Chancery Court does not violate Due Process where, as here, the "indicated" individual is receiving a fair trial with a decision based upon the

preponderance of the evidence.

In light of the significant procedural safeguards employed during the administrative process, this Court HOLDS that Tennessee has complied with the requirements of due process even though the review of the administrative decision is conducted on the deferential "substantial and material evidence" standard.

Having concluded that Mr. Fountain received due process through the administrative and statutory procedure surrounding his listing on the abuse registry, this Court now turns to the evidentiary review required by T.C.A. §4-5-322(h)(5).

D. Whether the administrative decision was supported by substantial and material evidence in light of the entire record.

Because this Court's review is limited to the record before the administrative judge, no additional testimony or documentary evidence has been presented. The undersigned has reviewed the Administrative Record and read the 144 page transcript of the evidence presented at the administrative hearing.

There is no question that Mr. Fountain directly touched the genitals of JDB, either unclothed or under his clothes. (Tr. p. 31, 35, 71, 80-82). Mr. Fountain claims that he was checking the child for a possible hernia. The child confirms that as his understanding of what Mr. Fountain was doing, (Tr. p. 75), but stated that the touching of his genitals and in that area made him uncomfortable. (Tr. p. 68, 79-82). The child did not perceive the touching to be sexual in nature. (Tr. p. 75, 83-84).

Despite Mr. Fountain's claims that the touching of the child's private areas was

legitimate and not sexual, he did not disclose the fact of his touching to the child's father (Tr. p. 34, 37, 55) nor the minister at the church when he advised her that he would no longer be working with that family. (Tr. p. 92-93). When asked why he did not disclose the touching to the child's father, Mr. Fountain stated "well, if I had of, he would have said right then to me, 'well, what are you doing messing with my child?'" (Tr. p. 37, 60). In addition, the child testified that Mr. Fountain instructed him not to tell his father about the touching. (Tr. p. 71, 118).

Mr. Fountain did not have any expertise in diagnosing medical conditions, even though he had suffered a hernia as a teenager himself. (Tr. p. 32-33). He did not seek or request medical attention for the child nor telephone the child's parents regarding a possible injury, (Tr. p. 34, 55), he just took it upon himself to run his hands on and around the lower abdomen and private parts of a teenage boy who said "oh" while lifting some cases of canned drinks sometime earlier in the day. (Tr. p. 28, 52). According to Mr. Fountain's own testimony, he asked the child, "you didn't pull yourself, did you, when I heard you?" (Tr. p. 59). To which Mr. Fountain says the child stated, "no, I don't think so." Without any complaint of pain (Tr. p. 33, 79) or any indication from the child that he was injured, (Tr. p. 30, 33, 58) Mr. Fountain placed his hands on and around the genitals of a teenage boy in a private setting then told the boy not to tell anyone. (Tr. p. 71, 118).

Under the direction of his attorney, Mr. Fountain admits that he "certainly made an error in judgment in what happened with this young man." (Tr. p. 54). And, he obviously recognized that the child's father would view it as absolutely inappropriate when he acknowledged that if he had spoken to the father about the "exam" the father would have said

"well, what are you doing messing with my child?" (Tr. p. 37).

Even Mr. Fountain's character witness, Mr. Loy, with whom he has worked in the church for years, stated that if he found out that Mr. Fountain had performed a hernia exam on one of his sons he "would be shocked," (Tr. p. 129), and would find such action "inappropriate." (Tr. p. 130). That reaction sums up the only conceivable reaction to this factual scenario. Under these circumstances, there is probably no evidence which can sufficiently detract from the weight of the evidence supporting the finding of the administrative judge to the extent that substantial and material evidence would not exist for the administrative judge's finding. However, the evidence which fairly detracts from the weight of the evidence supporting the administrative judge must be analyzed by this Court.

The main evidence which fairly detracts from the weight of the evidence supporting the conclusion that Fountain is a child sexual abuser, is the lack of any other indication that he is a pedophile. Mr. Fountain has worked with and around children for some twenty years in his job at Carson-Newman College and his ministry in the United Methodist Church without ever so much as a suggestion of impropriety in his actions. (Tr. p. 95, 114, 123-124, 128-129, 135). According to the victim in this case, the incident at issue was the only time Mr. Fountain acted inappropriately toward him. (Tr. p. 75). Fountain presented impressive character witnesses who were convinced that he was not a child sex abuser. (Tr. p. 124, 130, 135). Fountain was very close to JDB and his family, acting as a father figure to JDB. (Tr. p. 84, 100-101).

However, after considering the evidence which detracts from the administrative ruling, the undisputed evidence of touching the genitals of a teenage boy, while alone with the boy,

without a complaint of pain and in the face of a denial of injury, for the alleged purpose of checking for a hernia, without checking with either of the child's parents or seeking to access actual medical care, in a non-emergency situation, leaves inescapably to one conclusion: there is substantial and material evidence in the administrative record to support the decision of the administrative judge and the commissioner of the department of children's services.

Accordingly, the decision of the Department of Children's Services is AFFIRMED. Costs are taxed to the Petitioner, for which execution may issue, if necessary.

Enter:

_____

Tom Wright
Circuit Court Judge

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE,
AT CHATTANOOGA

TAMMY O. COMBS, Individually and on behalf of the Estate of Lamar Kenneth Combs and as Mother and Next of Kin of Olivia G. Combs and Julia L. Combs, **Plaintiffs,**	§	
vs.	§	**No. 06C1464**
HORTON MADDOX and ANDERSON, PLLC and GEARHISER, PETERS, LOCKABY, CAVETT & ELLIOTT, PLLC, **Defendants.**	§	

MEMORANDUM OPINION

This case was before the court on the motion for summary judgment filed on behalf of the defendant Gearhiser firm (hereafter referred to as "Gearhiser" whether referring to the firm or one of its lawyers). The issues have been briefed extensively and oral argument was heard by the court February 12, 2008. After carefully considering the arguments, briefs, authorities and exhibits made and filed on behalf of the parties the court issues the following Memorandum Opinion containing its findings of fact and conclusions of law.

1. Factual Background

On or about October 12, 2003 Lamar Combs drowned in the Tennessee River. Mr. Combs was operating a jon boat with an outboard motor and tiller steering. Witnesses observed Mr. Combs being ejected from the boat when it made a hard turn. Mr. Combs' boat and chest waders were found in the river later in the day on October 12, 2003 but his body was not located until Wednesday October 15, 2003. (TWRA Report, Ex.1 to Defendant's Motion for Summary

Judgment hereafter referred to as "MSJ"). Plaintiff is the surviving spouse of Mr. Combs and Mother of their two children.

Plaintiff contacted Gearhiser in late September, 2004 seeking representation in a wrongful death action to recover damages for the death of her husband. (Gearhiser memo dated 9/20/04, Ex. 12 to Plaintiff's Memorandum of Law in Opposition to MSJ hereafter "Memorandum"). Gearhiser was employed by plaintiff for this purpose in early October 2004 and filed a wrongful death complaint on plaintiff's behalf against the manufacturer of the outboard motor on October 12, 2004 in Hamilton County Circuit Court. Prior to filing the complaint, plaintiff and Gearhiser discussed other potential defendants. Plaintiff specifically mentioned other potential defendants in a voice mail left at Gearhiser October 6, 2004. (Exhibit 5 to MSJ). However, Gearhiser determined that only the motor manufacturer should be sued and confirmed this in a letter to plaintiff dated October 8, 2004. (Ex. 9 to Memorandum). This letter accompanied a Representation Agreement signed by plaintiff on October 12, 2004. (Ex. 1 to Memorandum).

On October 18, 2004 Gearhiser voluntarily dismissed the complaint as they had indicated they would do in the October 8, 2004 letter. In light of the strategy which Gearhiser decided to employ in handling plaintiff's claim they advised her that their actions would "likely only preserve the statute of limitations as to the parties named in the complaint we file, and thus, the decision about which persons or entities are to be made parties takes on a great deal of significance." (October 8, 2004 letter to plaintiff from Gearhiser, Exhibit 2 to MSJ)

In June 2005 Gearhiser terminated its representation of plaintiff and referred her to co-defendant Horton, Maddox and Anderson ("HMA"). (Complaint at Para 5). HMA refiled the

wrongful death suit on October 11, 2005 again suing only the motor manufacturer in state court. (Complaint at Para 10). HMA then also voluntarily dismissed the action by order entered October 21, 2005. (id.). HMA's voluntary dismissal resulted in the loss of the potential claim against the motor manufacturer. (Complaint at Para 11). HMA admits it was negligent in voluntarily dismissing the case.

Plaintiff was concerned about the motor manufacturer being the only defendant and discussed other potential defendants with Gearhiser prior to the first complaint being filed. (Combs depo at p. 28-30, 143-145, Ex. 12 to MSJ; transcribed voice mail from Combs on October 6, 2004, Exhibit 5 to MSJ; transcribed voice mail from Combs to Anderson on Nov. 3, 2005, Ex. 6 to MSJ). Plaintiff also discussed Gearhiser's failure to name additional defendants when she employed HMA, and before they refiled the suit. (Combs depo continuation at p. 45-47, Ex. 13 to MSJ; handwritten memo of HMA attorney Anderson memorializing 9-30-05 telephone conference with Combs, Exhibit 7 to MSJ; Anderson depo at p. 35-36, Ex. 11 to MSJ). Plaintiff knew any potential state tort claims she may have had against anyone other than the motor manufacturer were barred by the statute of limitations prior to the refiling of her lawsuit by HMA on October 11, 2005.[1] (Combs depo continuation at 45-47, 98-100, Ex. 13 to MSJ).

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[1]Despite claiming in her complaint that Gearhiser was negligent because it did not take the steps necessary to pursue her claims against "the unnamed entities who should have been named defendants" (Complaint at Para 9), plaintiff now contends that the original failure to name all potential defendants did not injure her, and thus could not have caused her legal malpractice statute of limitations to begin to run, because her claims under state tort law could still have been pursued in an action brought under admiralty law. (Memorandum at p. 2, 5-7, 9). If that is the case, the discussion in section 2A., below is unnecessary. However, because Plaintiff's complaint alleges that she was injured by Gearhiser's failure to name all potential defendants, (Complaint Para 8,9,27), and she has not amended that complaint, it seems appropriate to address this claim in ruling on the MSJ.

Plaintiff claims that the motor manufacturer as well as all other potential defendants could and should have been sued under admiralty law, which would have provided the advantages of a three year statute of limitations (46 U.S.C.§30106) and a pure comparative fault analysis. (Memorandum at p.5). For purposes of the motion for summary judgment the Court accepts as true that plaintiff had a viable admiralty claim and that Gearhiser and HMA were negligent in failing to recognize this claim and/or failing to assert this claim and/or failing to advise plaintiff of its existence as well as the applicable statute of limitations for such a claim.

Plaintiff's potential claim under admiralty law expired October 12, 2006 by operation of the three year statute of limitations, sixteen months after Gearhiser terminated its attorney-client relationship with plaintiff. (Memorandum at p. 2, 7-8). Despite the fact that she is an attorney and that on October 5, 2004 she reviewed an admiralty case provided to her by Gearhiser (Ex 1 to Gearhiser Reply), plaintiff asserts she did not learn of the potential admiralty claim until she engaged her current attorney in this case. (Combs affidavit para. 28) (although the exact date her current attorney was employed is not in evidence, it was apparently some time after 10/12/06 since he has not been sued).

On October 19, 2006 plaintiff filed the present complaint against Gearhiser and HMA for malpractice.

2. Legal Analysis

Defendant Gearhiser has pursued this motion for summary judgment based solely on its arguments concerning the statute of limitations and causation. Defendant deferred pressing its "professional judgment" argument during the hearing on this motion and submitted it to the court strictly upon the other two issues.

A. Statute of Limitations

T.C.A. §28-3-104(a)(2) provides a one year statute of limitations for malpractice claims such as have been made in this case, whether they are based in contract or tort. The limitation period does not begin to run until the injured party has "discovered" that they have been harmed by their attorney's negligence. Carvell v. Bottoms, 900 S.W.2d 23(Tenn.1995). This "discovery rule" is composed of two elements: 1. Plaintiff has sustained a legally cognizable or actual injury as a result of her attorney's negligence; and 2. Plaintiff either knew, or in the exercise of reasonable diligence, should have known that her injury was caused by her attorney's negligence. id at 28.

With regard to the date a cause of action for malpractice accrues, the defendant is not required to show that plaintiff actually knew her injury constituted " a breach of the appropriate legal standard in order to discover that [she] has a 'right of action'; the plaintiff is deemed to have discovered the right of action if [she] is aware of facts sufficient to put a reasonable person on notice that [she] has suffered an injury as a result of wrongful conduct." Roe v. Jefferson, 875 S.W.2d 653, 657 (Tenn. 1994). In addition, a plaintiff cannot wait until she " knows of all the injurious effects or consequences of an actionable wrong before taking action." Hartman v. Rogers, 174 S.W.3d 170, 173 (Tenn. App.), *perm. app. denied* (2005).

A plaintiff has been injured when "she has suffered the loss of a legal right, remedy or interest." Carmack v. Oliver, 2007 Tenn. App. LEXIS 721, at p. 12 (Tenn. App. 2007). Plaintiff in this case knew on October 12, 2004 that Gearhiser had sued only the motor manufacturer and that the statute of limitations (with regard to state tort claims) had expired. Thus, on October 12, 2004 plaintiff suffered the loss of any state tort claims she may have had against any other

parties.[2] The Court finds this alleged loss to be a legally cognizable or actual injury. Arguably, her limitations period in which to sue Gearhiser for its alleged negligence related to not naming other defendants began to run at that time. Certainly it began to run before October 19, 2005.

Plaintiff was unhappy with Gearhiser's decision not to name any other parties and discussed her "injury" from the loss of these potential state tort claims with her successor attorney at HMA. This occurred before she refiled her complaint against the motor manufacturer October 11, 2005. Plaintiff knew or should have known that she had been injured by the alleged negligence of Gearhiser in failing to name additional parties in the original complaint prior to October 11, 2005 and thus her statute of limitations to sue Gearhiser for that alleged negligence expired prior to the date she filed this lawsuit. Accordingly, plaintiff's negligence claims against Gearhiser relating to the failure to name all appropriate parties in the original wrongful death complaint expired prior to October 19, 2006 when the instant suit was filed.

B. Causation

With respect to plaintiff's loss of the admiralty claim, she asserts that the statute of limitations for her malpractice claim could not have run prior to her filing this lawsuit on October 19, 2006 because her cause of action only accrued the week before, on October 12, 2006 when the statute of limitations for the admiralty claim expired. (Feb. 12, 2008 Transcript of Hearing on MSJ at p. 25, l. 21-24). While Gearhiser argues that the alleged negligence regarding the admiralty claim is simply a rehash of plaintiff's principal argument that Gearhiser failed to sue all the appropriate parties, which plaintiff knew as early as October 12, 2004, this Court finds the most pertinent inquiry with regard to the admiralty claim to be one of causation. Accordingly,

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[2]See footnote 1, above

this Court is not addressing the argument in Gearhiser's Reply brief that the plaintiff "is not permitted to wait, and the statute of limitations is not tolled, while she determines all of the harm which she now claims results from her attorneys' alleged malpractice in 2004." (Reply to Response of Tammy Combs to the Gearhiser Firm's MSJ at 9). For purposes of this analysis, the court will assume that the alleged failures of Gearhiser relating to the admiralty claim were not "discovered" until October 2006.

Plaintiff's admiralty claim was alive and well at the time Gearhiser terminated the attorney-client relationship with plaintiff. It is undisputed that when the attorney-client relationship was terminated, plaintiff still had approximately sixteen months within which an admiralty claim could have been filed. During those sixteen months, plaintiff was represented by co-defendant HMA. We have assumed, for purposes of this Motion, that it was negligence to fail to recognize the admiralty claim and/or fail to assert the claim and/or fail to advise plaintiff of its existence as well as the applicable statute of limitations for such claim. That being the case, if HMA had not been negligent, plaintiff would never have sustained this injury. In other words, if HMA had complied with the alleged standard of care then Gearhiser's breach of that standard would never have resulted in harm to the plaintiff. Restated again, **but for** the negligence of HMA plaintiff would not have been injured. It has been "consistently held," that an attorney cannot be responsible for the loss of a client's claim if the attorney ceased to represent the client and was replaced by successor counsel prior to the running of the statute of limitations on the client's claim. Norton v. Sperling Law Office, 437 F. Supp. 2d 398, 402 (D.Md. 2006).

When HMA received plaintiff's case it became responsible for all remaining viable causes of action. Any viable claims plaintiff had after employing HMA were lost as a result of

the negligence of HMA and not as the result of any negligence by Gearhiser. Accordingly, Gearhiser's alleged negligence could not be the actual or proximate cause of plaintiff's injury from the loss of her alleged admiralty claim.

Although this fact pattern does not appear to have been addressed in any reported Tennessee decisions, there have been several decisions in other jurisdictions which support this Court's position. See, e.g. Luttgen v. Fischer, 107 P.3d 1152 (Colo. Ct. App. 2005); Mitchell v. Schain, Fursel & Burney, Ltd., 332 Ill.App.3d 618, 773 N. E.2d 1192 (App. Ct. 2002); Albin v. Pearson, 734 N.Y.S.2d 564, 289 A.D.2d 272(App. Div. 2001); White v. Rolley, 225 Ga.App. 467, 484 S.E.2d 83 (Ct. App. 1997); Medrano v. Reyes, 902 S.W.2d 176 (Tex. Ct. App. 1995); Knight v. Myers, 12 Kan. App. 2d 469, 748 P.2d 896(Ct. App.1988); Frazier v. Effman, 501 So.2d 114 (Fla.. Dist. Ct. App. 1987); Steketee v. Lintz, Williams & Rothberg, 38 Cal.3d 46, 694 P.2d 1153 (Cal. 1985).

In Plaintiff's Supplemental Memorandum of Law Opposing MSJ, on Issue of Causation, the court is referred to two additional cases addressing the causation issue from foreign jurisdictions which plaintiff claims supports denial of the MSJ: Lopez v. Clifford Law Offices, P. C., 362 Ill.App.3d 969, 841 N.E.2d 465 (App. Ct. 2005); Collins v. Missouri Bar Plan, 157 S.W.3d 726 (Mo. Ct. App) *app. transfer denied* (2005). These cases are not on point.

In Lopez, plaintiff was improperly advised about the applicable statute of limitations for his wrongful death claim; and, like the instant case, Lopez did still have time within which to file his wrongful death suit when the defendant law firm ceased representing him. However, unlike the instant case, "Lopez did not retain a successor counsel until after the expiration of the statute of limitations, *i.e.*, when the successor counsel could not have cured the problem created

by the incorrect advice." Lopez at 981-982(emphasis added).

Similarly, in the Collins case the plaintiffs received and acted upon bad legal advice, losing custody of their child, before the subsequent attorney was hired. The defendant attorneys alleged that the subsequent lawyer was negligent in her actions attempting to repair the damage caused by the defendants' negligent advice. But unlike the case at bar, the defendants' alleged negligence had already resulted in injury to the plaintiffs before the subsequent attorney became involved. Thus, the Missouri court held that the subsequent attorney's negligence "did not interrupt the chain of events triggered by [defendants'] alleged negligence." Collins at 733.

Plaintiff argues at length that under Tennessee law the negligence of HMA cannot be an "intervening cause" which would relieve Gearhiser of liability for its negligence. (Plaintiff's Supplemental Memorandum etc.). The Court finds it unnecessary to address this issue. This Court rests its decision regarding the loss of the admiralty claim on its conclusion of law that under the circumstances presented in this case Gearhiser's alleged negligence could not be the cause in fact or proximate cause of plaintiff's alleged loss.

Based upon the Court's analysis set forth above, the court finds that Gearhiser's Motion for Summary Judgment is well taken as to plaintiff's claims against it for malpractice, whether couched in terms of negligence, breach of contract or breach of fiduciary duty. However, plaintiff has also claimed that Gearhiser violated the Tennessee Consumer Protection Act, T.C.A. §47-18-101 *et seq.*

C. Tennessee Consumer Protection

First, although the Court finds it unnecessary to reach this issue, this Court doubts the applicability of the TCPA to the attorney-client relationship. See., Newton v. Cox, 1992 WL

220189 (Tenn. App.), *reversed on other grounds* 878 S.W.2d 105 (Tenn.) *cert. denied* 513 U.S. 869 (1994). The attorney-client relationship is not a "consumer transaction" and the practice of law is not a "trade or commerce," although the act defines these terms so broadly that one can argue they do cover this situation.

Plaintiff claims that Gearhiser had some knowledge about the possible existence of an admiralty claim but failed to share that with her and thus tended to deceive her, in violation of TCAP, into believing that her only viable claim after October 12, 2004 was against the motor manufacturer. (Memorandum at p. 25).

However, it is "well settled in this state that the gravamen of an action" determines the applicable statute of limitations. Pera v. Kroger Co., 674 S.W. 2d 715, 719 (Tenn. 1984). The essence of this suit is that the plaintiff was damaged by the failure of Gearhiser to properly investigate, research and prosecute her claims as well as by Gearhiser's failure to properly advise her as to potential rights of action and statutes of limitations. These are allegations of professional negligence which, however couched in plaintiff's pleading, are subject to the one year statute of limitations for malpractice, Swett v. Binkley, 104 S.W.3d 64, 67 (Tenn. App. 2002), *perm. app. denied* (2003), and, are subject to the same causation analysis[3] set forth in section 2B, above. Thus Gearhiser is entitled to summary judgment on the TCPA claim as well.

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[3]For a "causation" analysis in a malpractice case where the first attorney "deceived" the plaintiff about the applicable statute of limitations on a claim, but the actual statute of limitations did not expire before successor counsel began handling case, see, Ritam, Int'l v. Pattishall, et.al., 2000 U.S. Dist. LEXIS 21636 (S.D.Iowa 2000). Although no consumer protection act was involved in Ritam, the plaintiff claimed injury from detrimental reliance on erroneous legal advice about the viability of a claim.

For the reasons set forth above, an order will be entered contemporaneously with this Memorandum Opinion granting Gearhiser's MSJ.

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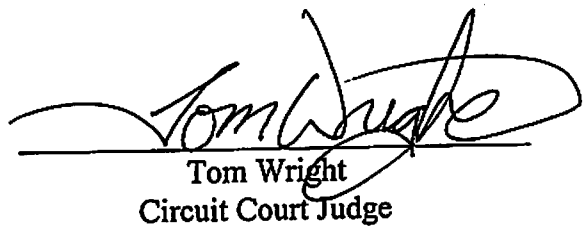

Tom Wright
Circuit Court Judge